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Subject: Summary of Benefits and Coverage and Uniform Glossary—Templates, Instructions, and Related Materials Under the Public Health Service Act, 76 Fed. Reg. 162, 52442, 52475 (Aug. 22, 2011).

The Institute for Policy Integrity (“Policy Integrity”) submits the following comments to the U.S. Department of Health and Human Services in response to its proposed rule for increasing transparency reporting by insurance carriers, as required by the Affordable Care Act of 2010 (“the Act”).¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. This rule, which aims to facilitate improved consumer decisionmaking in the essential area of health insurance coverage, is being proposed jointly with the Department of the Treasury and the Department of Labor.

Section 2715 of the Act requires HHS to develop uniform disclosure standards for use by group health plans and health insurance issuers in providing benefits and coverage explanation to insurance applicants and enrollees.² A core component of this rule is a four-page disclosure requirement that, *inter alia*, would require insurance providers to publish, for the benefit of consumers, a label summarizing common benefits scenarios and their related costs; this requirement would apply to all health insurance products offered to the public.³ The Act also requires that the full individual coverage policy or group certificate of coverage be made available online.⁴

¹ These comments are derived from a letter Policy Integrity submitted earlier this year to Kaye L. Pestaina, Office of Consumer Support, Department of Health and Human Services, in response to the proposed rule being listed as an upcoming action in the Fall 2010 Unified Agenda. <http://policyintegrity.org/what-we-do/update/letter-to-hhs-on-proposed-transparency-reporting-rule/>.

² Patient Protection and Affordable Care Act of 2010 § 2715, 42 U.S.C. § 300-gg-15 (2010) [hereinafter § 2715].

³ Specifically, the Act requires disclosure in the form of “[a] summary of benefits and coverage explanation...presented in a uniform format that does not exceed 4 pages in length and does not include print smaller than 12-point font.” *Id.* at (b)(1) and (b)(3).

⁴ *Id.* at (b)(3)(I).

The Proposed Rulemaking Will Require a Non-Traditional Cost-Benefit Analysis Focused On Maximizing Benefits

Regulatory best practices and Executive Orders 12,866 and 13,563 all require that HHS conduct a cost-benefit analysis in promulgating its proposed rule.⁵ The costs imposed on the Department in developing and implementing this rule will consist primarily of administrative costs and should therefore be minimal; the same is true of compliance costs imposed on the regulated community. Moreover, these costs are unlikely to vary significantly, no matter which label design is ultimately required by the agency or adopted by a particular company. Because these implementation and compliance costs can be estimated as fixed amounts, or fixed between an estimated range of amounts, conducting a cost-benefit analysis in this context will essentially amount to an inquiry into how to maximize the net benefits of disclosure.

The primary beneficiaries of HHS's transparency reporting standards are consumers, whose welfares stand to improve if they become more informed about insurance policy options and thereby make better consumer choices.⁶ HHS's proposed rulemaking should be informed at all times by the goal of disseminating information that will put consumers in the best position to make welfare maximizing choices. Although other parties will make use of the disclosed information—government regulators and independent watchdog organizations, for instance, can use the information to inform monitoring of insurance providers—the ultimate beneficiaries of these efforts are consumers.⁷

Disclosure can benefit consumer welfare through two primary mechanisms: improved consumer decision-making and improved health outcomes. First, consumers with more information will be able to select insurance policies that better match their preferences along the axes of price, quality, and risk preferences, leading to increased consumer satisfaction. Second, individual consumers that are able to select the insurance option that best matches their unique set of health needs may be more likely to have access to medical care when it is needed, resulting in improved health outcomes and decreased morbidity.⁸ The format that HHS ultimately settles on for its disclosure requirements will have a direct impact on the extent of benefits to be realized within these two categories.

⁵ See Exec. Order No. 12,866 § (1)(a), 58 Fed. Reg. 51,735, 51,741 (1993) (“in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits”); Exec. Order No. 13,563 § (1)(c), 76 Fed. Reg. 3,821 (2011) (instructing agencies to “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible”).

