

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

SUPPLEMENTAL MEMORANDUM

February 16, 2011

To: Members of the Subcommittee on Oversight and Investigations

Fr: Henry A. Waxman, Ranking Member, and Diana DeGette, Subcommittee Ranking Member

Re: Supplemental Information on Health and Human Services' Center for Consumer Information and Insurance Oversight

On Wednesday, February 16, 2011, at 9:30 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled, "Health Care Issues Involving the Center for Consumer Information and Insurance Oversight."

In advance of today's hearing, the Democratic staff reviewed over 50,000 pages of documents and data produced by the U.S. Department of Health and Human Services (HHS) and its Center for Consumer Information and Insurance Oversight (CCIIO). As summarized below, a review of the documents and other information produced to the Committee provides additional information on the Center and its activities. Much of this information contradicts a series of assertions made by Republican members of Congress about the health care reform law, CCIIO, and CCIIO's role in implementing the law.

The documents and data show:

- The process established by CCIIO for waiving the new restrictions on annual limits in health insurance policies is flexible and transparent. Health and Human Services published an interim final rule and CCIIO issued three sets of guidance to explain waiver criteria. The agency received input from stakeholders and worked individually with applicants to facilitate approvals.

- The waiver processes is simple and fast. Over 90% of all entities that applied for waivers received them, and the average waiver was approved within 13 days of receipt of the application.
- The waiver process is fair to all applicants and did not favor applicants that insured unionized employees. In fact, plans that covered union employees were nearly five times more likely to be denied waivers compared to other applicants.

The Waiver Application Process Is Flexible and Transparent

Republicans have repeatedly asserted that the annual limits waiver process is not transparent. Chairman Upton stated: “We believe it is entirely appropriate to demand transparency from the Administration that has promised it will be the most open and transparent in history.”¹ Representative Darrell Issa, Chairman of the House Oversight and Government Reform Committee wrote: “Our principal concern in the lack of transparency. It is unclear how (or if) the public was notified by HHS about the availability of waivers. It is also unclear what criteria were used to evaluate requests and whether the process was fair and open to all businesses.”² Senator Orrin Hatch said, “The lack of transparency which has surrounded the waiver process has been disappointing.”³ But these assertions are not borne out by the facts.

The waiver process has been accessible and transparent. The Affordable Care Act prohibited health insurance companies from offering insurance plans that limited the amount of medical claims they would cover annually or over the course of a beneficiary’s lifetime.⁴ The law specifically contemplated the use of waivers as it stipulated that “the Secretary shall ensure that access to needed services is made available with a minimal impact on premiums.”⁵ The interim final regulations establishing restricted annual limits was publicly published on June 28, 2010.⁶

Following the issuance of the regulation, industry, employers, and insurers approached HHS to explain their concerns about the immediate increase of restricted annual limits to

¹ Letter from Fred Upton, Chairman, House Committee on Energy and Commerce, to Henry A. Waxman, Ranking Member, House Committee on Energy and Commerce (Feb. 3, 2011).

² Letter from Darrell Issa, Chairman, House Committee on Oversight and Government Reform, and Trey Gowdy, Chairman, House Subcommittee on Health Care, District of Columbia, Census, and the National Archives, to Kathleen Sebelius, Secretary, U.S. Health and Human Services (Feb. 10, 2011).

³ Letter from Senator Orrin Hatch, Ranking Member, Senate Finance Committee, to Donald Berwick, Administrator, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services (Feb. 8, 2011).

⁴ The Patient Protection and Affordable Care Act, Pub. L. 111-148 § 10101 (2010).

⁵ *Id.*

⁶ 26 C.F.R. § 54.9815-2719T; 29 C.F.R. § 2590.715-2719; 45 C.F.R. § 147.126.

