

In The Matter Of:
*NOI to Adopt Rule Changes to
Regulation 120-2-97 and 120-2-106*

*Proceedings
November 19, 2020*

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Min-U-Script® with Word Index

Page 1

1 BEFORE THE COMMISSIONER OF INSURANCE
2 STATE OF GEORGIA
3
4 IN THE MATTER OF:)
5 NOTICE OF INTENT TO ADOPT)
6 RULE CHANGES TO REGULATION)
7 120-2-97, PHARMACY BENEFITS)
8 MANAGERS REGULATION; and)
9 120-2-106, SURPRISE BILLING.)
10
11 Proceedings before COMMISSIONER JOHN
12 KING, before Kelly D'Amico, RPR, Certified
13 Court Reporter and Notary Public, at 2 Martin
14 Luther King Drive, West Tower, Ninth Floor
15 Training Room, Atlanta, Georgia, on the 19th
16 day of November, 2020, commencing at the hour
17 of 10:00 a.m.
18
19
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Page 2

1 INDEX TO EXHIBITS
2
3 Defendant's Description Marked/First
4 Exhibit Identified
5 D-1 120-2-106, Surprise Billing 6
6 D-2 120-2-97 Pharmacy Benefit 6
7 Managers Regulation
8 D-3 Marked-Up 120-2-97 Pharmacy 6
9 Benefit Managers Regulation
10 D-4 Publisher's Affidavit 6
11 D-5 E-mails Concerning Proposed New 6
12 Regulation on PBM and Surprise
13 Billing
14 D-6 Letters Concerning Surprise Billing 6
15 D-7 Letters Concerning PBM 6
16
17
18
19
20
21
22
23
24
25

Page 3

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Page 4

1 A P P E A R A N C E S
2
3 Also present:
4
5 Sarah Crittendon, OCI
6 Pennie Womack, OCI
7 Keith Shadix, State Fire Marshal's Office
8 W.T. Hickox, DOI Health & Safety Inspector
9 Amanda McGovern, Manufactured Housing
10 Ben Crawford, State Fire Marshal's Office
11 Victor Moldovan, PPPA
12 Dr. Brett Cannon, MAG and GCEP
13 Mark Middleton, PCMA
14 Jamila Pope, GHA
15 Ethan James, GHA
16 Greg Reysold, GPA
17 Bob Coleman, GPHA
18 Scott LoFranco, GDA
19 Jesse Weathington, GAHP
20 Rep. David Knight, General Assembly
21
22
23
24
25

Page 5

1 PROCEEDINGS
2 THE COMMISSIONER: Good morning. It is
3 10:00 o'clock. My name is John King. I'm Georgia's
4 Insurance and Safety Fire Commissioner, and we're here
5 today -- we're here today to discuss changes to the
6 Department's regulations.
7 This hearing is convened pursuant to
8 Notice and Intent to Adopt Rule Changes and Notice of
9 Hearing issued pursuant to the Georgia Administrative
10 Procedures Act and Title 33 of the Official Code of
11 Georgia Annotated, and in particular O.C.G.A. 33-2-9
12 which authorizes a commissioner to promulgate rules
13 and regulations that are reasonably necessary to
14 implement Title 33.
15 The rules and regulations of the
16 Department are proposed to be changed by amending
17 Regulation 120-2-97 entitled Pharmacy Benefits
18 Management Regulation promulgating Regulation
19 120-2-106 entitled Surprise Billing. And pursuant to
20 O.C.G.A. 50-13-4(e) a copy of the proposed regulations
21 was provided to Legislative Counsel for the Georgia
22 General Assembly.
23 Notice of this hearing was posted on the
24 Department's website and published in the Fulton
25 County Daily Report. The notice stated that

Page 7

1 clean copy of the proposed amendments to Regulation
2 120-2-97; Exhibit 3 is a marked copy of the proposed
3 amendments to Regulation 120-2-97; Exhibit 4 is an
4 affidavit of publication with a copy of Notice of
5 Rulemaking as published in the Daily Report; Exhibit 5
6 is a copy of communication from the Office of
7 Legislative Counsel; Exhibit 6 are the comments
8 received concerning the surprise billing rule; and
9 Exhibit 7 are the comments received concerning the PBM
10 rule.
11 May I approach?
12 MR. CONLEY: Yes.
13 THE COMMISSIONER: Are there any other
14 persons who would like to make oral comments? Please
15 make sure that you have signed in to the sign-in sheet
16 and state your name for the record.
17 Who do we have?
18 (Thereupon, an off-the-record discussion
19 was held.)
20 THE COMMISSIONER: Victor Moldovan?
21 MR. MOLDOVAN: Yes, sir.
22 THE COMMISSIONER: Sorry if I
23 mispronounced it.
24 MR. MOLDOVAN: Moldovan (pronunciation).
25 That's fine. No problem.

Page 6

1 interested persons could participate in the proposed
2 rulemaking by submitting written comments to this
3 office. Interested persons are also entitled to
4 participate in today's hearing in making oral
5 arguments. As stated in the notice, oral comments
6 should be limited to five minutes per person in order
7 to allow all interested persons an opportunity to be
8 heard. However, I may at my direction allow more time
9 for any given presentation. Interested persons who
10 would like to speak at this hearing need to sign the
11 sign-in sheet and indicate they would like to speak.
12 At this spot -- at this time the
13 Department has several exhibits to be entered into the
14 record and I'm going to ask a representative of the
15 Department to identify those exhibits.
16 Mike?
17 MR. DAWSON: Good morning, Commissioner
18 King. My name is Michael Dawson. I'm an attorney
19 with the Department of Insurance. There's seven
20 exhibits that the Department seeks to admit.
21 (Thereupon, marked for identification,
22 Department Exhibit Number D-1, D-2, D-3, D-4,
23 D-5, D-6 and D-7.)
24 MR. DAWSON: Exhibit 1 is a clean copy of
25 the proposed regulation, 120-2-106; Exhibit 2 is a

Page 8

1 THE COMMISSIONER: It's your handwriting.
2 It's not (overspeak) --
3 MR. MOLDOVAN: No problem. It's harder
4 than my name, right.
5 THE COMMISSIONER: Yes.
6 MR. MOLDOVAN: Thank you for this
7 opportunity to be here today and present some
8 comments. I submitted written comments to Mr. Conley.
9 I appreciate the opportunity to do that. I just want
10 to follow up on those. I'm counsel for the Private
11 Practice Physicians Association, which is basically
12 doctors who have current private practice across the
13 state of Georgia.
14 THE COURT REPORTER: I'm having trouble
15 hearing you.
16 MR. MOLDOVAN: Oh, I'm sorry.
17 THE COURT REPORTER: So go back to
18 "physicians" again.
19 MR. MOLDOVAN: I represent the --
20 THE COURT REPORTER: A little bit louder
21 just to start.
22 And this is for everyone: Make sure you
23 just project for me because you're at a side angle.
24 MR. MOLDOVAN: Okay. Private Practice
25 Physicians Association --