⁶ See RIN 0950-AA07, *supra* note 1 (noting in discussion of anticipated benefits that “improved information for consumers will allow them to make better health insurance choices—to choose higher quality insurers that match their preference with respect to plan design. This could result in increased satisfaction and decreased morbidity.”).

⁷ Moreover, as discussed in greater depth *infra*, government regulators and independent watchdog organizations are likely to rely less heavily on summary disclosure because of their expertise in the field.

⁸ Anecdotal evidence illustrates how a lack of transparency regarding health plan coverage can lead to decreased consumer satisfaction and insufficient health coverage for specified medical needs. In Virginia, family members of autistic children petitioned state insurance regulators to require insurers to disclose the therapies they cover. These families had selected health plans with the expectation that they covered behavioral, speech, and occupational therapy for their children when it only covered diagnosis of the condition. If these consumers had known the limits of their coverage they may have selected a plan that did in fact cover the additional therapies. David Ress, *Parents Criticize Autism Insurance Coverage*, RICHMOND TIMES-DISPATCH, Apr. 22, 2010.

HHS Should Ensure the Disclosed Information is Tailored to its Audience

HHS should draft the disclosure requirements in contemplation of the audiences for the disclosed information.⁹ This audience is composed of three groups—consumers, regulators, and third party consumer watchdog organizations—each of which is likely to use different aspects of the disclosed information for different purposes.

Consumers will primarily use the summary disclosure and coverage facts label to inform purchasing decisions. Regulators and third party watchdogs, on the other hand, will utilize both full disclosure and summary disclosure. Regulators will use this information primarily for auditing purposes, while third party watchdogs can process and distill information for consumers to help facilitate informed decision-making. While HHS should be aware of all of these constituencies and their varied objectives in structuring its proposed rule, it should always remain mindful of the fact that the ultimate goal of the rule is to advance consumer welfare, which is served by disclosure to the other two audiences.

Consumers

HHS can improve consumer purchasing decisions through the presentation of clear and concise information and by exploiting mental heuristics in its disclosure design. It is not enough simply to “provide information.”¹⁰ Consumers may benefit from “nudges” in the right direction¹¹ and even seemingly small alterations in presentation format can “highlight different aspects of options and suggest alternative heuristics” that have demonstrable effects on people’s behavior.¹² Interventions taking advantage of these effects can be strikingly cost-benefit justified as these psychological cues typically cost very little.¹³

Summary disclosure should be concise and straightforward to “highlight the most relevant information” and to “increase the likelihood that people will see it, understand it, and act in accordance with what they have learned.”¹⁴ Disclosure should avoid technical language or extraneous information that may be inaccessible to the average reader: “Unduly complex and detailed disclosure requirements may fail to inform consumers” because the disclosure “may not be read at all, and if it is read, it may not have an effect on behavior” because it is poorly understood.¹⁵

⁹ See Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs to Heads of Exec. Dep’ts and Agencies 4 (June 18, 2010) [hereinafter Sunstein Memo] (“Summary disclosure should be designed so as to be relevant to the affected population, enabling people to know why and how the information is pertinent to their own choices.”).

¹⁰ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in CASS R. SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 13, 42 (Cass R. Sunstein ed., 2000) [hereinafter BEHAVIORAL LAW AND ECONOMICS].

¹¹ See CASS SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2008) [hereinafter NUDGE] (“A nudge...is any aspect of the choice of architecture that alters people’s behavior in a predictable way without forbidding any option or significantly changing their economic incentives.”); *id.* at 95 (“As choices become more numerous, good choice architecture will provide structure, and structure will affect outcomes.”).

¹² Cass R. Sunstein, *Introduction*, BEHAVIORAL LAW AND ECONOMICS 1, 1 (“Human preferences and values are constructed rather than elicited by social situations...they are actually constructed during the elicitation process...Different elicitation procedures highlight different aspects of options and suggest alternative heuristics, which give rise to inconsistent responses.”); see NUDGE, *supra* note 12 at 252.

