

June 15, 1999

The Honorable John A. Boehner
U.S. House of Representatives
1011 Longworth House Office Building
Washington, DC 20515

Dear Congressman Boehner:

On behalf of the undersigned organizations representing physicians (M.D., D.O.), dentists (D.D.S. and D.M.D.), and patients, we appreciate the opportunity to provide comments on H.R. 2095, the "Health Care Quality and Access Act of 1999." Unfortunately, as currently drafted, this bill falls well short of the mark, both in terms of the provisions contained in the bill and in terms of those provisions that are not currently included in the legislation. In the spirit of helping to advance the enactment of comprehensive patient protection legislation this year, we respectfully offer the following comments on specific sections of the bill.

The Bill Does Not Guarantee a Fair and Equitable Grievance and Appeals Process and Fails to Ensure Health Plan Accountability to Patients By Removing ERISA Preemption

First and foremost, H.R. 2095, the "Health Care Quality and Access Act of 1999," would require that group health plans' arbitrary definitions and guidelines be followed, throughout the review process, when determining medical necessity. Accordingly, the bill fails to ensure that medical necessity decisions are made in accordance with generally accepted standards of medical practice that a prudent physician or dentist would make.

This bill also fails to guarantee that only truly independent physicians or dentists would review medical decisions made by other physicians or dentists, respectively. Similarly, while HR. 2095 attempts to provide some level of accountability by affording aggrieved patients the right to internal and external review, these decisions may not be binding on the plans. The bill also could allow plans to ask patients to unwittingly waive their rights to physician or dentist involvement in an external review, should they elect to proceed under a permitted alternative. In addition, the bill injects a new and novel concept into external appeals processes, requiring "independent contract experts"—presumably lawyers—to make a preliminary determination that the appeal requires the evaluation of medical evidence by a health professional.

Also of utmost importance, this bill would fail to remove ERISA's preemption of state-based causes of action for patients who have been injured or killed by negligent health plan medical decision-making. We have long believed that those making medical decisions must be held accountable for their decisions. Currently, ERISA plans cover 125 million Americans—

constituting 72% of the entire workforce and 64% of the non-elderly population. Nevertheless, those plans remain immune under ERISA from state-based causes of action. Not only does this bill fail to correct that problem, it moves unacceptably in the other direction by permanently arresting the development of ERISA case law that has been slowly and incrementally forcing plans to account for their negligent decisions.

The Bill Fails to Ensure Patients' Choice of Physicians and Dentists

H.R. 2095 fails to guarantee that patients have the ability to select the physician and dentist of their choice. To ensure choice, at the time of enrollment, patients should be offered a health plan or coverage package that contains a "point-of-service" option when the plan otherwise limits their access to a closed provider network. This option could easily be structured so that it imposes no additional costs on the employer. If a plan's network cannot provide for the needs of the patient, the patient must be allowed to seek care outside the network.

The Bill Does Not Protect Medical Communications Between Patients and Physicians or Dentists

We note with interest the inclusion of language that would begin to limit "anti-gag" clauses and practices by health plans, but we are concerned about the consequences of drawing the language so tightly. For example, under the bill's language a physician or dentist operating under a plan's contract might not be able to draw upon the best advice of a trusted colleague outside of the plan, in providing the fullest measure of medical advice to a patient. The Rules of Construction also suggest that a plan's contract terms that are not based on a plan's guidelines or protocols may still be enforced even though they have the intended effect of preventing full and open medical communication between patients and their physicians or dentists. This section should be redrafted to effectively protect legitimate "medical communications."

The Bill Does Not Ensure Patient Access to Covered Emergency Services

The bill as currently written would undermine the intent of the "prudent layperson" standard and provides those covered by private managed care plans with less protection for coverage of emergency care than Congress provided to Medicare and Medicaid patients as part of the "Balanced Budget Act."