Page 9

1 THE COURT REPORTER: Thank you.
2 MR. MOLDOVAN: -- whose members -- the
3 members are private doctors in private practice in
4 Georgia.
5 We had submitted some written comments.
6 And during the course of the bill working its way
7 through the legislature, we had expressed concern back
8 then -- I think it was independent doctors back
9 then -- about the constitutionality of the statute.
10 We still have those concerns. We recognize that the
11 agency needs to implement the statute as it's written,
12 but I do want to point out that we continue to have
13 concerns about the state government dictating private
14 contracts in terms of how much private parties get
15 paid, how much private parties should pay and we --
16 and I pointed that out in our written comments, both
17 under the state and federal constitutions, and I just
18 want to again say that for the record.
19 In the course of actually looking at the
20 rules, our concern continues to be sort of a race to
21 the bottom a little bit in that once you start to have
22 the state set rates for private doctors in terms of
23 what they get paid, we are concerned that there will
24 be an opportunity, an invitation to the payers to
25 basically try to reduce the amount that those doctors

Page 11

1 And also a prohibition that there should
2 be no manipulation of the payment data to support a
3 lower payment rate. And the concern again is because
4 the information from the payer -- that the state is
5 going to rely on, even though I recognize the regs
6 talk about using independent vendors to help figure
7 that out, the information is coming from what the
8 payers pay and the concern being that there should be
9 some speed bumps or some sort of, you know, dates in
10 terms of the payer's ability to use that data to try
11 and reduce payments to our members, our doctors. So
12 those are the primary concerns.
13 And then finally I just want to point out
14 that the issue that is sort of -- again is sort of
15 going to be the big sort of -- you know, as we go
16 forward is what data does the state use to set these
17 contracted rates. And I recognize that under
18 Section .09 in the proposed rules the office has
19 suggested or is saying it's going to use an
20 independent vendor to basically make available the
21 data. We think that that should be pretty
22 transparent; whatever data is being used that it's
23 available on the website, that we have the opportunity
24 to come back to the agency and express our concerns
25 about that and have input on that. And so we

Page 10

1 get paid.
2 And, you know, an example, you know, not
3 that this will happen but it may, is a doctor may have
4 a higher contracted rate today and then the
5 opportunity would be potentially for a payer to say,
6 well, the median contracted rate which is under the
7 statute is lower, and find a way to basically push
8 that doctor out of network. And that has been a
9 primary concern of our members that that could happen,
10 and, again, whether it's intentional or whether it's
11 sort of a mission creep where over time there's an
12 opportunity to save money.
13 And the regulations and the statute give
14 the payers the opportunity to do that, so we had
15 suggested in our written submission a couple of
16 thoughts in terms of trying to make it a little bit
17 more vigorous and rigorous in terms of prohibiting
18 that or at least slowing that down. And I
19 specifically talk about in sections 106-.05 and
20 106-.06 that the regulations should include a specific
21 provision prohibiting the plans, the payers from
22 canceling or not renewing a network contract in order
23 to allow the plans to pay a lower amount. If that's
24 the reason they're doing it and there's evidence of
25 that, that should be prohibited.

Page 12

1 appreciate the opportunity to do that.
2 And again, thank you for your time. I
3 appreciate it.
4 MR. CONLEY: Thank you very much.
5 MR. MOLDOVAN: Thank you.
6 THE COMMISSIONER: Dr. Brett Cannon.
7 DR. CANNON: I'll project a little bit
8 here.
9 THE COMMISSIONER: How you doing, Doctor?
10 DR. CANNON: Good morning.
11 THE COMMISSIONER: Good morning.
12 DR. CANNON: Thank you again. I'm Brett
13 Cannon, here as a member of the Medical Association of
14 Georgia and also a member of the Georgia College of
15 Emergency Physicians.
16 I am someone who spent a lot of hours the
17 last number of years, as did many others, across the
18 street at the Capitol, on phone calls and meetings,
19 reading draft legislation. But most importantly, as a
20 physician who has practiced in Georgia for over 20
21 years and who has had the privilege to take care of
22 over 100,000 Georgia patients -- I suppose some were
23 passing through or visitors to our fine state -- but
24 regardless, I've had a chance to talk to a lot of
25 physicians. I know this is an important issue to

Page 13

1 them. Whether we call it surprise billing or surprise
2 insurance coverage, this has affected them.
3 And for years I've been able to say,
4 "Hey, a solution is coming," and it's kind of nice to
5 be able to say, "Hey, we've got it." So again, that's
6 kind of heartwarming.
7 I'd also like to point out the importance
8 of the legislation rests in part with protecting those
9 patients from those unanticipated out-of-network
10 costs, but an equally valuable aspect, at least from
11 emergency medicine, is maintaining access. And we've
12 spoken at length about how there's importance of fair
13 rates and reasonable contracting when it comes to
14 attracting physicians and providing care and not
15 putting additional cost on the hospitals, particularly
16 in rural parts of the state.
17 I'd like to thank Commissioner King as
18 well as Mr. Conley for all of your work as well as the
19 Department's on these rules. I know it takes a lot of
20 work and effort to kind of implement the legislation
21 once it crosses the street. So again, we do
22 appreciate your efforts.
23 MAG and GCEP have both submitted written
24 comments that I think fully contain our feedback about
25 the proposed rules, and I'd like to take just a few

Page 15

1 wouldn't be appropriate any more than it would be
2 appropriate for an insurer or insurer-controlled
3 company to provide that data solely. So we simply
4 call for a fair, transparent, verifiable and
5 independent database to be used.
6 We'd like to see the Prudent Layperson
7 standard included in the reference to a medical
8 necessity for any payment denials. The importance of
9 adhering to the PLP was recently recognized by the
10 11th Circuit. They reinstated the lawsuit by MAG and
11 GCEP on behalf of Georgia physicians against Anthem of
12 Georgia in regard to the retrospective denials of
13 emergency care in reversing the dismissal by the
14 District Court, recognizing the importance and the
15 mandate required by the Prudent Layperson standard.
16 We are also asking for additional clarity
17 on the arbitration process and would like to ensure
18 the transparency to reduce information asymmetry
19 between insurers and physicians as emphasized. That
20 imbalance will hamper efforts to close claims without
21 arbitration. And again, we'd like for things to go
22 smoothly, as easy for both sides as possible.
23 And then finally, we're asking for more
24 clarity around the parameters of cost estimate and
25 consent required when a patient chooses out-of-network

Page 14

1 minutes to highlight a couple of concerns that are of
2 particular importance.
3 Number 1, I'd first like to emphasize the
4 importance of removing the six-month limitation on the
5 previously-contracted rate. I think that's Item 13
6 under the definitions. I can't overemphasize enough
7 the importance of that specific previous rate
8 provision that came to getting the agreement on 888
9 passed. Finding a fair standard that both insurers
10 and physicians were able to come to previously in a
11 market transaction as a fallback when there's not a
12 contract was really key in moving them forward after
13 many years of efforts had failed to do so.
14 Limiting the lookback to six months would
15 encourage the exact behavior that the bill was
16 contemplating -- that language was designed to
17 prevent. It largely unhinges the bill from the
18 foundation of fairness and compromise that we
19 designed, and I believe there's been communication
20 from the legislature that that was -- that would be
21 contrary to the intent of the bill. So we feel very
22 strongly about that.
23 From the outset, again, it seemed like
24 there was not going to be funding for the APCD. I
25 have a database I'd be glad to provide, but that

Page 16

1 care. Importantly, maintaining patient choice was
2 contemplated in this bill and preservation of that
3 intent is very important.
4 MAG and GCEP certainly look forward to
5 working with the Department on the revisions and
6 implementation of the rules as well as developing the
7 arbitration process and selecting the vendor for the
8 database. We certainly appreciate your time this
9 morning.
10 THE COMMISSIONER: Thank you very much,
11 Doctor.
12 DR. CANNON: Thank you.
13 THE COMMISSIONER: Mark Middleton?
14 MR. MIDDLETON: Yes, sir, I'm here on
15 behalf of the pharmacy. Do you want to go ahead and
16 hear that or are you getting all of the (inaudible)
17 first?
18 THE COMMISSIONER: I guess we didn't --
19 (Thereupon, an off-the-record discussion
20 was held between Commissioner King and
21 Mr. Conley.)
22 THE COMMISSIONER: Okay. Let's hold off,
23 Mark, because I want to make sure that we keep our
24 comments in order --
25 MR. MIDDLETON: Yes, sir.