¹³ Hunt Allocott, *Beliefs and Consumer Choice* (MIT Working Paper, Nov. 2010), available at <http://web.mit.edu/allcott/www/papers.html>.

¹⁴ Sunstein Memo, *supra* note 10 at 3.

¹⁵ OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, APPENDIX D: DISCLOSURE AND SIMPLIFICATION AS REGULATORY TOOLS (2010) 55 [hereinafter OIRA 2010 REPORT]; see Sunstein Memo at 4 (“If

Presenting information in this manner coincides with HHS's statutory mandate to account for linguist and educational barriers to health and literacy,¹⁶ defined as the "degree to which individuals have the capacity to obtain, process and understand basic health information."¹⁷ The Center for Health Care Strategies (CHCS) notes that "[w]hile low health literacy is found across all demographic groups, it disproportionately affects non-white racial and ethnic groups; the elderly; individuals with lower socioeconomic status and education; people with physical and mental disabilities; those with low English proficiency (LEP); and non-native speakers of English."¹⁸ Presenting information in a format that is easy to understand and to act on will allow consumers across the entire spectrum to make more informed insurance choices.¹⁹

Because consumers are known to have cognitive biases,²⁰ academic research on how individuals absorb and process information should inform the design of government policy. Research on framing effects, for instance, reveals that a potential outcome presented as a loss can cause people to pay more attention than if it is presented as a gain.²¹ Compiling simple statistics, for example by listing the average costs or range of costs associated with specific medical services—for example, "the average co-payment for a week-long hospital stay is, on average, X amount of dollars"—may also help individuals process complex information.

Consumers tend to be overconfident and overoptimistic regarding to risks to life and health, which can lead them to select under-inclusive insurance coverage.²² The common benefits scenarios on the coverage facts label gives HHS the opportunity to leverage the availability heuristic—people's tendency to "assess [the] likelihood of risk[] by asking how readily examples come to mind—to counter detrimental overconfidence. If people can easily think of relevant examples, they are far

information is unduly complex and detailed, there is a risk that it will not be carefully read or processed, especially if the relevant area is technical or new and unfamiliar.").

¹⁶ § 2715(b)(2).

¹⁷ Stephen A. Somers & Roopa Mahadevan, *Health Literacy Implications of the Affordable Care Act 4*, Center for Health Care Strategies, Inc., November 2010 (report commissioned by the National Institute of Medicine).

¹⁸ Center for Health Care Strategies, Inc., *Health Literacy Implications of the Affordable Care Act 1*, Missouri Foundation for Health's Health Summit, Dec. 9, 2010, available at www.mffh.org/mm/files/Summit_Mahadevan_handout.pdf.

¹⁹ Low health literacy has been estimated to cost the U.S. economy between \$106 billion and \$236 billion annually." *Id.*

²⁰ See e.g., Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, in BEHAVIORAL LAW AND ECONOMICS 325, 325; see also Judith H. Hibbard, et al., *Informing Consumer Decisions in Health Care: Implications from Decision-Making Research*, 75 *Milbank Quarterly*, 395 (1997) (describing how, when faced with complex information, "individuals will give more weight to variables that are precise and concrete and less weight to 'fuzzier' factors that are inherently harder to evaluate."). See also OIRA 2010 Report, *supra* note 16 at 4 (noting the salience of "empirically informed" data on how people process information).

²¹ Sunstein Memo at 4; see Jolls, *supra* note 11, at 44 (describing how pamphlets describing the positive effects of breast self-examination are less effective than those that stress the negative consequences of a refusal to self-examine).