\$750,000.⁷ On September 3, 2010, the Center publicly issued the first of three regulatory guidances to explain the waiver process. This guidance described in detail the information needed in a waiver application: the number of individuals covered, the annual limits and rates, a description of why compliance with the interim final regulations would result in significant decrease in access to benefits or significant increase in the premium rates, and an attestation by the plan administrator.⁸

The Center subsequently released additional guidance explaining the waiver process. On November 5, 2010, the Center published a description of the standards used to assess waiver applications.⁹ The Center issued a third guidance on the waiver application process on December 9, 2010.¹⁰ This guidance also ensured that, in cases where waivers were granted, insurers had to inform their beneficiaries that their plans have annual limits lower than what is required by law.¹¹

In December, the Center simplified its application process by publishing a waiver application form and application instructions on the HHS website.¹² The website includes an array of public information concerning the waiver process, including supplemental guidance, fact sheets, news releases, letters to consumer groups, application forms, application instructions, and lists of approved applications.¹³

⁷ Bipartisan Briefing by Gary Cohen, Director, Office of Oversight, Center for Consumer Information and Insurance Oversight, U.S. Health and Human Services, to House Committee on Energy and Commerce Staff (Feb. 15, 2011).

⁸ U.S. Department of Health and Human Services, *Office of Consumer Information and Insurance Oversight Sub-Regulatory Guidance (OCIIO 2010-1): Process for Obtaining Waivers of the Annual Limits Requirements of PHS Act Section 2711* (Sept. 3, 2010) (online at www.hhs.gov/cciiio/regulations/patient/ociio_2010-1_20100903_508.pdf) (accessed on Feb. 15, 2011).

⁹ U.S. Department of Health and Human Services, *Office of Consumer Information and Insurance Oversight Sub-Regulatory Guidance (OCIIO 2010-1A) Supplemental Guidance* (Nov. 5, 2010) (online at www.hhs.gov/cciiio/regulations/annual_limits_waiver_guidance.pdf) (accessed on Feb. 15, 2011).

¹⁰ U.S. Department of Health and Human Services, *Office of Consumer Information and Insurance Oversight Guidance (OCIIO 2010-1C) Supplemental Guidance* (Dec. 9, 2010) (online at www.healthcare.gov/center/regulations/guidance_limited_benefit_2nd_supp_bulletin_120910.pdf) (accessed on Feb. 15, 2011).

¹¹ *Id.*

¹² U.S. Health and Human Services, *Annual Limits Waivers* (online at http://www.hhs.gov/cciiio/regulations/annual_limit_waivers.html) (access on Feb. 15, 2011).

¹³ *Id.*

Information on applicants who receive waivers is published on the HHS website, updated on a monthly basis.¹⁴ The Department’s website states that “HHS periodically posts the list of the plans that have been granted waivers to ensure the public is aware of the new waiver process and stakeholders understand how they are affected.”¹⁵

The Waiver Process Is Not Complicated or Difficult

The vast majority of applicants for waivers from this provision of the health care law receive waivers. In preparation for the hearing, HHS produced a list of all approvals and denials of annual limit waivers to the Committee. The Democratic staff analyzed data from 975 total waivers, of which 919 were approved and 56 were denied, an overall approval rate of over 90%.¹⁶

CCIIO officials provide additional assistance for entities whose initial requests for waivers are denied. In cases where waiver requests are incomplete or raise additional questions, CCIIO staff communicate individually with entities requesting waivers, and entities are given three separate opportunities to correct waiver requests that are incomplete. A number of entities that were initially not approved for initial waiver requests were later approved through this process.¹⁷

The Center required itself to reach determinations on waiver application within 30 days.¹⁸ The data on all waiver approvals obtained from HHS and analyzed by Committee staff indicates the average time between receipt of the completed waiver application and approval of the

¹⁴ Bipartisan Briefing by Gary Cohen, Director, Office of Oversight, Center for Consumer Information and Insurance Oversight, U.S. Health and Human Services, to House Committee on Energy and Commerce Staff (Feb. 15, 2011).

¹⁵ U.S. Health and Human Services, *Helping Americans Keep the Coverage They Have and Promoting Transparency* (online at http://www.hhs.gov/cciio/regulations/approved_applications_for_waiver.html) (accessed on Feb. 15, 2010).

