



**FRESENIUS
MEDICAL CARE**

September 18, 2015

VIA FIRST CLASS MAIL AND EMAIL

Ms. Laura Cali, Insurance Commissioner
Department of Consumer & Business Services
Insurance Division
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Mr. Patrick Allen, Director
Department of Consumer & Business Services
PO Box 14480
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Re: Unfair Insurance Trade Practices and Discrimination against Persons with End-Stage Renal Disease by Oregon Health Insurers

Dear Commissioner Cali and Director Allen,

We have learned that multiple Oregon health insurers are engaging in unfair trade practices and are unlawfully discriminating against Oregon insureds that have End-Stage Renal Disease (ESRD). We are concerned that these practices are a consumer protection issue that will adversely affect of Oregon employers and critically-ill consumers.

Fresenius Medical Care currently treats more than two thousand Oregonians who have ESRD, an incurable, life-threatening kidney condition that requires regular dialysis treatments at least three times per week. Fresenius Medical Care's patients have serious health problems with multiple comorbidities. In addition, the vast majority of our patients cannot work and most have limited financial means. Dialysis treatment is expensive and is usually required for the remainder of a patient's life, unless a kidney transplant is successful. Consequently, a patient's ability to have dependable and trustworthy insurance coverage to pay for their dialysis treatments is imperative. Many of Fresenius Medical Care's Oregon patients are covered by commercial health plans. Unfortunately, these plans are increasingly insured by, or administered by, insurers that seek to implement misleading and discriminatory plan designs during open enrollment for the 2016 plan year.

We believe several Oregon health insurers, including Regence BlueCross BlueShield and Providence Health Plans, are implementing misleading plan designs (ESRD Benefit Design) that substantially reduce the insurance benefits available for the treatment of ESRD, while increasing out-of-pocket costs and reducing access to care for consumers that require continuing medical care and are typically financially unstable. They are also unlawfully discriminating against persons with ESRD in violation of Oregon law, as well as the Medicare Secondary Payer Act. With the 2016 plan year quickly arriving, we respectfully request that the Department invoke its authority under ORS § 731.236 to fully investigate these issues and bar insurers, under ORS § 731.252, from implementing deceptive and discriminatory plan benefit designs.

A. The Providence and Regence Plan Designs Are Radical Departures from Standard, Commercial Insurance Dialysis Benefits.

The plan design implemented by Regence and Providence, among others, pays benefits for ESRD dialysis services at market rates for the first three months of a patient's treatment. Then, in the fourth month of treatment, precisely when the patient becomes eligible for Medicare, health insurance benefits for dialysis services are reduced dramatically to the Medicare rate (or some small percentage above the Medicare rate) for the duration of the patient's need for dialysis services. Providence's 2016 Oregon Small Group Rate Filing with the Department is illustrative:

Outpatient Renal Dialysis Services¹

The Member's first 3 months of renal dialysis (cumulative and not subject to annual reset) are paid at the Plan's allowable amount up to the Out-of-Pocket Maximum after satisfaction of the Deductible and application of the predominant In-Network or Out-of-Network Coinsurance. Additional visits beginning on the first day of the fourth month of dialysis are paid at 125% of the Medicare allowable amount, deductible and coinsurance do not apply.

Medicare Part B Reimbursement

If you or your enrolled Eligible Family Dependent has End-Stage Renal Disease (ESRD), the Plan pays as Primary during the first 30 months of dialysis, or the first 30 months of treatment in connection with a kidney transplant. Thereafter, Medicare becomes the Primary Payer of benefits.

The Medicare Secondary Payer statute requires the Plan to identify Members in the Plan, including enrolled Eligible Family Dependents, who are eligible for Medicare, including those eligible because of ESRD. To ensure the correct Coordination of Benefits, Members are required to provide the Plan the basis for their eligibility for Medicare (age, ESRD, or disability) and the effective date of Medicare Part A and Part B.

During the period where the Plan is the Primary Payer, Medicare Part B monthly premiums for Member, including enrolled Eligible Family Dependents, that have become entitled, including dual-entitlement, to Medicare based on ESRD, will be

¹ SERFF No.: PROV-130051933, 2016 Providence Health, Oregon Small Group Contract Comparison, at 1 (Ex. A).

covered by the Plan, up to a lifetime maximum amount of \$5,500. Reimbursement for monies withheld by Medicare for Social Security, Railroad Retirement, or Office of Personnel Management payments will be made at the end of each calendar quarter.

