Support the Restore Anti-discrimination Protections for Dialysis Patients Act
Urgent Action Needed to Preserve Protections for Individuals with Kidney Failure

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In 1980, the Congress made a commitment to individuals living with kidney failure to protect their access to private insurance coverage. In the Medicare Secondary Payer Act (MSPA), Congress prohibited private group health plans from taking into account an individual's entitlement to Medicare because of End Stage Renal Disease (ESRD) and from differentiating in the benefits the plan provides for individuals with ESRD. Congress sought to prevent plans from discouraging patients with ESRD from maintaining their employer group coverage. In a June 2022 decision, the U.S. Supreme Court weakened the MSPA statutory provisions by modifying the statutory test for evaluating plan practices so as to create a loophole for private employer group health plans to evade these protections, placing both patients with ESRD and the Medicare Trust Fund at risk. The "Restore Protections for Dialysis Patients Act" closes this loophole and preserves the long standing protections that Congress intended ESRD patients to have.

MSPA Provisions Recognize the Vulnerability of Patients with ESRD

- More than 750,000 Americans have kidney failure or ESRD, which occurs when the kidneys can no longer filter waste and excess fluid from the blood. Patients with ESRD are among the most vulnerable and medically complex of all patients, and the disease disproportionately affects individuals from communities of color. Approximately 60,000 individuals whose kidney disease progresses to kidney failure decide to retain the health insurance coverage they had prior to developing kidney failure.

- Although a kidney transplant is ideal, several factors limit its availability. As a result, most patients with ESRD must receive multiple, weekly dialysis sessions to sustain their lives.

- Regardless of their age, patients with ESRD have the option to enroll in Medicare; however, they also have the right to elect private health plan coverage for 30 months. Many individuals with ESRD decide to maintain their private health plan because they do not want to disrupt their employer-provided coverage and their dependents may also be covered by the plan (unlike with Medicare). Under their private health plan, these individuals also may enjoy more robust coverage for benefits, such as dental care (which can play an important role in qualifying for a kidney transplant). Traditionally, retaining their private insurance often also results in lower out-of-pocket costs for them and their family members who also rely upon coverage under these plans.

- Congress expressly stated that individuals with kidney failure should have the right to decide what insurance coverage is best for them and also recognized that entitlement to Medicare regardless of age creates incentives for private employer group health plans to discourage these patients from maintaining private coverage. As a result, patients could be

led to believe they have no choice but to enroll in Medicare sooner than they otherwise would prefer.

- To prevent this coercion and protect the integrity of the Medicare Trust Fund, Congress passed into law the MSPA specifically applying its protections to patients with ESRD. When the first iteration failed to address the problem in its entirety, Congress subsequently adopted additional protections to ensure that private group health plans did not evade their responsibility to cover dialysis and other health care services for patients with ESRD. Under the current MSPA, Congress determined that individuals should be able to remain on their private plans for up to 30 months before moving to Medicare for their primary coverage, thereby limiting a health plan's obligation to these patients to 30 months.

Private Health Plans Have Begun Using the Loophole Created by Supreme Court Ruling, Making a Legislative Remedy Even More Imperative

- In its 2022 ruling, the U.S. Supreme Court decided that when a plan applied benefit limitations on outpatient dialysis services to all enrollees, it did not differentiate in the benefits it provides between individuals with and without ESRD. This reading ignored that nearly all patients needing dialysis have ESRD. By restricting outpatient dialysis treatments, the plan was effectively discriminating against individuals with ESRD in violation of the MSPA. Unfortunately and as the minority opinion highlighted, the Court chose not to apply the statutorily mandated three-part test that Congress established to evaluate group health plan practices.

- Upon the Supreme Court's decision, individuals with ESRD, their families, health care professionals, and disability advocates expressed concern that the decision would result in discriminatory behavior that would eliminate patient access to alternative private insurance coverage options. Unfortunately, these concerns became a reality as <u>private employer group health plans use this loophole to completely eliminate all in-network benefits for dialysis care.</u> One example of such practices is below.

    - Plan descriptions of the Court's decision mislead patients, indicating that patients' rights have not changed, when in reality many plans have used the decision to increase patients' cost-sharing obligations.

    - Some plans have excluded all kidney care health care professionals and dialysis providers from their networks, making all dialysis-related services, as well as some if not all kidney transplant services, out-of-network and subject to higher deductibles and co-insurance amounts.

    - Not only do these practices increase patient costs, but they also can disrupt patient-provider relationships and undermine providers' ability to coordinate care, which is important given the complexity of ESRD.

- These plans explicitly tell patients to enroll in Medicare to get protection from the higher cost-sharing the plan itself is imposing on them by offering no in-network dialysis coverage.

Congress Can Restore the Protections It Provided to Individuals with Kidney Failure by Passing the Restore Act

The "Restore Protections for Dialysis Patients Act" closes this loophole and preserves the long-standing protections that Congress intended ESRD patients to have. It does this by expressly designating the three-part test that the U.S. Supreme Court chose not to apply. It also emphasizes the original intent to prohibit both direct and indirect differentiation of benefits. Moreover, it reinstates the long-standing regulations CMS adopted to implement the MSPA as a beneficiary protection statute. It does not prohibit plans from creating legitimate, meaningful adequate provider networks.