Page 17

1 THE COMMISSIONER: -- if you don't mind.
2 Anna Adams?
3 MS. ADAMS: Good morning. Thank you,
4 Commissioner, and thank you, everybody, for having
5 this today.
6 I am Anna Adams. I'm with the Georgia
7 Hospital Association. And on behalf of our 161 member
8 hospitals in the state of Georgia, I want to thank you
9 for the opportunity to speak today and thank the
10 bill's authors and everyone who worked so tirelessly
11 on this effort over the past eight years to get it
12 done.
13 I will just highlight a few points that
14 were in our comment letter that we submitted on
15 November the 12th. These are the points that I think
16 from the Association's standpoint are kind of a
17 priority for us.
18 First and foremost, this act is effective
19 January 1st, 2021. However, the arbitration
20 organization does not have to be selected until
21 July 1, 2021. So we think this effectively leaves
22 providers and facilities with no recourse in the event
23 that a provider feels they have not been paid
24 adequately. So we would respectfully request that the
25 enforcement of House Bill 888 and the proposed rule be

Page 19

1 we do have concerns that this could lead patients to
2 assign this rating to the facility and see it as kind
3 of a rating of quality as opposed to a rating of the
4 plans and it puts at a disadvantage the facilities
5 that don't offer those particular services like
6 specialty hospitals, hospitals that don't have an
7 emergency department. They would have a lower rating
8 in that instance. So we would ask that you stick just
9 to the room checkmarks and the red Xs as prescribed in
10 the legislation.
11 And that concludes my comments. Thank
12 you very much.
13 THE COMMISSIONER: Thank you very much.
14 MS. ADAMS: Thank you, sir.
15 (Thereupon, an off-the-record discussion
16 was held.)
17 THE COMMISSIONER: Pamela Pope (sic)?
18 MS. POPE: Good morning, Commissioner.
19 My name is Jamila Pope. I am --
20 THE COMMISSIONER: I am sorry. I
21 mispro- --
22 MS. POPE: Oh, that's okay.
23 THE COMMISSIONER: You have wonderful
24 handwriting. I just...
25 MS. POPE: It's okay.

Page 18

1 delayed in the interim until a resolution organization
2 is selected and operational.
3 The second point that I would like to
4 make today that is a priority is that House Bill 888
5 only regulates provider billing of nonemergency
6 medical services in situations where a surprise bill
7 may arise. Instances where a patient may unknowingly
8 receive nonemergency hospital services from an
9 out-of-network facility are fairly limited.
10 Section 120-2-106.6(5), we would ask that you remove
11 this section in its entirety to remain consistent with
12 House Bill 888 and legislative intent.
13 With regard to House Bill 789, the
14 Surprise Billing Transparency Act, the GHO recommends
15 health plans be required to list network participation
16 and qualified groups and not individual physicians.
17 As physicians are coming onto and off of their network
18 plans, these can sometimes take time and we don't want
19 to confuse patients into thinking an entire group is
20 out of network when one new physician could
21 potentially skew that rating.
22 And then finally, the references to zero
23 to four rating factor in Section 122-106-11 of the
24 proposed rule, we recommend that be deleted. That
25 particular reference was not a part of the statute and

Page 20

1 I am Jamila Pope of Children's Healthcare
2 of Atlanta, and we just want to agree with the
3 comments that the Georgia Hospital Association
4 offered, but just a couple of clarifying requests that
5 we would like to see.
6 With regards to the comparison of
7 specialties and subspecialties under the contracted
8 amount definition, we would like to make sure that
9 the -- that the Department of Insurance determine the
10 application of the same or similar specialty or
11 subspecialty, and we'd also like to see a reference
12 added that is based on the predominant age of the
13 patients served by the provider. So a peds-to-peds
14 comparison versus an adults-to-peds comparison.
15 One other issue that we would like to see
16 a little clarity around would be the provider -- the
17 obligation for the payer to tell the provider whether
18 they are in or out of network. There is -- as I
19 understand it, there would -- the provider would be
20 required to have someone constantly checking to see if
21 the disclosure that the payer is providing is actually
22 up to date and accurate which would be somewhat
23 burdensome on the provider to be checking that
24 constantly. So we would just like some clarity around
25 that.

Page 21

1 And if there are no questions, that ends
2 my comments.
3 THE COMMISSIONER: Thank you very much.
4 MS. POPE: Thank you.
5 THE COMMISSIONER: Ethan James?
6 MR. JAMES: No, sir, not testifying.
7 THE COMMISSIONER: Okay. Mark Middleton?
8 MR. MIDDLETON: Commissioner, thank you
9 for the opportunity to be here today. I'm here on
10 behalf of PCMA, which is the Pharmaceutical Care
11 Medical Association. We filed comments in regard to
12 20-2-97 (sic), the Pharmacy Benefits Management
13 Regulation.
14 Our comments basically fell in three
15 categories. I thought I would just take this five
16 minutes to kind of outline what those -- the
17 intentions of those comments were in regard to each
18 and appreciating this -- the Department's efforts and
19 your efforts since you've been in office to point
20 toward compliance for regulated industries.
21 And as you can imagine, this being a new
22 regulation, you know, one of the things that we
23 focused on was making sure that the rule stayed within
24 the scope of the statute and was reasonable as
25 required by Georgia law. So you'll see a number of

Page 23

1 otherwise.
2 Also under that kind of general category
3 of due process, the statute on 2-97 had referred
4 to a -- had provided for a statutory right for a
5 continuance on the initial filings next year. Again,
6 I think that contemplates that this is a newly
7 regulated situation, there's going to be some growing
8 pains and some -- and some -- some accommodation that
9 has to be made, and so we proposed that language that
10 would -- that would have included that language into
11 the rules so that both your staff and the parties
12 recognize they have that right to continue next year
13 when they do these initial filings. And that's, you
14 know, obviously within the context of the statute.
15 And then finally, you know, we added a
16 couple of instances where we requested and suggested
17 that the rules contain reference to ERISA, the Georgia
18 Open Records Act, et cetera. You know, there are
19 instances where the -- documents that are produced
20 requiring confidentiality would be subject to the
21 exceptions of the Open Records Act law. Obviously
22 there are -- would be a category of complaints, as
23 there always is in this space, that are covered by
24 ERISA or federal law rather than state law and so it
25 is our request that that be referenced.

