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February 3, 2016

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joseph R. Pitts
Chairman
Health Subcommittee
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Upton and Pitts:

Thank you for your January 20th letter. I appreciate the opportunity to respond on behalf of myself, my fellow members of the Medicaid and CHIP Payment and Access Commission (MACPAC), and MACPAC's excellent staff.

As you note, MACPAC has a "unique statutory mission," one whose purpose is to provide "objective, thoughtful, and independent analysis" that will assist Congress in shaping the future of Medicaid, which plays an indispensable role in the U.S. health care system. Given the nation's high poverty rates and the extent to which Medicaid complements and supplements other sources of insurance with specialized coverage not available elsewhere, the program's importance has never been greater, nor has the need to develop approaches to coverage, payment, and financing that assure Medicaid's long-term stability.

I have been fortunate enough to be a Commissioner since MACPAC's establishment, and I consider myself especially privileged to now serve as its Chair. I recognize and deeply respect the Chair's special responsibilities. I know that I speak for my fellow Commissioners in recognizing the important role we play for Congress as set forth in statute, 42 U.S.C. § 1396.

In seeking an independent voice to weigh the evidence related to a complex program, Congress patterned MACPAC after the Medicare Payment Advisory Commission (MedPAC). The statute identifies MACPAC's general duties and



directs our specific areas of review. It also sets forth the requirements for the U.S. Government Accountability Office (GAO) to appoint Commissioners from diverse backgrounds including plans, providers of various types, beneficiaries, those with experience running Medicaid and CHIP at the state and federal level, and others expert in program and policy issues. The diversity of experience and expertise about Medicaid and CHIP that Commissioners bring to MACPAC means that Commissioners often have conflicting views, although not necessarily conflicts of interest, about problems and solutions. Furthermore, because the people selected by GAO are expected, as a matter of law, to bring enormous experience to their public service, many members come to the table with long track records of actions and published work that reflects their points of view.

As with MedPAC, pursuant to GAO requirements, all Commissioners currently are bound by extensive financial conflict of interest standards that require comprehensive disclosure of financial interest upon appointment and annually thereafter. All Commissioners provide whatever information GAO seeks, as part of the appointment process and on an ongoing basis. It is inevitable perhaps that, over the course of his or her term, a MACPAC Commissioner may undergo a change in professional affiliation or position. When such a transition has even potentially raised the possibility of an appearance of or actual conflict of interest, MACPAC's chair and executive director have always brought such changes to GAO's attention so that GAO may fulfill its obligations in assessing the potential for conflict of interest.

In addition, MACPAC has also endeavored to ensure that its processes are transparent. Our meetings are conducted in full public view, with time provided throughout each day for direct public input. Additionally, we encourage written comments from the public and post verbatim transcripts of each meeting on our website in order to further strengthen our public accountability. All votes are public votes, we deliberate in public, and evidence presented to Congress is first presented to the public.

We agree with you that MACPAC could take an additional step to strengthen our independence by adopting a policy requiring that Commissioners declare any actual or apparent conflict of interest (financial or otherwise) on any specific issue that is the focus of our research, deliberations, or votes. We will add a conflict of interest standard and procedure to our process to maximize transparency and will post this standard so that it is available to the public. This is a sensible and appropriate addition to the other steps we have taken to ensure that our work is, as you note, independent, objective, meaningful, and actionable.

You also note the importance of conflict of interest policies (financial and otherwise) where MACPAC staff are concerned. Because employees of MACPAC are considered employees of the U.S. Senate for the purposes of pay and benefits, they are subject to the STOCK Act (P.L. 112-105), meaning that senior staff members must file an extensive financial disclosure form with the Senate Ethics Committee within 30 days of employment, and each year thereafter. In addition, these staff members must promptly report any purchase, sale or exchange of any stock, bond, or securities if the transaction exceeds \$1,000. We have retained outside counsel to review these submissions and identify specific conflicts, allowing for appropriate recusals from Commission business.

Furthermore, our employee policies note the importance of MACPAC staff avoiding conflicts of interest, both real and apparent. Upon hire, all employees must complete a conflict of interest form to report any

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associations with outside organizations and activities. Any affiliations are reported annually. Our policies further note that staff may not be directly involved in partisan political activities or advocacy on behalf of political causes related to MACPAC business, in order to avoid the perception that they may be biased. In addition, MACPAC has developed strong policies to ensure fairness and objectivity in its processes for awarding research and other contracts. Commissioners are not involved in contract awards, and staff may not participate in decisions to award contracts if they have a financial stake in the outcome.

You also have raised the question of whether there should be Commissioner recusal in situations involving legal cases that focus on “federal health care programs” and that might pose the type of undue influence that necessitates a recusal, not simply transparency regarding past work and affiliations. The issue of recusal is one that can arise for any number of reasons and goes beyond a conflict of interest that, once declared, does not prevent service. There may come a time when a Commissioner may recuse himself or herself on a particular vote or recommendation, because he or she simply feels unable to be independent and impartial. Such a step would be in keeping with our institutional emphasis on independence.

I do not consider my involvement in an amicus brief (now filed with the court and a final document that cannot be altered) in *House v. Burwell* to be the type of activity that merits recusal, since it does not affect my ability to fairly and independently advise Congress on matters concerning Medicaid and CHIP. An important separation of powers case, *House v. Burwell* does not focus on Medicaid.

At the same time, I recognize the nature of your concern. My decision to join the amicus brief in this case predates my appointment as MACPAC Chair, and I did so because the issue is one of high importance to low-income children and families, the focus of my life’s work. It is customary for law professors to work on amicus briefs, just as it is customary for my colleagues, who are involved in activities such as health care, public administration, organizational leadership, advanced research; and other endeavors, to engage in other types of activities that are hallmarks of their chosen fields. I would note that, prior to agreeing to serve as Chair, and cognizant of the elevated significance of my role, I concluded that during my term as Chair, I would avoid future work on this particular case or cases that involve either Medicaid or CHIP.

I hope that these answers are complete. I would be happy to meet with you or your staff to discuss this matter further, and I am honored to serve as MACPAC’s Chair.

With regards,



Sara Rosenbaum, JD
Chair

Cc: Marsha Gold, ScD, Vice Chair
Anne L. Schwartz, PhD, Executive Director
MACPAC Commissioners

