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Re: **Detailed Analysis of PFFS Provisions of Reid Substitute**
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Under current law[i], the Secretary of Health and Human Services has authority to "negotiate" the premiums to be charged by private Medicare plans ("Medicare Advantage" health insurance plans) – meaning that the Centers for Medicare and Medicaid Services (CMS) can keep a Medicare Advantage plan from participating unless it agrees to charge a premium acceptable to CMS– , ***but*** this authority does not apply to private fee-for-service plans[ii]– meaning that CMS has no power to impose a premium price control as a condition of participation for private fee-for-service plans, which can be excluded only if they fail to meet other applicable standards.

Section 3209 of the Reid Substitute[iii] and Section 1175 of the House-passed bill[iv] both effectively trump this crucial exemption by giving CMS the absolute and standardless discretion to reject premium "bids" by *any* Medicare Advantage plan, including a private fee-for-service plan. Specifically, both the Reid Substitute and the House-passed bill would add this subparagraph:

(c) REJECTION OF BIDS.–

(i) IN GENERAL.–Nothing in this section shall be construed as requiring the Secretary to accept any or every bid submitted by an MA organization under this subsection.[v]

This means that the existing law that effectively forbids the Secretary to exclude a private fee-for-service plan on the basis that CMS considers its premiums to be too high would be trumped by the new ability of the Secretary to reject "any or every" premium bid submitted by a private fee-for-service plan.

1. 42 U.S.C. § 1395w-24 (a)(6)(B) reads, in relevant part (emphasis supplied):

(B) Acceptance and negotiation of bid amounts.

(i) Authority. Subject to clauses (iii) and (iv), the Secretary has the authority to negotiate regarding monthly bid amounts submitted under subparagraph (A) . . . in exercising such authority the Secretary shall have authority similar to the authority of the Director of the Office of Personnel Management with respect to health benefits plans under chapter 89 of title 5, United States Code [5 USCS §§ 8901 et seq.].

(ii) Application of FEHBP standard. Subject to clause (iv), the Secretary may only accept such a bid amount or proportion if the Secretary determines that such amount and proportions are supported by the actuarial bases provided under subparagraph (A) and reasonably and equitably reflects the revenue requirements (as used for purposes of

section 1302(8) of the Public Health Service Act [42 USCS § 300e-1(8)] [relating to the standards for setting different rates for individuals and families and for individuals, small groups, and large groups]) of benefits provided under that plan.

2. 42 U.S.C. § 1395w-24 (a)(6)(B) provides:

> (iv) Exception. In the case of a [private fee-for-service] plan described in section 1851(a)(2)(C) [42 USCS § 1395w-21(a)(2)(C)], the provisions of clauses (i) and (ii)shall not apply and the provisions of paragraph (5)(B), prohibiting the review, approval, or disapproval of amounts described in such paragraph, shall apply to the negotiation and rejection of the monthly bid amounts and the proportions referred to in subparagraph (A).

The “provisions of paragraph (5)(B)” incorporated by reference are:

> (B) Exception. The Secretary shall not review, approve, or disapprove the amounts submitted under paragraph (3) or, in the case of an MA private fee-for service plan, subparagraphs (A)(ii) and (B) of paragraph (4).

Paragraph (4), subparagraph (A)(ii) reads “the amount of the Medicare + Choice [now called Medicare Advantage] monthly basic beneficiary premium”; paragraph (4), subparagraph (B) reads “Supplemental benefits. For benefits described in section 1852(a)(3) [42 USCS § 1395w-22(a)(3)], the amount of the Medicare + Choice monthly supplemental beneficiary premium (as defined in subsection (b)(2)(B)).”

3. The new subparagraph (C) would be added to 42 U.S.C. § 1395w-24 (a)(5). Since the language of subparagraph (a)(6)(B) that prevents the Secretary from “negotiating” private fee for-service plan premiums is based on incorporating by reference subparagraph (a)(5)(B), as explained in the previous note, and because clause (i) of (a)(5)’s new subparagraph (C) would prevent subparagraph (B) from being construed to limit the Secretary’s authority to reject bids, it effectively makes meaningless the premium negotiation prohibition of subparagraph (a)(6)(B).

If this seems head-spinningly confusing, it is possible that was the intent of the drafters – to employ a seemingly innocuous provision whose true meaning can be understood by following extremely convoluted cross-references.

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[i] 42 U.S.C. § 1395w-24 (a)(6)(B)
[ii] 42 U.S.C. § 1395w-24 (a)(6)(B)
[iii] Beginning at page 920.
[iv] Beginning at page 549.
[v] Reid Substitute, line 19, page 920; H.R. 3962, line 13 SEC. 1175 , page 549.