¹⁶ House Committee on Energy and Commerce, Democratic Staff, *Analysis of CCIIO Annual Limits Waiver Application Approvals and Denials* (Feb. 2011).

¹⁷ Bipartisan Briefing by Gary Cohen, Director, Office of Oversight, Center for Consumer Information and Insurance Oversight, U.S. Health and Human Services, to House Committee on Energy and Commerce Staff (Feb. 15, 2011).

¹⁸ U.S. Department of Health and Human Services, *Office of Consumer Information and Insurance Oversight Sub-Regulatory Guidance (OCIIO 2010-1): Process for Obtaining Waivers of the Annual Limits Requirements of PHS Act Section 2711* (Sept. 3, 2010) (online at www.hhs.gov/cciio/regulations/patient/ociio_2010-1_20100903_508.pdf) (accessed on Feb. 15, 2011).

waivers was only 13 days.¹⁹ Over one-third of applications were approved within a week of receipt.²⁰

Documents obtained by the Committee show the applicants appreciated the work of the Center's staff. In one e-mail, an approved applicant stated:

I just received approval on eight of the applications that you were reviewing for our company. I just want to thank you for your assistance in this process. I know you guys are buried in applications and we just want to thank you for the prompt and courteous service you gave these applications.²¹

Internal communications reveal that applicants valued the staff's promptness. In one e-mail, an applicant wrote: "Thank you so much for your quick turnaround of our application. . . . Once again, thank you for helping us to meet our communication deadline to our participants."²² In another e-mail, an executive thanks the staff of the Center for Consumer Information and Insurance Oversight:

On behalf of ... plan sponsor customers, and the hundreds of thousands of enrollees who use our group limited benefits medical plans, I want to sincerely thank the Department of Health & Human Services and your team for working so hard to process and approve our waiver application. This is extremely positive news for those who depend on both offering and electing this valuable coverage.²³

The Waiver Process Is Fair

Republicans have criticized the annual limits waiver process as biased. Representative Phil Gingrey said: "Hundreds of waivers have been granted in a process that has been highly political and selective. It has been done without transparency behind closed doors. Politics and insider status, rather than objective criteria, have been guiding this process."²⁴ Chairman Darrell Issa wrote: "The current process gives credence to the perception that bureaucrats are picking

¹⁹ House Committee on Energy and Commerce, Democratic Staff, *Analysis of CCIIO Annual Limits Waiver Application Approvals and Denials* (Feb. 2011).

²⁰ *Id.*

²¹ E-mail from Applicant, to Office for Consumer Information and Insurance Oversight, U.S. Health and Human Services (Dec. 14, 2010).

²² E-mail from Applicant, to Office for Consumer Information and Insurance Oversight, U.S. Health and Human Services (Oct. 29, 2010).

²³ E-mail from Applicant, to Office for Consumer Information and Insurance Oversight, U.S. Health and Human Services (Sept. 24, 2010).

²⁴ House Committee on Energy and Commerce, *Markup of H.R. 358, Protect Life Act; H.R. 570, Dental Emergency Responders Act; H.R. 528, Neglected Infections of Impoverished Americans Act; and H.R. 525, Veterinary Public Health Amendment Act*, 112th Cong. (Feb. 11, 2011).

winner and losers in a politicized environment where the winners are favored constituencies of the administration. For instance, while unionized employees represent less than 10% of all employed individuals in the United States, of the 2.1 million people exempted from the PPACA, unionized employees represent 40% of exempted employees.”²⁵

In preparation for the hearing, HHS produced a list of all approvals and denials of annual limits waivers to the Committee. The Democratic staff analyzed data from 970 total waivers, of which 919 were approved and 56 were denied.²⁶ The data show that, contrary to Republican assertions, the annual waiver process is not biased in favor of favor of plans that cover unions employees.

The overall approval rate for all entities that applied for waivers was over 90%.²⁷ The approval rate was lower for plans covering union employees. The Department denied 13.6% of waiver applicants that were union plans or plans serving union members.²⁸ In contrast, 2.9% of non-union health insurance waiver applications were denied.²⁹ The denial rate for union plan waivers was nearly five times higher than that of non-union plans. See Figure 1.