²² Numerous studies demonstrate people's bias toward unrealistic optimism. See generally David A. Armor and Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Dale Griffin and Daniel Kahneman eds., 2002) (collecting sources). See also, e.g., Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, John M. Olin Center for Law, Economics, and Business, Harvard Law School, Discussion Paper no. 436 (Sep. 2003), available at www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf; Arnold C. Cooper et al., *Entrepreneurs' Perceived Chances for Success*, 3 *J. OF BUSINESS VENTURING* 2 at 97-108 (1998).

more likely to be...concerned than if they cannot.”²³ Presenting common medical problems up front, possibly even tailored to relevant consumer subgroups, will encourage a realistic weighing of these scenarios in insurance purchasing. Along these lines, it may also be beneficial to include statistics on the occurrence of common health problems depending on age and other risk factors.²⁴

Finally, current policyholders are likely to display some degree of status quo bias—meaning a general tendency to stick with their current situation—in their insurance choice.²⁵ To the extent possible, disclosures should be presented in a way that encourages this group to reassess their coverage when appropriate.

Third Party Watchdogs and Government Regulators

Third party consumer watchdog organizations can facilitate informed decision-making by aggregating, analyzing, and packaging insurance information for different groups of consumers. They serve a critical intermediary role between consumers and insurance providers.²⁶ The complete insurance policies mandated by § 2715 (b)(3)(I) will likely be more useful to these third parties, who have the requisite expertise to process greater quantities of complex information.²⁷ Utilized in this manner, full disclosure is the best method of allowing groups and individuals access to a broad range of information in ways that can inform private and public decisions or otherwise to promote statutory goals.²⁸

Ideally, watchdog organizations could evaluate insurance policies with readily understood metrics. For example, letter grades attract attention, present a summary rating that conveys multiple pieces of required information, and avoid overloading consumers with information.²⁹ Because of the complexity of insurance policies and the unique needs of individual insurance consumers, it is unclear whether a simple letter grade would feasibly convey all the information consumers need in this particular instance. HHS should nonetheless support any tool that allows consumers to easily comprehend and evaluate insurance information.

Finally, regulators can use the disclosure information to facilitate industry monitoring.³⁰ As better information becomes available to regulators and consumers, disclosure will have the beneficial effect of incentivizing insurance providers to develop products more in line with market demand.³¹

²³ NUDGE, *supra* note 12 at 25 (“vivid and easily imagined causes of death (for example, tornadoes) often receive inflated estimates of probability, and less-vivid causes (for example, asthma attacks) receive low estimates, even if they occur with a far greater frequency (here a factor of twenty)”); see Sunstein Disclosure Memo at 5 (“If pervasive, the availability heuristic will produce systematic errors”).

²⁴ Accord James M. Naessens et al., *Effect of Premium, Copayments, and Health Status on the Choice of Health Plans*, 46 MEDICAL CARE 1033, 1040 (Oct. 2008) (describing how, in a natural experiment where health plan options were redesigned and employees were forced to choose a new plan, the presence of six major health conditions predicted a switch in plans).

²⁵ See NUDGE, *supra* note 12 at 34 (explaining status quo bias).

²⁶ Hibbard, *supra* note 21, at 405.

²⁷ See *id.* at 408 (“Many of these consumers will explicitly or implicitly rely on the expertise and choices made by intermediaries (e.g. benefits managers, purchasing alliances, and advocates).”).

²⁸ See Sunstein Memo, *supra* note 10 at 6.

²⁹ See Institute for Policy Integrity, Comments on Proposed Rule on Revisions and Additions to Motor Vehicle Fuel Economy Label, 75 Fed. Reg. 58,078 (Sept. 23, 2010), Docket No. EPA-HQ-OAR-2009-0865 (Nov. 22, 2010), via electronic submission, at 10.

³⁰ See RIN 0950-AA07, *supra* note 1 (“Improved information for regulators will allow for monitoring of the markets to track current industry practices, which will allow for better enforcement of current market regulations through more targeted audits that are based upon insurer responses.”).

