

January 11, 2011

Dr. Donald M. Berwick  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
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Baltimore, MD 21244

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Re: *Medicare Program: Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2012 Proposed Rule (CMS-4144-P)*, Sections 422.2264 and 423.2264 on Translation Requirements for Marketing Materials

Dear Dr. Berwick:

The Asian & Pacific Islander American Health Forum (APIAHF) thanks the Centers for Medicare & Medicaid Services (CMS) for the opportunity to comment on the Medicare Program Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2012 Proposed Rule (Proposed Rule). These comments are limited to the proposed regulations addressing the threshold for translation requirements for marketing materials for Medicare Advantage plans (MA plans) and Medicare prescription drug plans (proposed Sections 422.2264 and 423.2264). While we applaud CMS for proposing guidance to ensure materials are translated for limited-English proficient (LEP) enrollees, we caution CMS against adopting the proposed 10 percent threshold for translations.

For almost 25 years, APIAHF has dedicated itself to improving the health and well-being of Asian American, Native Hawaiian, and Pacific Islander communities (AA and NHPI). Asian American and Pacific Islander communities are overwhelmingly immigrant; over 60 percent of Asian Americans and 30 percent of Pacific Islanders living in the U.S. are foreign-born, representing the full spectrum of immigration status categories. Asian Americans, Native Hawaiians and Pacific Islanders trace their heritage to more than 50 countries and speak more than 100 different languages. Data from the Census Bureau's American Community Survey reveal that more than 8 million people in the United States speak Asian and Pacific Island languages at home, and more than 4 million of them are considered "limited English proficient," meaning they speak English less than "very well" or not at all.<sup>1</sup>

Language barriers are widely known to reduce rates in enrollment and lower the quality and effectiveness of prevention, treatment and patient education programs. Poor communication between providers and patients can also lead to medical errors

<sup>1</sup> "Language Use in the United States: 2007," U.S. Census Bureau, American Community Survey Reports, April 2010. Available at <http://www.census.gov/prod/2010pubs/acs-12.pdf>.

<sup>2</sup> See The Joint Commission, "Hospitals, Language, and Culture: A Snapshot of the Nation," 2007. Available at [http://www.jointcommission.org/assets/1/6/hlc\\_paper.pdf](http://www.jointcommission.org/assets/1/6/hlc_paper.pdf). See also Mara Youdelman and Jan Perkins, National Health Law Program, "Providing Language Services in Small Health Care Provider Settings: Examples From the Field," April 2005. Available at [http://www.commonwealthfund.org/usr\\_doc/810\\_Youdelman\\_providing\\_language\\_services.pdf](http://www.commonwealthfund.org/usr_doc/810_Youdelman_providing_language_services.pdf).

<sup>3</sup> Asian Pacific American Legal Center and Asian & Pacific Islander American Health Forum, "California Speaks: Language Diversity and English Proficiency by Legislative District," available at <http://www.apiahf.org/index.php/component/content/article/332.html>.

that are dangerous to patients and cost the U.S. health care system more than \$69 billion every year. As such, many hospitals, health plans, and private physician offices have voluntarily adopted language access practices in an effort to increase patient safety and improve quality.<sup>2</sup>

The Proposed Rule sets a 10 percent threshold for translations by private Medicare Plans (Part C and D), requiring these plans to translate written materials only into languages spoken by 10 percent of the population in the plan's service area. Under this standard, most of the approximately 3 million LEP Medicare enrollees would not have written materials in their plans translated into their languages. In addition, the focus on percentage of the population does not take into account the disproportionate language assistance needs of a population. For example, California's federal district 9 (encompassing a portion of Alameda county) is 8 percent Chinese, however 51 percent are LEP.<sup>3</sup>

The 10 percent threshold shuts out most LEP beneficiaries from the right to receive documents that they can use and understand. The proposal is inconsistent with Title VI of the Civil Rights Act and out of step with other HHS regulations including HHS Title VI guidance, DOJ Title VI guidance and the Title VI guidance of other agencies. CMS should abandon the proposed threshold and adopt regulations that support the purpose of Title VI.

We urge CMS to substitute the proposed threshold with the following recommendation by the National Senior Citizens Law Center, the National Health Law Program and the Center for Medicare Advocacy:

Plans must provide translated marketing materials in any language that is spoken by more than **“5% of the population in a plan service, or 500 members if the plan, whichever is lower.”**

We appreciate the opportunity to comment on the Proposed Rule and welcome future opportunities to work together.

Respectfully,

Kathy Lim Ko  
President & CEO