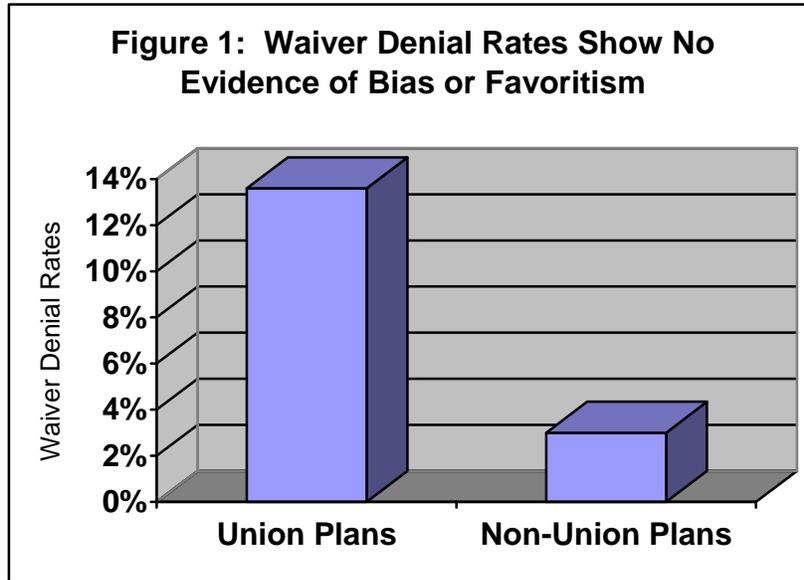
²⁵ Letter from Darrell Issa, Chairman, House Committee on Oversight and Government Reform, and Trey Gowdy, Chairman, House Subcommittee on Health Care, District of Columbia, Census, and the National Archives, to Kathleen Sebelius, Secretary, U.S. Health and Human Services (Feb. 10, 2011).

²⁶ House Committee on Energy and Commerce, Democratic Staff, *Analysis of CCIIO Annual Limits Waiver Application Approvals and Denials* (Feb. 2011). For purposes of these calculations, Committee staff classified multi-employer plans as “union” plans. Multi-employer group health plans are created by collective bargaining agreements between unions and employers. It is important to note, however, that both employers and employees contribute to the fund and representatives from both the union and the employer are managers of the health care coverage fund.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*



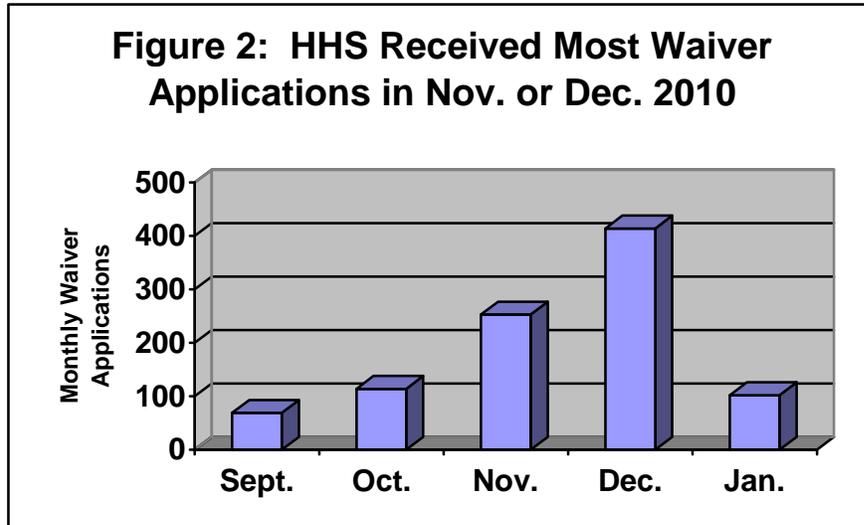
The Timing of Waiver Approvals Is Based on the Timing of Waiver Applications