Page 22

1 comments that point to that issue. For example -- and
2 I'm obviously not going to go through them all -- but
3 one highlight in our outline was there was -- you
4 know, in the statute there were some exclusions, the
5 state health plan and other plans. We -- you know, we
6 made some proposed revisions that would add that
7 language to the statute.
8 Secondly, you know, we wanted to make
9 sure that -- that the rules were very clear in terms
10 of what the obligations were for parties that have
11 been noticed or have complaints filed against them and
12 that there are also reasonable time periods in regard
13 to being responsive to those filings. And so you'll
14 see throughout the document where the rules have set
15 forth a five-business-day standard that we are
16 requesting that that be changed throughout the
17 document to 14 calendar days. That is, I think, more
18 consistent with some of the other deadlines that you
19 have elsewhere in the code and in the statute. And,
20 you know, given the potential voluminous filings that
21 are coming your way, which I'm sure you're all
22 thrilled about, you know, it gives the parties an
23 opportunity to get a more -- you know, a higher
24 quality response and to -- and to just limit some of
25 the back and forth that would inevitably go on

Page 24

1 And I recognize that some of the comments
2 we made are probably more procedural than substantive
3 and there's some discussion to be had around the more
4 substantive categories and we'd be happy to engage in
5 that. I appreciate the opportunity to be here today
6 and look forward to working with you towards the
7 completion of these rules.
8 THE COMMISSIONER: Thank you very much.
9 MR. MIDDLETON: Thank you, sir.
10 THE COMMISSIONER: Appreciate it.
11 Greg Reysold?
12 MR. REYSOLD: Yes, sir.
13 Mr. Commissioner, I very much appreciate
14 the opportunity to be here today. My name is Greg
15 Reysold. I represent the Georgia Pharmacy
16 Association, and we are here to speak in favor of the
17 regulations as promulgated. I think that our
18 membership was heartened to see the work that went
19 into this and I think we firmly believe that the
20 regulations and the rules track very closely with the
21 spirit of the law and that was encouraging to see.
22 You know, it's been a long time coming.
23 The last PBM regulation was promulgated I think
24 sometime in 2011, so it's been a long time and there's
25 been significant work done over the years on the part

Page 25

1 of the General Assembly. And this year was really, I
2 would say, a sweeping update to the Pharmacy Benefit
3 Managers code and it looked to do a couple of things:
4 It looked to strengthen patient protections, increase
5 transparency, and greatly expand your authority to
6 regulate pharmacy benefit managers. I think that's
7 what the law looked to do and I think that that's what
8 your regulations give life to.

9 PCMA, no surprise, everybody sit down for
10 this, this is going to shock people, we don't share
11 the view of PCMA on -- with regard to the public
12 comments. I would note certainly, I think, that, you
13 know, extending deadlines from 5 to 14 days and
14 acknowledging a couple of some of those other points,
15 I think there's certainly points in agreement there or
16 points that are reasonable.

17 What I'd like to really emphasize,
18 though, is I couldn't disagree more with PCMA's stated
19 position in writing regarding ERISA, and I'm going to
20 talk -- talk to you about that for just a few minutes.
21 And before I do that, I just want to say I hold Mark
22 Middleton in the highest regard. I -- my strong
23 suspicion here is, you know, he hadn't been working on
24 this for a real long time and that some of those
25 comments, you know, may even come from him.

Page 27

1 There were oral arguments in October. I
2 don't know what the decision will be, but obviously
3 that will shed a lot of light on the issue, but for
4 them to come into the General Assembly and decide not
5 to have an explicit ERISA carve-out and make a
6 representation that this is clear law and that there
7 should be notice of redemption when there's a pending
8 Supreme Court case that they are a party to I take
9 tremendous issue with.

10 I would also note and don't want to
11 overburden you, and we can submit some additional
12 comments, but PCMA requested an explicit carve-out
13 when they were sued in other states when there was an
14 explicit ERISA carve-out. One of the ways to
15 implicate ERISA and run afoul of ERISA is to reference
16 ERISA and carve ERISA out.

17 It gets a little bit circular, but it's a
18 Trojan horse. They're requesting language that they
19 were sued on in other states. And so that's sort of
20 addressing, I would say, the overall broad ERISA
21 issue.

22 Now I'd like to drill down into the
23 surcharge issue as well because they -- on top of
24 asking for it broader as a carve-out, they asked for a
25 specific ERISA carve-out on the PBM surcharge. And

Page 26

1 But I take tremendous issue, and I think
2 there's insidiousness in it, they in an overarching
3 request requested an ERISA carve-out for all of these
4 regulations. First of all, the General Assembly had
5 they wanted an ERISA carve-out, they would have put an
6 ERISA carve-out just like they did for the surprise
7 billing. They chose not to.

8 PCMA certainly tried to get that ERISA
9 carve-out into the General Assembly during the session
10 and it was rejected, but I think more important than
11 that, they sort of make this sweeping generalization,
12 hey, PBM regulations are preempted by federal law.
13 And they cite some case precedent and that's great,
14 but here's what they don't cite. There's a case
15 pending right now before the U.S. Supreme Court. It's
16 called PCMA v. Rutledge and it's looking at the very
17 issue of whether states can regulate PBMs in the ERISA
18 market.

19 PCMA's letter doesn't cite that. They
20 don't mention it. They don't reference it. They're a
21 party to the case before the U.S. Supreme Court. So
22 for them to make representation that PBM law is
23 somehow preempted and that it's settled law when the
24 U.S. Supreme Court granted cert because it's not
25 settled law...

Page 28

1 there's a Supreme Court case, and it's New York Blue
2 Cross Blue Shield versus Travelers, where the Supreme
3 Court held explicitly that surcharges aren't preempted
4 by ERISA, surcharges are good and they can be enforced
5 across markets.

6 So for PCMA to not reference that case,
7 they weren't a party to that case, maybe they don't
8 know about it, but I would be surprised. Because in
9 the Supreme Court oral arguments that case was
10 mentioned more than 50 times in oral arguments in
11 October, which PCMA was a part of, more than 50 times.
12 And their counsel, Lassman (phonetic), in that
13 particular case went out of his way to try to
14 distinguish surcharges from other PBM regulations.

15 So surcharges should be enforced across
16 the market. We're good with the Medicare carve-out.
17 I think the Medicare Act rightfully preempts that.

18 And so I leave you with this: A lot of
19 comments I think are esoteric. This is dense stuff,
20 and so I'd just like as we go through this process --
21 and we welcome the opportunity to work with your
22 office on this -- as we go through this process to
23 keep in mind what the purpose of the General Assembly
24 was here and that was to protect patients, as many
25 patients as possible, protect patients from steering,

1 protect parents from delayed care, from interrupted
2 care, protecting small businesses, and protecting
3 payers as well.
4 And the General Assembly overwhelmingly
5 moved forward with that almost unanimously under
6 tremendous pressure, but they didn't buckle to the
7 pressure. The Governor's office signed the law and he
8 didn't buckle to that pressure either. And so we
9 would just ask that you enforce these -- or pass
10 regulations as written or as close to as written in
11 terms of material elements and we would welcome
12 ongoing conversation.
13 I appreciate it very much.
14 THE COMMISSIONER: Thank you very much.
15 MR. REYSOLD: Thank you, Commissioner.
16 THE COMMISSIONER: Are there any other
17 persons that wish to make oral argument -- or oral
18 comments?
19 (No response.)
20 THE COMMISSIONER: Okay. If there are no
21 other persons wishing to speak today, then after
22 review of this proceeding, including all comments, I
23 will make a decision. At this time this hearing is
24 adjourned. Thank you.
25 (Proceedings concluded.)

