

November 15, 2002

The Honorable Tommy Thompson
Secretary
Department of Health and Human Services
200 Independence Avenue, SW, Room 615F
Washington, DC 20201

The Honorable Thomas Scully
Administrator
Centers for Medicare and Medicaid Services
200 Independence Avenue, SW, Room 314G
Washington, DC 20201

The Honorable Alex Azar II
General Counsel
Department of Health and Human Services
200 Independence Avenue, SW, Room 713F
Washington, DC 20201

The Honorable Robert D. McCallum, Jr.
Assistant Attorney General, Civil Division
Department of Justice
950 Pennsylvania Avenue, NW, Room 3141
Washington, DC 20530

Dear Sirs:

As you know, yesterday the House of Representatives passed H.R. 5063, which included a provision that purported to “[c]larif[y] that the Administration may not be sued for any redeterminations for prior fiscal years” for sustainable growth rates related to its calculation of Medicare physician payments. Specifically, the language amends Section 1848(i)(1)(C) of the Social Security Act to include among nonreviewable decisions of the Secretary:

(C) the determination of conversion factors under subsection (d),
including without limitation a prospective redetermination of the
sustainable growth rates for any or all previous fiscal years,

It is our understanding that this provision is being described by its sponsors as a potential “fix” for negative physician payment updates by allowing the Administration to correct estimation errors made

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in 1998 and 1999 and applying reestimations to the calculation of physician payments for 2003 and beyond. We are also in receipt of widely-distributed communications from the American Medical Association urging passage of H.R. 5063, which explain that the provision "is written in the current fashion in order to avoid a CBO score. We have every expectation that HHS will take advantage of such authority, should it be granted, to issue a new SGR rule with necessary technical corrections."

In discussions with the Director of the Congressional Budget Office (CBO) and his staff, we were told that if the Administration reads this provision to permit it to correct estimation errors made in 1998 or 1999 and to apply the corrections in setting new physician fee schedules, that CBO would "score" the provision at approximately \$43 billion over ten years.

It is of crucial importance in evaluating this bill and in ascertaining its cost to know

- (1) whether it is the Administration's understanding that, if this provision were enacted into law, the Centers for Medicare and Medicaid Services (CMS) would be permitted to change the conversion factor for 2003 based on reestimations of 1998 and/or 1999 conversion factors because such action would be either legally permissible or insulated from judicial review;
- (2) if the Administration believes that this provision authorizes such an action, whether CMS intends to use such redeterminations to increase the 2003 conversion factor from the conversion factor used in 2002;
- (3) the rationale behind the Administration's position that this language would or would not authorize such action from CMS.

We expect a response from you on these questions no later than 3 p.m. on Friday, November 15. If you cannot provide a written response by that time, we ask you to formally brief us or our staffs on this issue at 3 p.m.

We are advised that the provision's effect is merely to insulate CMS from a lawsuit relating to redeterminations of sustainable growth rates, and that it does not in any way grant CMS additional statutory authority permitting it to change the 1998 or 1999 conversion factors for use in setting future physician fee schedules. We look forward to your response.

Sincerely,

Charles E. Grassley
Ranking Minority Member

Max Baucus
Chairman