Unfortunately, the bill would substantially narrow the standard so patients would only be covered for an initial, but undefined, "appropriate screening examination." For all other services, including potentially life-saving treatments, emergency physicians and dentist would have to certify in writing that the patient needed immediate emergency medical care. Yet the plan would only be required to cover such care if retrospectively the plan agrees with the treating physician's judgment. Additionally, patients who are in severe pain and make a reasonable decision to seek emergency care, would not be fully protected or covered.

The Bill Fails to Ensure Patient Access to Specialty Care and Continuity of Care

The bill is also noticeably silent on access to specialty care and continuity of care, and we strongly urge you to address this serious deficiency in the bill.

With respect to the bill's language allowing access to covered obstetrical and gynecologic services by women and pediatric care by children, we are generally supportive of the underlying intention of the provisions but find the language in both sections unnecessarily narrow and limiting. Section 301, for instance, considers as acceptable the ordering of only *routine* gynecological and obstetric care by an obstetrician/gynecologist.

The Bill Does Not Effectively Promote Broad Plan Information Disclosure to Patients

We are somewhat encouraged at the broad-based inclusion of patient disclosure information relating to covered services, limitations and restrictions thereon, participant responsibility and dispute resolution. We note with approval the additional sorts of information available to patients upon request.

At the same time, we would note that these provisions and all others directly applicable to patient protection should be implemented as soon as possible after enactment, and not, as this bill indicates, on January 1st of the second calendar year after enactment, with enforcement of the provisions delayed until final regulations have been issued. We also caution against enabling plans to fulfill any information disclosure requirements by disseminating the information electronically. This in many cases is not an effective means of communicating with many participants and may have the effect of discriminating against minorities, lower income patients, and the elderly.

The Bill Fails to Offer Real Choice and Meaningful Patient Protections With the Proposed Association Health Plans

We remain extremely concerned with one of the titles (Title VII) of this bill, in particular. By modifying ERISA to allow the formation of Association Health Plans (AHPs) under it, existing state-based patient protections would not apply to these new plans, thereby severely impeding our ongoing efforts to extend adequate protections to all health plan enrollees. Conversely, modifying ERISA in the manner proposed in this bill would do little to ensure that all patients receive effective and meaningful patient protections.

Additionally, Title VII remains seriously deficient by enabling AHPs to offer only a single option of health insurance coverage.

The Bill Would Unnecessarily Establish the Health Care Access, Affordability, and Quality Commission

We are puzzled that some of the proposed Health Care Access, Affordability and Quality Commission's statutory duties would include establishing model guidelines for independent expert external review programs, systems to ensure the timely processing of claims, and patient outcomes. We question whether a federal commission is needed to create these guidelines or

report on the "appropriateness and availability of particular medical treatments," given current activity in the states and within the Medicare program.

Thank you for the opportunity to share our initial thoughts on your bill. We look forward to working with you to achieve a bipartisan solution that extends meaningful and comprehensive patient protections to all Americans.

Sincerely,

American Academy of Child and Adolescent Psychiatry
American Academy of Dermatology
American Academy of Ophthalmology
American Academy of Otolaryngology Head and Neck Surgery
American Academy of Pediatrics
American Association for Thoracic Surgery
American Association of Neurological Surgeons
American Association of Physicians of Indian Origin
American College of Cardiology
American College of Emergency Physicians
American College of Obstetricians and Gynecologists
American College of Occupational and Environmental Medicine
American College of Physicians-American Society of Internal Medicine
American College of Rheumatology
American College of Surgeons
American Dental Association
American Gastroenterological Association
American Lung Association
American Medical Association
American Osteopathic Association
American Psychiatric Association
American Society for Reproductive Medicine
American Society of Anesthesiologists
American Society of Cataract and Refractive Surgery
American Society of Nephrology
American Society of Plastic and Reconstructive Surgeons
American Thoracic Society
American Urological Association
College of American Pathologists
Congress of Neurological Surgeons
Renal Physicians Association
Society of Thoracic Surgeons