C E R T I F I C A T E

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2
3 I hereby certify that the foregoing
4 transcript was reported, as stated in the
5 caption; that the witness was duly sworn; that
6 the colloquies, questions and answers were
7 reduced to typewriting under my direction; and
8 that the foregoing pages 1 through 29 represent
9 a true, correct, and complete record of the
10 evidence given.

11 The above certification is expressly
12 withdrawn and denied upon the disassembly or
13 photocopying of the foregoing transcript,
14 unless said disassembly or photocopying is done
15 under the auspices of D'Amico & Associates,
16 Inc. and the signature and original seal is
17 attached thereto.

18 This, the 3rd day of December, 2020.
19
20

21 

22 KELLY D'AMICO, RPR, CCR-B-1322
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	9:11;11:24	ASSOCIATES (2) 1:20;30:15	12:7;27:17	23:2,22
A	agree (1) 20:2	Association (7) 8:11,25;12:13;17:7; 20:3;21:11;24:16	Blue (2) 28:1,2	CCR-B-1322 (1) 30:
ability (1) 11:10	agreement (2) 14:8;25:15	Association's (1) 17:16	Bob (1) 4:	cert (1) 26:24
able (3) 13:3,5;14:10	ahead (1) 16:15	asymmetry (1) 15:18	both (5) 9:16;13:23;14:9; 15:22;23:11	certainly (5) 16:4,8;25:12,15; 26:8
above (1) 30:11	allow (3) 6:7,8;10:23	Atlanta (7) 1:14,23;3:,7,12,17; 20:2	bottom (1) 9:21	certification (1) 30:11
access (1) 13:11	almost (1) 29:5	attached (1) 30:17	Brett (3) 4:8;12:6,12	Certified (1) 1:11
accommodation (1) 23:8	always (1) 23:23	Attorney (3) 3:;,6:18	broad (1) 27:20	certify (1) 30:3
accurate (1) 20:22	Amanda (1) 4:	attracting (1) 13:14	broader (1) 27:24	cetera (1) 23:18
acknowledging (1) 25:14	amending (1) 5:16	auspices (1) 30:15	buckle (2) 29:6,8	chance (1) 12:24
across (4) 8:12;12:17;28:5,15	amendments (2) 7:1,3	authority (1) 25:5	bumps (1) 11:9	changed (2) 5:16;22:16
Act (6) 5:10;17:18;18:14; 23:18,21;28:17	amount (3) 9:25;10:23;20:8	authorizes (1) 5:12	burdensome (1) 20:23	CHANGES (3) 1:5;5:5,8
actually (2) 9:19;20:21	angle (1) 8:23	authors (1) 17:10	businesses (1) 29:2	checking (2) 20:20,23
Adams (4) 17:2,3,6;19:14	Anna (2) 17:2,6	available (2) 11:20,23	C	checkmarks (1) 19:9
add (1) 22:6	Annotated (1) 5:11	B	calendar (1) 22:17	Children's (1) 20:1
added (2) 20:12;23:15	Anthem (1) 15:11	back (5) 8:17;9:7,8;11:24; 22:25	call (2) 13:1;15:4	choice (1) 16:1
additional (3) 13:15;15:16;27:11	APCD (1) 14:24	based (1) 20:12	called (1) 26:16	chooses (1) 15:25
addressing (1) 27:20	application (1) 20:10	basically (5) 8:11;9:25;10:7; 11:20;21:14	calls (1) 12:18	chose (1) 26:7
adequately (1) 17:24	appreciate (9) 8:9;12:1,3;13:22; 16:8;24:5,10,13; 29:13	behavior (1) 14:15	came (1) 14:8	Circle (1) 1:22
adhering (1) 15:9	appreciating (1) 21:18	Benefit (4) 2:6,9;25:2,6	can (5) 18:18;21:21;26:17; 27:11;28:4	Circuit (1) 15:10
adjourned (1) 29:24	approach (1) 7:11	BENEFITS (3) 1:;5:17;21:12	canceling (1) 10:22	circular (1) 27:17
Administrative (1) 5:9	appropriate (2) 15:1,2	big (1) 11:15	Cannon (7) 4:8;12:6,7,10,12, 13;16:12	cite (3) 26:13,14,19
admit (1) 6:20	arbitration (4) 15:17,21;16:7; 17:19	bill (10) 9:6;14:15,17,21; 16:2;17:25;18:4,6,12, 13	Canon (7) 4:8;12:6,7,10,12, 13;16:12	claims (1) 15:20
ADOPT (2) 1:;5:8	argument (1) 29:17	bill's (1) 17:10	Capitol (1) 12:18	clarifying (1) 20:4
adults-to-peds (1) 20:14	arguments (4) 6:5;27:1;28:9,10	bit (5) 8:20;9:21;10:16;	caption (1) 30:5	clarity (4) 15:16,24;20:16,24
affected (1) 13:2	arise (1) 18:7	BILLING (10) 1:;2:5,13,14;5:19; 7:8;13:1;18:5,14;26:7	care (7) 12:21;13:14;15:13; 16:1;21:10;29:1,2	clean (2) 6:24;7:1
Affidavit (2) 2:10;7:4	around (4) 15:24;20:16,24; 24:3	benefit (4) 2:6,9;25:2,6	carve (1) 27:16	clear (2) 22:9;27:6
afoul (1) 27:15	aspect (1) 13:10	behavior (1) 14:15	carve-out (10) 26:3,5,6,9;27:5,12, 14,24,25;28:16	close (2) 15:20;29:10
again (12) 8:18;9:18;10:10; 11:3,14;12:2,12;13:5, 21;14:23;15:21;23:5	Assembly (8) 4:12;5:22;25:1; 26:4,9;27:4;28:23; 29:4	Ben (1) 4:7	case (9) 26:13,14,21;27:8; 28:1,6,7,9,13	closely (1) 24:20
against (2) 15:11;22:11	assign (1) 19:2	Ben (1) 4:7	categories (2) 21:15;24:4	Code (3) 5:10;22:19;25:3
age (1) 20:12		Ben (1) 4:7	category (2)	Coleman (1) 4:
agency (2)		Ben (1) 4:7		College (1) 12:14
		Ben (1) 4:7		colloquies (1)

