



## POLICY & ACTION FROM CONSUMER REPORTS

August 1, 2014

Secretary Thomas E. Perez  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Secretary Sylvia Mathews Burwell  
U.S. Department of Health and Human Services,  
P.O. Box 8012  
Baltimore, Maryland 21244-1850

Secretary Jacob J. Lew  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Submitted via E-OHPSCA-FAQ.ebsa@dol.gov

Re: Application of the out-of-pocket limitation to the use of reference-based pricing

Dear Secretaries Perez, Burwell, and Lew:

Consumers Union, the policy and advocacy division of Consumer Reports, submits these comments on question #4 of your joint FAQs, dated May 2, 2014, regarding whether expenditures incurred by individuals using providers who do not accept a reference price should be applied to the out-of-pocket limitation, as well as the appropriate standards that plans using reference-based pricing structures should be required to meet.

We appreciate the concern raised by the Departments in the FAQs that “such a pricing structure [reference pricing] may be a subterfuge for the imposition of otherwise prohibited limitations on coverage, without ensuring access to quality care and an adequate network of providers.”

We share the concern the Departments have raised. Consumers Union believes that reference-based pricing can be a way to foster better value in our health care system, but also that strong consumer protection standards need to be applied to such programs to ensure that consumers are not caught in the middle of the bargaining process between insurers and providers. The restriction of choice of provider inherent in a reference-based pricing program should be carefully balanced with the benefit to consumers in the form of cost savings or higher provider quality. Further, consumers must have complete, actionable information about their choices, such that they do not inadvertently find themselves paying the “balance bill” of a provider that doesn’t accept the reference price. As one study illustrates, the gap between the reference price and the provider’s regular charge can mean a bill of tens of thousands of dollars for the consumer for some procedures.<sup>1</sup>

<sup>1</sup> Robinson, James C., and Brown, Timothy T. Increases in Consumer Cost Sharing Redirect Patient Volumes and Reduce Hospital Prices for Orthopedic Surgery (August 2013). *Health Affairs*. Accessed at <http://content.healthaffairs.org/content/32/8/1392.full.pdf+html>

### Headquarters Office

101 Truman Avenue  
Yonkers, New York 10703-1057  
(914) 378-2029  
(914) 378-2992 (fax)

### Washington Office

1101 17th Street, NW #500  
Washington, DC 20036  
(202) 462-6262  
(202) 265-9548 (fax)

### West Coast Office

1535 Mission Street  
San Francisco, CA 94103-2512  
(415) 461-6747  
(415) 431-0906 (fax)

### South West Office

506 West 14th Street, Suite A  
Austin, TX 78701  
(512) 477-4431  
(512) 477-8934 (fax)

The Departments should create strong consumer protection standards for reference-based pricing programs that all large group plans and self-insured plans (we would support applying this more broadly to all commercial plans and Exchange QHPs) must have in place to avoid these problems. Before reference-based pricing programs can be implemented, insurers and/or group purchasers must show that the consumer protection standards have been met and get approval from appropriate regulatory authorities before implementing a reference-based pricing structure.

The standards should ensure that, at a minimum, reference-based pricing programs are acceptable only if:

- The reference-based pricing structure is based on *available claims data* to select appropriate procedures and determine the correct reference-based price' i.e., evidence-based.
- The reference-based pricing structure is tested as a *pilot-program before wide-spread adoption*. Evidence showing consumer understanding and benefit from the pilot-program must be submitted to the appropriate regulatory agency for approval before adopting more broadly.
- Procedures subjected to reference-based pricing are routine procedures that have been shown to have *high cost variation with little to no corresponding quality variation*.
- Procedures subjected to reference-based pricing are *elective and non-urgent*.
- The program *does not apply* to procedures for which little consistency exists on appropriate treatments.
- Insurers provide a *list of facilities* that accept reference-based pricing, including cost and available quality information, to all consumers and providers involved in the program, as well as publicly post such list on their websites and as part of their online provider directories, including information about which providers accept the reference-based price for the specific service/procedure. The provider directory must be updated with accurate information in real-time.
- Insurers provide *robust educational materials to consumers and providers* (especially those making referrals) that include information about the reference-based pricing program in the plan's benefit information, include examples of different cost scenarios for consumers, and illustrate the repercussions for consumers when they get services from a provider who does not accept the reference-based pricing structure.
- Insurers have a program in place to require referring providers to obtain consumers' *affirmative consent before referring to providers charging above the reference-based price*.
- Insurers provide an *adequate network of providers accepting* the reference-based price. In particular, there should be:
  - An adequate number of providers accepting the reference price near enrollees' residences or workplaces to provide reasonable access.
  - An adequate number of providers who can accommodate the linguistic and cultural needs of the enrollee population, based on standards such as state and federal language threshold requirements.
  - An adequate number of providers accepting the reference price who are accepting new patients.
  - Reasonable wait time standards for providers accepting the reference-based price.
  - An easy-to-use exceptions and appeals process for enrollees who have difficulty finding providers accepting the reference-based price.
  - An adequate number of providers accepting the reference-based price that meet pre-defined quality standards.
  - A "network" of providers accepting the reference-based price that meet state and federal standards for network adequacy, if applicable.
- Insurers demonstrate that some of the *savings generated from the program are passed on to enrollees* in the form of lower premiums, lower cost-sharing, or direct reimbursement.

- Insurers implement *continuous monitoring and data collection*, the results of which should be shared with the public and with the relevant regulatory agencies. This data collection should include:
  - Collection of data to ensure that the program does not have a disproportionately negative impact on certain populations of enrollees.
  - Monitoring for any effects on quality outcomes; both improvements and deteriorations.
  - Monitoring patient experience: tracking the number of appeals and complaints and the resolution of these appeals and complaints, and assessing enrollee understanding and ability to use the program.

It is our position that all the consumer protections described above must be in place and operational before removing protections, such as applying out-of-pocket maximums to non-reference priced, in-network provider charges.

If these consumer protections are not in place, consumers could find themselves with an unexpectedly large medical bill for a reference-priced procedure— because, for example, they unknowingly used a provider that didn't accept the reference price—or with larger required out-of-pocket expenditures overall because a non-reference-priced provider's charges were not attributed to the usual out-of-pocket maximum.

On behalf of Consumers Union, we welcome the opportunity to comment on this important policy decision and the effort to realize the full promise of the Affordable Care Act.

Sincerely,



DeAnn Friedholm  
Director, Health Reform  
Consumers Union