For members who are not eligible for Medicare Part B, benefits will be continued to be paid at the applicable benefit level for the type of Services received.

Regence has requested approval from the Department to implement a similar ESRD Benefit Design for the 2016 small group market, although it is unclear whether Regence will pay the Medicare Part B premiums for its Medicare-eligible members.² We understand that these plan designs are being implemented across Providence's and Regence's insured and self-funded business lines.

B. The Insurers' ESRD Benefit Designs Are Misleading and Omit Increased Costs and Coverage Gaps to Employers and Insureds.

Oregon law prohibits insurers and their agents from directly or indirectly misrepresenting the terms of any policy or the benefits or advantages of a policy. ORS § 746.075(2)(a). Oregon law also prohibits insurers from making any assertion, representation, or statement regarding insurance that is untrue, deceptive, or misleading. ORS § 746.110. The Providence and Regence ESRD Benefit Designs are misleading, because they provide no indication to the employers purchasing the policies or their employees (the beneficiaries) that the insurers' dialysis benefits and access to care are far less than the benefits and coverage competing commercial insurers typically offer for dialysis treatment. For instance:

1. **The ESRD Benefit Designs provide no way for employers or beneficiaries to understand that dialysis benefits are reduced at the fourth month of dialysis treatment.** The Providence Plan states that the first 3 months of treatment are paid at the "Plan's allowable amount" and additional visits beginning in the fourth month of treatment are paid at 125% of the Medicare-allowable amount. The employer and the beneficiary are provided no indication whether the dialysis benefit increases or decreases starting in the fourth month of treatment, and certainly most employers and beneficiaries would not have any reason to know of the huge difference between commercial and Medicare rates. The reality is that the insurers' ESRD benefit drops dramatically. However, the ESRD Benefit Designs, as written, provide no notice to employers or beneficiaries that this will occur.
2. **The ESRD Benefit Designs do not inform employers or beneficiaries about the impact of Medicare eligibility and enrollment.** The ESRD Benefit Design language does not explain to an employer or beneficiary the actual consequences of the benefit reduction that occurs in the fourth month, and the insurers' requirement that those persons eligible for Medicare Part B enroll at that time. For those persons who are ineligible for Medicare Part B or choose not to enroll, they will be liable for the difference between what the dialysis provider charges and the amount paid by the insurer.

² SERFF No.: RGOR-129924806, Regence Sample Form, Dialysis for End-Stage Renal Disease (Ex. B).

The difference can result in beneficiary liability exceeding several thousand dollars *per treatment* and *hundreds of thousands of dollars of patient liability per year*. For those patients who do enroll in Medicare Part B, they will be purchasing redundant insurance coverage and will be locked into paying additional monthly Medicare Part B premiums for that coverage, if: (i) the insurer does not make Medicare Part B premium payments on behalf of the beneficiary at all; (ii) the insurer hits a cap on lifetime premium payments for Medicare Part B premiums (see Providence \$5,500 lifetime maximum on premium payments); or (iii) the beneficiary changes commercial health coverage and loses eligibility for the premium support offered by the insurer that implemented the ESRD Benefit Design (yet has to remain enrolled in Medicare Part B). These outcomes all lead to significant, increased out-of-pocket costs to beneficiaries with ESRD requiring dialysis, none of which are disclosed to the employers or beneficiaries by the insurers.

3. **The insurers omit that beneficiaries may experience reduced access to care at Oregon dialysis providers as a result of the ESRD Benefit Designs.** The ESRD Benefit Design language is silent as to whether beneficiaries will be able to access Providence or Regence participating dialysis providers to receive dialysis treatment at contracted facilities or whether dialysis treatment can only be accessed “out-of-network.” We believe that most, if not all, dialysis providers will not contract as a participating provider with health insurers who implement plan designs like those proposed by Providence and Regence. We are therefore concerned that patients who are sick and financially strapped will be left to treat out-of-network at an increasingly diminished network of dialysis providers throughout the state, leading to a reduction in access to care and treatment options.

