DPC
DIALYSIS PATIENT CITIZENS

Improving Life Through Empowerment

October 31, 2011

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

Re: CMS-9974-P: Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers

Dear Secretary Sebelius:

Dialysis Patient Citizens (DPC) appreciates the opportunity to provide comments to the Department of Health and Human Services (HHS) on the Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers (CMS-9974-P).

As America's largest dialysis patient organization, DPC represents more than 23,000 dialysis and pre-dialysis patients and their families. DPC's mission is to improve the quality of life of dialysis patients by engaging policy makers, providers and the public. Through patient education, empowerment and advocacy, we work to increase awareness about kidney disease and promote favorable public policy.

Each year in the United States, more than 100,000 Americans are diagnosed with end stage renal disease (ESRD), an irreversible condition that is fatal without a kidney transplant or lifesaving dialysis treatments. Currently, more than 485,000 Americans suffer from ESRD and 341,000 are on dialysis, a number that is expected to double over the next decade. This dramatic rise is attributable to the increased prevalence of diabetes and hypertension, two skyrocketing chronic diseases and the leading risk factors for ESRD.

DPC appreciates this opportunity to raise awareness about a significant concern facing kidney failure and dialysis patients in the new health insurance exchanges, and we encourage HHS to fully consider the following discussion.

Access to Premium Tax Credits and Cost-Sharing Subsidies
We urge HHS to ensure that the Affordable Care Act (ACA) not be interpreted in any way that prevents dialysis patients from receiving premium credits and cost-sharing subsidies in the exchanges.

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As reiterated in CMS-9974-P, the terms of the ACA state that an applicant is ineligible for advance payments of the premium tax credit to the extent that he or she is eligible for other minimum essential coverage, including Medicare Part A.[1] However, we conclude that an individual with ESRD who qualifies for Medicare coverage based on their ESRD diagnosis, but has not yet filed an application for benefits and enrolled in Medicare, would not be considered eligible for other minimum essential benefits, and therefore be qualified for premium credits in the health insurance exchanges.

It is our assertion that an individual who qualifies for Medicare on the basis of ESRD but has yet to enroll in the program is not "eligible for coverage" but simply "eligible to enroll."[2] Section 226A of the Social Security Act, governing Medicare eligibility for individuals with ESRD, states with regard to an individual meeting the statutory qualifications for Medicare entitlement, that such an individual must first "file an application for benefits" before being "entitled to benefits under part A and eligible to enroll under part B of title XVIII."[3] The language in the Act suggests that "eligibility for coverage," or entitlement to benefits, is dependent upon filing an application for benefits.[4] An individual is "eligible for enrollment" by virtue of his/her condition (ESRD, or in the case of § 226, age) and work contributions.[5] However, a qualified beneficiary is "eligible to enroll" subject to the filing of an application and a determination by the Government that the individual is entitled to benefits.[6] So the simple fact of possessing the qualifications for Medicare coverage does not entitle an individual to benefits or make them "eligible for coverage."

The Internal Revenue Service even made this distinction in clarifying the meaning of "Medicare entitlement" in its 1999 COBRA regulation, noting:

> A qualified beneficiary becomes entitled to Medicare benefits upon the effective date of enrollment in either part A or B, whichever occurs earlier. Thus, merely being *eligible to enroll* in Medicare does not constitute being *entitled* to Medicare benefits. (64 Fed. Reg. 5160, 5168-5169, February 3, 1999)

This meaningful distinction between "eligibility for coverage" and "eligibility for enrollment" has also been upheld in case law, including *Kemp v. Republic National Life Insurance Company*, 649 F.2d 337 (5th Cir. 1981) and *United American Insurance Company v. Office of the Commissioner of Insurance*, 117 Wis.2d 779 (Wis.Ct.App.1983).

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[1] Internal Revenue Code ("IRC") § 36B(c)(2)(B)(i).

[2] "Every individual who … (1) is entitled to hospital insurance benefits under Part A, or (2) has attained age 65 and is a resident of the United States … is *eligible to enroll* in the insurance program established by this part." Social Security Act ("SSA") § 1836 (Emphasis added) (describing eligibility for Part B benefits.)

[3] SSA § 226A(a)(3).

[4] In order to be "entitled to benefits under part A" an individual must have first "filed an application for benefits." *Id*

[5] The language "eligible to enroll under part B of title XVIII" suggests that an individual is not "eligible for coverage" before the filing of an application. Rather, that individual is "eligible to enroll. *Id*.

[6] *See also* SSA § 1831 ("There is hereby established a voluntary insurance program to provide medical insurance benefits in accordance with the provisions of this part for aged and disabled individuals who *elect to enroll* under such program"). (Emphasis added).

Given the legal and statutory distinction between *eligibility for enrollment* and *eligibility for coverage*, an individual who qualifies for Medicare on the basis of ESRD but has yet to enroll in the program would not be deemed "eligible" for Medicare coverage. As such, an individual with ESRD who has not yet enrolled in the Medicare program would qualify for the premium credit provided to other Americans under section 36B of the Internal Revenue Code.

Not only is the availability of premium tax credits to ESRD beneficiaries a matter of fairness, but any interpretation that denies access could force many patients to drop their private coverage and shift into Medicare as they become dependent on dialysis. This could dramatically disrupt patient care and the care for their families, especially as they struggle to deal with the onset of a life-changing chronic condition. It would also increase the burden on Medicare, as more patients would be solely reliant on the program for their health needs.

With more than 31 million Americans suffering from chronic kidney disease (CKD), which very often leads to kidney failure, it is absolutely critical that HHS not forget this growing segment of the population during the creation of the new health insurance exchanges. We appreciate your consideration and stand ready to assist in ensuring that all dialysis patients are protected as you move forward with designing the regulatory framework for the insurance exchanges.

Sincerely,

Hrant Jamgochian
Executive Director