30:6 coming (5) 11:7;13:4;18:17; 22:21;24:22 commencing (1) 1:15 comment (1) 17:14 comments (25) 6:2,5;7:7,9,14;8:8, 8:9;5,16;13:24;16:24; 19:11;20:3;21:2,11, 14,17;22:1;24:1; 25:12,25;27:12; 28:19;29:18,22 COMMISSIONER (43) 1:1,10;3:,,,,;5:2,4, 12:6;17;7:13,20,22; 8:1,5;12:6,9,11; 13:17;16:10,13,18,20, 22;17:1,4;19:13,17, 18,20,23;21:3,5,7,8; 24:8,10,13;29:14,15, 16,20 communication (2) 7:6;14:19 company (1) 15:3 comparison (3) 20:6,14,14 complaints (2) 22:11;23:22 complete (1) 30:9 completion (1) 24:7 compliance (1) 21:20 compromise (1) 14:18 concern (5) 9:7,20;10:9;11:3,8 concerned (1) 9:23 Concerning (5) 2:11,14,15;7:8,9 concerns (6) 9:10,13;11:12,24; 14:1;19:1 concluded (1) 29:25 concludes (1) 19:11 confidentiality (1) 23:20 confuse (1) 18:19 CONLEY (6) 3:9;7:12;8:8;12:4; 13:18;16:21 consent (1) 15:25 consistent (2)	18:11;22:18 constantly (2) 20:20,24 constitutionality (1) 9:9 constitutions (1) 9:17 contain (2) 13:24;23:17 contemplated (1) 16:2 contemplates (1) 23:6 contemplating (1) 14:16 context (1) 23:14 continuance (1) 23:5 continue (2) 9:12;23:12 continues (1) 9:20 contract (2) 10:22;14:12 contracted (4) 10:4,6;11:17;20:7 contracting (1) 13:13 contracts (1) 9:14 contrary (1) 14:21 convened (1) 5:7 conversation (1) 29:12 copy (6) 5:20;6:24;7:1,2,4,6 cost (2) 13:15;15:24 costs (1) 13:10 Counsel (5) 3:;5:21;7:7;8:10; 28:12 County (1) 5:25 couple (6) 10:15;14:1;20:4; 23:16;25:3,14 course (2) 9:6,19 Court (14) 1:12,21;8:14,17,20; 9:1;15:14;26:15,21, 24;27:8;28:1,3,9 coverage (1) 13:2 covered (1) 23:23 Crawford (1) 4:7	create (1) 10:11 Crittendon (1) 4: Cross (1) 28:2 crosses (1) 13:21 current (1) 8:12	18:1;29:1 deleted (1) 18:24 denials (2) 15:8,12 denied (1) 30:12 dense (1) 28:19 Department (10) 3:;5:16;6:13,15,19, 20,22;16:5;19:7;20:9 Department's (4) 5:6,24;13:19;21:18 Description (1) 2:3 designed (2) 14:16,19 determine (1) 20:9 developing (1) 16:6 dictating (1) 9:13 direction (2) 6:8;30:7 disadvantage (1) 19:4 disagree (1) 25:18 disassembly (2) 30:12,14 disclosure (1) 20:21 discuss (1) 5:5 discussion (4) 7:18;16:19;19:15; 24:3 dismissal (1) 15:13 distinguish (1) 28:14 District (1) 15:14 doctor (4) 10:3,8;12:9;16:11 doctors (6) 8:12;9:3,8,22,25; 11:11 document (2) 22:14,17 documents (1) 23:19 DOI (1) 4:6 done (3) 17:12;24:25;30:14 down (3) 10:18;25:9;27:22 Dr (6) 4:8;12:6,7,10,12; 16:12	draft (1) 12:19 drill (1) 27:22 Drive (5) 1:13;3:6,11,16,21 due (1) 23:3 duly (1) 30:5 during (2) 9:6;26:9
		D		E
		D-1 (2) 2:5;6:22 D-2 (2) 2:6;6:22 D-3 (2) 2:8;6:22 D-4 (2) 2:10;6:22 D-5 (2) 2:11;6:23 D-6 (2) 2:14;6:23 D-7 (2) 2:15;6:23 Daily (2) 5:25;7:5 D'Amico (4) 1:11,20;30:;15 data (6) 11:2,10,16,21,22; 15:3 database (3) 14:25;15:5;16:8 date (1) 20:22 dates (1) 11:9 David (1) 4:12 DAWSON (4) 3:19;6:17,18,24 day (2) 1:15;30:18 days (2) 22:17;25:13 deadlines (2) 22:18;25:13 December (1) 30:18 decide (1) 27:4 decision (2) 27:2;29:23 Defendant's (1) 2:3 definition (1) 20:8 definitions (1) 14:6 delayed (2)	easy (1) 15:22 effective (1) 17:18 effectively (1) 17:21 effort (2) 13:20;17:11 efforts (5) 13:22;14:13;15:20; 21:18,19 eight (1) 17:11 either (1) 29:8 elements (1) 29:11 elsewhere (1) 22:19 E-mails (1) 2:11 Emergency (4) 12:15;13:11;15:13; 19:7 emphasize (2) 14:3;25:17 emphasized (1) 15:19 encourage (1) 14:15 encouraging (1) 24:21 ends (1) 21:1 enforce (1) 29:9 enforced (2) 28:4,15 enforcement (1) 17:25 engage (1) 24:4 enough (1) 14:6 ensure (1) 15:17 entered (1) 6:13	