These Oregon insurers are proposing plan designs that are clearly deceptive and misleading and are likely to result in injury to employers who purchase these policies and beneficiaries who enroll in their health plans thinking they have purchased robust health coverage for dialysis treatment, when, in fact, they have not. For these beneficiaries, it is vital that they have full disclosure regarding the increased out-of-pocket costs and limitations of the ESRD Benefit Design, particularly given the fact that they will be undergoing dialysis treatments several times per week, potentially for the rest of their lives. The insurers’ implementation of the ESRD Benefit Design is an insurance trade practice that is unfair, deceptive, and injurious to the insurance-buying public. ORS §§ 746.240. Moreover, these plan designs improperly restrict coverage for persons with ESRD in violation of ORS § 746.240 and OAR 836-053-0211(2).

C. The Insurers’ ESRD Benefit Designs Discriminate Against Insureds With ESRD in Violation of Both State and Federal Law.

Oregon law prohibits insurers from discriminating against beneficiaries based on “actual or expected health status.” ORS §§ 743.734(3), 743.752(1), 743.754(1). Insurers in Oregon are additionally prohibited from unfairly discriminating between similarly situated beneficiaries in setting benefits available under a plan or establishing any other term or condition of the policy. *Id.* § 746.015. The Providence and Regence ESRD Benefit Designs discriminate against ESRD beneficiaries because they single out and unfairly differentiate between those beneficiaries diagnosed with ESRD and other plan members. These insurers substantially reduce benefits and

add onerous conditions and coverage requirements that apply *only* to ESRD patients and nobody else. Effectively, Providence and Regence are penalizing their members who are unfortunate enough to have been diagnosed with ESRD. On its face, this practice is illegal discrimination prohibited by Oregon law. *Id.* § 746.015.

The ESRD Benefit Designs violate state law. It is a discriminatory insurance practice in violation of the Oregon Insurance Code to impose differing plan terms or conditions on coverage or benefits of a plan beneficiary “based on the actual or expected health status of the” individual. ORS § 743.752(1); *see also* ORS §§ 743.734, 743.737, 743.754(1), 746.015. The Providence and Regence ESRD Benefit Designs run afoul of this prohibition by explicitly limiting dialysis benefits only for beneficiaries with ESRD who require maintenance dialysis services.

Federal law prohibits the ESRD Benefit Designs as well. ESRD patients are generally eligible for Medicare coverage, and those patients who are also covered by a commercial insurance plan are protected from discrimination from their commercial plans under the Medicare Secondary Payer Act (MSP Act). 42 U.S.C. § 1395y(b)(1)(C). The MSP Act and its accompanying regulations prohibit discrimination against ESRD-based-Medicare-eligible individuals and differentiation between patients based on a beneficiary’s diagnosis with ESRD during the 30-month coordination of benefits period. 42 C.F.R. § 411.161(a)-(b). The regulations explicitly prohibit imposing benefit limitations on individuals diagnosed with ESRD that do not apply to other beneficiaries who are not Medicare-eligible or who do not have ESRD, including providing less comprehensive coverage or reducing benefits. *Id.* § 411.161(b)(2)(ii). “Imposing on persons who have ESRD, but not on others enrolled in the plan, benefit limitations such as less comprehensive health plan coverage [or] reduction in benefits” constitutes illegal differentiation under federal law. *Id.*

* * *

Providence and Regence have developed plan designs that will harm Oregon employers and beneficiaries suffering from ESRD. They have designed a dialysis benefit that slashes dialysis reimbursement and undercuts access to care in a discriminatory and misleading fashion, providing no fair warning to the unwary customer who purchases their insurance products. These insurers’ actions risk harming Fresenius Medical Care’s patients, many of whom are already faced with significant health and financial troubles. Of course, application of the ESRD Benefit Designs works to the detriment of Fresenius Medical Care itself, and Fresenius Medical Care risks being severely financially harmed. But Fresenius Medical Care’s real concern, and the impetus for writing this letter, is for the patients and to ensure they have the health care insurance, while they face serious health and financial hardships. That these Oregonians are further mislead and discriminated against by their health insurer/administrator is unjustifiable.

Fresenius Medical Care therefore respectfully asks that the Department take immediate action to investigate, and sanction if necessary, insurers such as Providence and Regence that are attempting to market these discriminatory, unfair, and misleading plan provisions. It is important to stave off these misleading and discriminatory ESRD Benefit Designs before employers and beneficiaries are actually harmed. We look forward to working with the Department to address these issues and to assist in the Department's efforts to protect Oregon consumers.

Sincerely,

A handwritten signature in blue ink, appearing to read 'RS', is written over the word 'Sepucha' in the typed name below.

Robert Sepucha
Senior Vice President Corporate Affairs