American Kidney Fund Statement
Regarding Our Payment of Insurance Premium Assistance Grants to Patients

The American Kidney Fund (AKF) Health Insurance Premium Program (HIPP) helps thousands of U.S. dialysis patients afford their health coverage by paying premiums for Medicare Part B, Medigap, employer group health, COBRA, commercial, and exchange plans. The majority—nearly two-thirds—of our premium payment grants are for Medicare Part B and Medigap coverage.

A number of health insurance companies have imposed, or are in the process of imposing, new policies and practices that target low income enrollees with chronic, expensive-to-insure conditions like end-stage renal disease (ESRD). Specifically, AKF understands that many insurance companies have begun refusing premium assistance payments from charitable organizations like AKF—payments which are directed to assist low-income ESRD patients who could not otherwise afford the coverage of their choice. Such policies are inconsistent with existing regulatory guidance, detrimental to public health, unfair to patients, and unlawful.

We are committed to educating insurers, regulators, policymakers, and other stakeholders about AKF's mission and about the serious legal concerns raised by insurers' refusal to accept premium payments on behalf of people living with ESRD. The following outlines just some of AKF's concerns regarding these new practices. Also, in keeping with its mission, AKF is committed to facilitating premium assistance payments directly to its beneficiaries wherever necessary to ensure coverage for the low-income individuals and families who depend on AKF assistance, as outlined below.

Refusing Premium Assistance Payments from Charitable Organizations Unlawfully Discriminates on the Basis of Disability and is Otherwise Unlawful

Insurance companies' practice of refusing premium payments from people living with ESRD raises serious legal concerns under both state and federal law. At the federal level, the Affordable Care Act ("ACA") prohibits insurers that offer coverage in the individual or group markets from employing marketing practices or benefit designs that "will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage" or that otherwise discriminate based on an individual's "present or predicted disability" or other protected grounds.[1] Insurers offering plans through state or federal insurance exchanges are subject to even broader non-discrimination requirements.[2] Individuals applying for or receiving coverage from such insurers must not, "on the basis of race, color, national origin, sex, age, *or disability*, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination" in the "provision or administration of . . . health-related insurance coverage."[3]

An insurance company cannot use a purportedly neutral classification—such as the receipt of premium assistance from third-party charitable organizations—as a proxy to evade prohibitions on discrimination

[1] 45 C.F.R. § 147.104.
[2] *See* 42 U.S.C. § 18116(a); 45 C.F.R. § 92.101.
[3] *Id.* (emphasis added). Notably, the anti-discrimination provisions apply to "all operations" of insurers offering coverage through an exchange, and not just to an insurer's exchange line of business. *See* 45 C.F.R. § 92.4.

in insurance and "redline" expensive to cover ESRD patients.[4] It is significant in this context that ESRD is recognized as a disability under federal law[5] and therefore constitutes one of the protected grounds under the ACA nondiscrimination provision.[6] Given the demographics of HIPP recipients, the refusal by an insurer to accept premium assistance payments from HIPP may also have an illegal disparate impact with regard to race and national origin.[7]

The practice of refusing premium payments funded through charitable assistance also runs counter to longstanding guidance from the U.S. Department of Health and Human Services ("HHS"). The HHS Office of Inspector General (the "OIG") has expressly permitted AKF's payment of premiums for ESRD patients funded in part by contributions from dialysis company providers.[8] AKF has operated HIPP continuously since 1997 under the OIG's federally approved guidelines, which are designed to wall off contributing providers from AKF's grant-making operations. Subsequent OIG advisory opinions and CMS guidance have consistently approved charitable assistance programs like HIPP that are administered by *bona fide*, independent charities such as AKF.[9]

One particularly distressing development is certain insurers' false representations that an Interim Final Rule (IFR) promulgated by HHS on December 14, 2016 supports or requires insurers to refuse charitable third-party premium assistance. The IFR said no such thing. Rather, the IFR expressly stated that it "does not alter the legal obligations or requirements placed on issuers, including with respect to the guaranteed availability and renewability requirements of the Public Health Service Act and non-discrimination-related regulations issued pursuant to the Affordable Care Act."[10] Moreover, the IFR is of no effect. A federal court issued a nationwide injunction indefinitely prohibiting the IFR from going into effect as of January 25, 2017.[11]

At the state level, insurers' refusal of premium assistance implicates various non-discrimination and insurance consumer protection laws. It also potentially constitutes breaches of contract and/or violates common law duties of good faith and fair dealing.

AKF's Continued Commitment to Its Beneficiaries

Because AKF continues to believe that policies or practices that target low-income ESRD patients and bar them from obtaining the coverage of their choice are unlawful and contrary to public policy, and in keeping with AKF's mission to maintain access to coverage for low-income ESRD patients and their families, AKF will extend its practice of facilitating premium assistance grants directly to HIPP recipients wherever beneficiaries are in jeopardy of being turned away by their insurer. AKF either makes the grant check payable to the patient, or provides the patient with a pre-loaded general purpose debit card in the patient's name. To ensure timely delivery of these vitally needed grant funds, without risk of the grants being stolen from a home mailbox or otherwise lost, AKF mails the check or debit card to the patient in care of their dialysis clinic.

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[4] *Cf., e.g., McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir.1992).
[5] *Fiscus v. Wal-Mart Stores, Inc*., 385 F.3d 378, 382 (3d Cir. 2004).
[6] *See* 45 C.F.R. § 92.4.
[7] A *prima facie* case of disparate impact is established when a party can show that a facially neutral practice "operated more harshly on one group than another." *See Chance v. Rice Univ*., 989 F.2d 179, 180 (5th Cir. 1993).
[8] *See* Advisory Opinion No. 97-1, Office of Inspector General, Dep't of Health and Human Services.
[9] *See, e.g.*, Advisory Opinion No. 15-06; HHS, "Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces" (Feb. 7, 2014), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/third-party-payments-of-premiums-for-qualified-health-plans-in-the-marketplaces-2-7-14.pdf.
[10] Interim Final Rule with Comment Period, Medicare Program; Conditions for Coverage for End-Stage Renal Disease Facilities—Third-Party Payment, 81 Fed. Reg. 90,211 (Dec. 14, 2016).
[11] *Dialysis Patient Citizens v. Burwell*, No. 4:17-CV-16, 2017 WL 365271 (E.D. Tex. Jan. 25, 2017).