<p>entire (1) 18:19</p> <p>entirety (1) 18:11</p> <p>entitled (3) 5:17,19;6:3</p> <p>equally (1) 13:10</p> <p>ERISA (17) 23:17,24;25:19; 26:3,5,6,8,17;27:5,14, 15,15,16,16,20,25; 28:4</p> <p>esoteric (1) 28:19</p> <p>estimate (1) 15:24</p> <p>et (1) 23:18</p> <p>Ethan (2) 4:;21:5</p> <p>even (2) 11:5;25:25</p> <p>event (1) 17:22</p> <p>everybody (2) 17:4;25:9</p> <p>everyone (2) 8:22;17:10</p> <p>evidence (2) 10:24;30:10</p> <p>exact (1) 14:15</p> <p>example (2) 10:2;22:1</p> <p>exceptions (1) 23:21</p> <p>exclusions (1) 22:4</p> <p>Executive (1) 3:</p> <p>Exhibit (9) 2:;6:22,24,25;7:2,3, 5,7,9</p> <p>EXHIBITS (4) 2:1;6:13,15,20</p> <p>expand (1) 25:5</p> <p>explicit (3) 27:5,12,14</p> <p>explicitly (1) 28:3</p> <p>express (1) 11:24</p> <p>expressed (1) 9:7</p> <p>expressly (1) 30:11</p> <p>extending (1) 25:13</p>	<p>facilities (2) 17:22;19:4</p> <p>facility (2) 18:9;19:2</p> <p>factor (1) 18:23</p> <p>failed (1) 14:13</p> <p>fair (3) 13:12;14:9;15:4</p> <p>fairly (1) 18:9</p> <p>fairness (1) 14:18</p> <p>fallback (1) 14:11</p> <p>favor (1) 24:16</p> <p>federal (3) 9:17;23:24;26:12</p> <p>feedback (1) 13:24</p> <p>feel (1) 14:21</p> <p>feels (1) 17:23</p> <p>fell (1) 21:14</p> <p>few (3) 13:25;17:13;25:20</p> <p>figure (1) 11:6</p> <p>filed (2) 21:11;22:11</p> <p>filings (4) 22:13,20;23:5,13</p> <p>finally (4) 11:13;15:23;18:22; 23:15</p> <p>find (1) 10:7</p> <p>Finding (1) 14:9</p> <p>fine (2) 7:25;12:23</p> <p>Fire (8) 3:;5,10,15,20;4:;7; 5:4</p> <p>firmly (1) 24:19</p> <p>first (4) 14:3;16:17;17:18; 26:4</p> <p>five (2) 6:6;21:15</p> <p>five-business-day (1) 22:15</p> <p>Floor (1) 1:13</p> <p>focused (1) 21:23</p> <p>follow (1) 8:10</p>	<p>foregoing (3) 30:3,8,13</p> <p>foremost (1) 17:18</p> <p>forth (2) 22:15,25</p> <p>forward (5) 11:16;14:12;16:4; 24:6;29:5</p> <p>foundation (1) 14:18</p> <p>four (1) 18:23</p> <p>fully (1) 13:24</p> <p>Fulton (1) 5:24</p> <p>funding (1) 14:24</p>	<p>29:7</p> <p>GPA (1) 4:10</p> <p>GPHA (1) 4:</p> <p>granted (1) 26:24</p> <p>great (1) 26:13</p> <p>greatly (1) 25:5</p> <p>Greg (3) 4:10;24:11,14</p> <p>GREGG (1) 3:9</p> <p>group (1) 18:19</p> <p>groups (1) 18:16</p> <p>growing (1) 23:7</p> <p>guess (1) 16:18</p>	<p>4:6</p> <p>higher (2) 10:4;22:23</p> <p>highest (1) 25:22</p> <p>highlight (3) 14:1;17:13;22:3</p> <p>hold (2) 16:22;25:21</p> <p>horse (1) 27:18</p> <p>Hospital (3) 17:7;18:8;20:3</p> <p>hospitals (4) 13:15;17:8;19:6,6</p> <p>hour (1) 1:15</p> <p>hours (1) 12:16</p> <p>House (4) 17:25;18:4,12,13</p> <p>Housing (1) 4:</p>	
			G		
		<p>GAHP (1) 4:</p> <p>GCEP (4) 4:8;13:23;15:11; 16:4</p> <p>gconley@ocigagov (1) 3:</p> <p>GDA (1) 4:11</p> <p>General (9) 4:12;5:22;23:2; 25:1;26:4,9;27:4; 28:23;29:4</p> <p>generalization (1) 26:11</p> <p>GEORGIA (25) 1:2,14,23;3:;,7,12, 17;5:9,11,21;8:13; 9:4;12:14,14,20,22; 15:11,12;17:6,8;20:3; 21:25;23:17;24:15</p> <p>Georgia's (1) 5:3</p> <p>gets (1) 27:17</p> <p>GHA (2) 4:;9</p> <p>GHO (1) 18:14</p> <p>given (3) 6:9;22:20;30:10</p> <p>gives (1) 22:22</p> <p>glad (1) 14:25</p> <p>Good (8) 5:2;6:17;12:10,11; 17:3;19:18;28:4,16</p> <p>government (1) 9:13</p> <p>Governor's (1)</p>	H	I	
				<p>hamper (1) 15:20</p> <p>handwriting (2) 8:1;19:24</p> <p>happen (2) 10:3,9</p> <p>happy (1) 24:4</p> <p>harder (1) 8:3</p> <p>Health (3) 4:6;18:15;22:5</p> <p>Healthcare (1) 20:1</p> <p>hear (1) 16:16</p> <p>heard (1) 6:8</p> <p>hearing (7) 5:7,9,23;6:4,10; 8:15;29:23</p> <p>heartened (1) 24:18</p> <p>heartwarming (1) 13:6</p> <p>held (4) 7:19;16:20;19:16; 28:3</p> <p>help (1) 11:6</p> <p>hereby (1) 30:3</p> <p>here's (1) 26:14</p> <p>Hey (3) 13:4,5;26:12</p> <p>Hickox (1)</p>	<p>identification (1) 6:21</p> <p>Identified (1) 2:</p> <p>identify (1) 6:15</p> <p>imagine (1) 21:21</p> <p>imbalance (1) 15:20</p> <p>implement (3) 5:14;9:11;13:20</p> <p>implementation (1) 16:6</p> <p>implicate (1) 27:15</p> <p>importance (7) 13:7,12;14:2,4,7; 15:8,14</p> <p>important (3) 12:25;16:3;26:10</p> <p>importantly (2) 12:19;16:1</p> <p>inaudible (1) 16:16</p> <p>INC (2) 1:20;30:16</p> <p>include (1) 10:20</p> <p>included (2) 15:7;23:10</p> <p>including (1) 29:22</p> <p>increase (1) 25:4</p> <p>independent (4) 9:8;11:6,20;15:5</p>
F					