³¹ See OIRA 2010 REPORT, *supra* note 16 at 57 (Providing, as example, the FDA requirement that saturated fat and dietary cholesterol be listed on a food label: “Identifying saturated fat, trans fat, and cholesterol on the

Research on the effects of disclosure in the insurance market reveals that while less informed consumers tend to evaluate insurance policies on price alone, informed consumers can better evaluate price against quality of care, forcing plans and providers to compete on both of these rubrics rather than on cost alone.³²

HHS Should Conduct Testing To Determine the Best Format for Disclosure

Best practices require testing of potential disclosure formats,³³ and as OIRA guidance documents make clear, testing should be a major component of any label evaluation process.³⁴ In order to maximize the benefits of this rulemaking HHS should test its label designs in market conditions: “To be effective, disclosure requirements should be tested in advance, preferably through quasi-experimental studies” which will allow agencies to ascertain which structures of information work and which do not.³⁵ These studies should determine “whether users are aware of the disclosure, whether they understand the disclosure, whether they remember the relevant information when they need it, whether they have changed their behavior because of the disclosure, and, if so, how.”³⁶ Pre-implementation field testing is the gold standard for evaluating a label’s efficacy and choosing between alternative designs. This field testing is consistent with past agency practice: EPA has used field experiments to guide label design,³⁷ as have other agencies.³⁸

In addition, HHS should conduct ongoing research on the disclosure format after the rule has been released. One of the inherent difficulties in agency decision-making is that “most regulations are subject to a cost-benefit analysis only in advance of their implementation.”³⁹ However, particularly “[w]ith respect to summary disclosure, agencies will often be able to learn more over time.”⁴⁰ Thus, in order to ensure that net benefits are being maximized under the standards, HHS should attempt to verify the impact of disclosure on behavior through empirical study of practices or through surveys that reliably measure behavior,⁴¹ and should modify the standards accordingly. HHS should be open to “new approaches to the extent feasible and as the evidence warrants.”⁴² This may entail a revision of the disclosure design or the substantive content of what is being disclosed, or empirical findings may support retention of the Department’s initial design choice.

food label gives consumers information to enable them to make healthy food choices that reduce the risk of coronary heart disease...Furthermore, manufacturers now have a clear way, and an incentive, to eliminate trans fat in their products and substitute healthier oils (and thus to distinguish their products as having “zero grams of trans” at the point of purchase).”).

³² Hibbard, *supra* note 21, at 395.

³³ See Sunstein Memo, *supra* note 10 at 6.

³⁴ OIRA 2010 REPORT, *supra* note 16 at 56.

³⁵ *Id.* at 40.

³⁶ Sunstein Memo, *supra* note 10 at 5.

³⁷ See, e.g., WELSEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION (1992) (discussing EPA-funded field experiments regarding warning labels).

³⁸ See, e.g., OSHA Hazard Communication, 29 C.F.R. § 1910.1200 (2009).

³⁹ Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in NEW PERSPECTIVES ON REGULATION 111, 113 (David Moss and John Cisternino eds., 2009) (noting that “most regulations are subject to a cost-benefit analysis only in advance of their implementation”); see also John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 973-74 (2006) (arguing that the “vast majority” of rules “have never been re-examined to determine whether they achieved their intended purpose, or what their actual costs and benefits were.”).

⁴⁰ OIRA 2010 REPORT, *supra* note 16 at 101.

⁴¹ *Id.*

⁴² *Id.*

Conclusion

The Affordable Care Act's Transparency Reporting Rule is an essential move towards increased transparency of health coverage with the ultimate aim of improving consumer welfare via informed consumer decision-making. Given the negligible costs of implementing the rule, a primary focus should be on what design standards for summary disclosure and labeling maximize the benefits of disclosing information. Consumers must be able to select insurance policies that better match their preferences and unique set of health needs if consumer satisfaction and improved health outcomes are to be realized. HHS should have the needs of the consumer in mind in crafting its rule, to ensure that information will be presented in a simple and easily comprehensible format—one that best minimizes the cognitive biases that can detrimentally affect insurance choices. To accomplish this, the Department should engage in pre-implementation field testing as well as ongoing testing.

Respectfully submitted,

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