Republicans have questioned the timing of the waiver approvals, indicating that the large number of approvals in January 2011 was indicative of problems with implementation. Senator Hatch wrote: “I was surprised by the announcement made by HHS on January 26, 2011, that a total of 733 waivers have been granted from the annual benefit limits established under the Patient Protection and Accountability Act. This is a more than 200% increase from the 222 waivers that were previously announced in December 2010.”³⁰

The timing of the processing and announcement of waivers is directly related to the date of receipt by CCIIO. The Center’s staff received the majority of the waiver applications in November and December 2010. In September, the Center received 69 applications; in October, it received 114; in November, it received 253; in December, it received 414; and in January, the Center received 102.³¹ See Figure 2. Because most applications were received in November and December 2010, most approvals occurred after a short time for evaluation – in December 2010 or January 2011.

³⁰ Letter from Senator Orrin Hatch, Ranking Member, Senate Finance Committee, to Donald Berwick, Administrator, Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services (Feb. 8, 2011).

³¹ House Committee on Energy and Commerce, Democratic Staff, *Analysis of CCIIO Annual Limits Waiver Application Approvals and Denials* (Feb. 2011).



The Waivers Affect a Small Percentage of the Insured Population

Republicans have characterized the annual limits waivers as indication the Affordable Care Act is flawed. Subcommittee Chairman Cliff Stearns stated: “The American people repeatedly have been told that the new health care law is an effective and responsible plan for overhauling the nation’s health care system. Yet, if the law is so good, why are so many waivers to the law being granted. . . . As a matter of fairness, I must question the value of a law that requires so many waivers.”³²

The waiver on annual limits requirements impact a small percentage of Americans. The waivers apply to 2.4 million people in the employer-based insurance market.³³ The entire market of employer-based or private insurance totals 164 million people.³⁴ Annual limits waivers thus apply to less than 2% of beneficiaries who are enrolled in employer-based health insurance.

The annual limits requirement is not the final step of health care reform, but the first stage. The waivers provided to the annual limits requirement of the law do not exempt the entities that received them from any other health care reform provisions. No waivers will be issued after 2014, when the new reform law takes full effect.

³² Stearns leading the investigation into the Obama administration’s decision to grant more than 700 waivers to the new health care law, CNS News (Feb. 4, 2011) (online at <http://cnsnews.com/news/article/house-prepares-investigation-obamacare-w>) (accessed on Feb. 15, 2011).

³³ House Committee on Energy and Commerce, Democratic Staff, *Analysis of CBO Annual Limits Waiver Application Approvals and Denials* (Feb. 2011).

³⁴ Kaiser Family Foundation, *Health Insurance Coverage in the U.S., 2009* (online at <http://facts.kff.org/chart.aspx?ch=477>) (accessed on Feb. 15, 2011).

CCIIO Is Not a “Massive Bureaucracy”

Republicans have asserted that the Affordable Care Act has created a massive new regulatory body. According to a press release posted on the Committee on Energy and Commerce website, “[t]he inquiry into the operations and activities of the CCIIO is part of a broader effort being undertaken by the Committee to scrutinize the massive bureaucracy created by the health care law.”³⁵

CCIIO is not a massive bureaucracy, but a small office within the Centers for Medicare and Medicaid Services. According to data produced to the Committee by HHS there are currently 259 employees and detailees in the Center.³⁶ These employees represent just 0.35% of the total employment at HHS.³⁷

³⁵ House Committee on Energy and Commerce, *Press Release: Energy and Commerce Committee Launches Probe of New Health Care Bureaucracy* (Jan. 20, 2011) (online at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8152>) (accessed on Feb. 15, 2011).

³⁶ Letter from Steve Larson, Deputy Administrator and Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicaid Services, U.S. Department of Health, to Fred Upton, Chairman, House Committee on Energy and Commerce, Tranche 3, Tranche 4 (Feb. 7, 2011)

³⁷ U.S. Health and Human Services, *FY 2012 President’s Budget for HHS Budget in Brief* (online at <http://www.hhs.gov/about/FY2012budget/fy2012bib.pdf>) (accessed on Feb. 15, 2011).