<p>INDEX (1) 2:1 indicate (1) 6:11 individual (1) 18:16 industries (1) 21:20 inevitably (1) 22:25 information (3) 11:4,7;15:18 initial (2) 23:5,13 input (1) 11:25 insidiousness (1) 26:2 Inspector (1) 4:6 instance (1) 19:8 Instances (3) 18:7;23:16,19 INSURANCE (11) 1:1;3:,5,10,15,20; 5:4;6:19;13:2;20:9 insurer (1) 15:2 insurer-controlled (1) 15:2 insurers (2) 14:9;15:19 INTENT (5) 1:5;8;14:21;16:3; 18:12 intentional (1) 10:10 intentions (1) 21:17 interested (4) 6:1,3,7,9 interim (1) 18:1 interrupted (1) 29:1 into (7) 6:13;18:19;23:10; 24:19;26:9;27:4,22 invitation (1) 9:24 issue (10) 11:14;12:25;20:15; 22:1;26:1,17;27:3,9, 21,23 issued (1) 5:9 Item (1) 14:5</p>	<p>4:;21:5,6 Jamila (3) 4:9;19:19;20:1 January (1) 17:19 Jesse (1) 4: jkimg@ocigagov (1) 3: JOHN (3) 1:10;3:4;5:3 Jr (4) 3:6,11,16,21 July (1) 17:21</p>	<p>legislation (4) 12:19;13:8,20; 19:10 Legislative (3) 5:21;7:7;18:12 legislature (2) 9:7;14:20 length (1) 13:12 letter (2) 17:14;26:19 Letters (2) 2:14,15 life (1) 25:8 light (1) 27:3 limit (1) 22:24 limitation (1) 14:4 limited (2) 6:6;18:9 Limiting (1) 14:14 list (1) 18:15 little (6) 8:20;9:21;10:16; 12:7;20:16;27:17 Lofranco (1) 4:11 long (3) 24:22,24;25:24 look (2) 16:4;24:6 lookback (1) 14:14 looked (3) 25:3,4,7 looking (2) 9:19;26:16 lot (5) 12:16,24;13:19; 27:3;28:18 louder (1) 8:20 lower (4) 10:7,23;11:3;19:7 Luther (5) 1:13;3:6,11,16,21</p>	<p>MANAGERS (5) 1:6;2:7,9;25:3,6 mandate (1) 15:15 manipulation (1) 11:2 Manufactured (1) 4: many (3) 12:17;14:13;28:24 Mark (5) 4:;16:13,23;21:7; 25:21 marked (2) 6:21;7:2 Marked/First (1) 2:3 Marked-Up (1) 2:8 market (3) 14:11;26:18;28:16 markets (1) 28:5 Marshal's (2) 4:,7 Martin (5) 1:12;3:6,11,16,21 material (1) 29:11 MATTER (1) 1: may (7) 6:8;7:11;10:3,3; 18:7,7;25:25 maybe (1) 28:7 McGovern (1) 4: mdawson@ocigagov (1) 3:22 median (1) 10:6 Medical (4) 12:13;15:7;18:6; 21:11 Medicare (2) 28:16,17 medicine (1) 13:11 meetings (1) 12:18 member (3) 12:13,14;17:7 members (4) 9:2,3;10:9;11:11 membership (1) 24:18 mention (1) 26:20 mentioned (1) 28:10 MICHAEL (2) 3:19;6:18</p>	<p>Middleton (8) 4:;16:13,14,25; 21:7,8;24:9;25:22 Mike (1) 6:16 mind (2) 17:1;28:23 minutes (4) 6:6;14:1;21:16; 25:20 mispro- (1) 19:21 mispronounced (1) 7:23 mission (1) 10:11 Moldovan (12) 4:;7:20,21,24,24; 8:3,6,16,19,24;9:2; 12:5 money (1) 10:12 months (1) 14:14 more (12) 6:8;10:17;15:1,23; 22:17,23;24:2,3; 25:18;26:10;28:10,11 morning (7) 5:2;6:17;12:10,11; 16:9;17:3;19:18 most (1) 12:19 moved (1) 29:5 moving (1) 14:12 much (11) 9:14,15;12:4;16:10; 19:12,13;21:3;24:8, 13;29:13,14</p>
<p>J</p> <p>James (3)</p>	<p>K</p> <p>keep (2) 16:23;28:23 Keith (1) 4: Kelly (2) 1:11;30: key (1) 14:12 kind (7) 13:4,6,20;17:16; 19:2;21:16;23:2 KING (11) 1:11,13;3:4,6,11,16, 21;5:3;6:18;13:17; 16:20 Knight (1) 4:12</p>	<p>light (1) 27:3 limit (1) 22:24 limitation (1) 14:4 limited (2) 6:6;18:9 Limiting (1) 14:14 list (1) 18:15 little (6) 8:20;9:21;10:16; 12:7;20:16;27:17 Lofranco (1) 4:11 long (3) 24:22,24;25:24 look (2) 16:4;24:6 lookback (1) 14:14 looked (3) 25:3,4,7 looking (2) 9:19;26:16 lot (5) 12:16,24;13:19; 27:3;28:18 louder (1) 8:20 lower (4) 10:7,23;11:3;19:7 Luther (5) 1:13;3:6,11,16,21</p>	<p>Marked/First (1) 2:3 Marked-Up (1) 2:8 market (3) 14:11;26:18;28:16 markets (1) 28:5 Marshal's (2) 4:,7 Martin (5) 1:12;3:6,11,16,21 material (1) 29:11 MATTER (1) 1: may (7) 6:8;7:11;10:3,3; 18:7,7;25:25 maybe (1) 28:7 McGovern (1) 4: mdawson@ocigagov (1) 3:22 median (1) 10:6 Medical (4) 12:13;15:7;18:6; 21:11 Medicare (2) 28:16,17 medicine (1) 13:11 meetings (1) 12:18 member (3) 12:13,14;17:7 members (4) 9:2,3;10:9;11:11 membership (1) 24:18 mention (1) 26:20 mentioned (1) 28:10 MICHAEL (2) 3:19;6:18</p>	<p>N</p>
<p>J</p>	<p>L</p> <p>language (5) 14:16;22:7;23:9,10; 27:18 largely (1) 14:17 Lassman (1) 28:12 last (2) 12:17;24:23 Law (14) 3:;21:25;23:21,24, 24;24:21;25:7;26:12, 22,23,25;27:6;29:7 lawsuit (1) 15:10 Layperson (2) 15:6,15 lead (1) 19:1 least (2) 10:18;13:10 leave (1) 28:18 leaves (1) 17:21</p>	<p>light (1) 27:3 limit (1) 22:24 limitation (1) 14:4 limited (2) 6:6;18:9 Limiting (1) 14:14 list (1) 18:15 little (6) 8:20;9:21;10:16; 12:7;20:16;27:17 Lofranco (1) 4:11 long (3) 24:22,24;25:24 look (2) 16:4;24:6 lookback (1) 14:14 looked (3) 25:3,4,7 looking (2) 9:19;26:16 lot (5) 12:16,24;13:19; 27:3;28:18 louder (1) 8:20 lower (4) 10:7,23;11:3;19:7 Luther (5) 1:13;3:6,11,16,21</p>	<p>Marked/First (1) 2:3 Marked-Up (1) 2:8 market (3) 14:11;26:18;28:16 markets (1) 28:5 Marshal's (2) 4:,7 Martin (5) 1:12;3:6,11,16,21 material (1) 29:11 MATTER (1) 1: may (7) 6:8;7:11;10:3,3; 18:7,7;25:25 maybe (1) 28:7 McGovern (1) 4: mdawson@ocigagov (1) 3:22 median (1) 10:6 Medical (4) 12:13;15:7;18:6; 21:11 Medicare (2) 28:16,17 medicine (1) 13:11 meetings (1) 12:18 member (3) 12:13,14;17:7 members (4) 9:2,3;10:9;11:11 membership (1) 24:18 mention (1) 26:20 mentioned (1) 28:10 MICHAEL (2) 3:19;6:18</p>	<p>name (6) 5:3;6:18;7:16;8:4; 19:19;24:14 necessary (1) 5:13 necessity (1) 15:8 need (1) 6:10 needs (1) 9:11 network (6) 10:8,22;18:15,17, 20;20:18 New (4) 2:11;18:20;21:21; 28:1 newly (1) 23:6</p>
<p>J</p>	<p>L</p>	<p>M</p> <p>MAG (4) 4:8;13:23;15:10; 16:4 maintaining (2) 13:11;16:1 making (2) 6:4;21:23 Management (2) 5:18;21:12</p>	<p>Marked/First (1) 2:3 Marked-Up (1) 2:8 market (3) 14:11;26:18;28:16 markets (1) 28:5 Marshal's (2) 4:,7 Martin (5) 1:12;3:6,11,16,21 material (1) 29:11 MATTER (1) 1: may (7) 6:8;7:11;10:3,3; 18:7,7;25:25 maybe (1) 28:7 McGovern (1) 4: mdawson@ocigagov (1) 3:22 median (1) 10:6 Medical (4) 12:13;15:7;18:6; 21:11 Medicare (2) 28:16,17 medicine (1) 13:11 meetings (1) 12:18 member (3) 12:13,14;17:7 members (4) 9:2,3;10:9;11:11 membership (1) 24:18 mention (1) 26:20 mentioned (1) 28:10 MICHAEL (2) 3:19;6:18</p>	<p>N</p>

<p>next (2) 23:5,12</p> <p>nice (1) 13:4</p> <p>Ninth (1) 1:13</p> <p>nonemergency (2) 18:5,8</p> <p>Notary (1) 1:12</p> <p>note (2) 25:12;27:10</p> <p>NOTICE (8) 1::5;8,8,23,25;6:5; 7:4;27:7</p> <p>noticed (1) 22:11</p> <p>November (2) 1:15;17:15</p> <p>Number (4) 6:22;12:17;14:3; 21:25</p>	<p>18:17</p> <p>Open (2) 23:18,21</p> <p>operational (1) 18:2</p> <p>opportunity (15) 6:7;8:7,9;9:24;10:5, 12,14;11:23;12:1; 17:9;21:9;22:23;24:5, 14;28:21</p> <p>opposed (1) 19:3</p> <p>oral (8) 6:4,5;7:14;27:1; 28:9,10;29:17,17</p> <p>order (3) 6:6;10:22;16:24</p> <p>organization (2) 17:20;18:1</p> <p>original (1) 30:16</p> <p>others (1) 12:17</p> <p>otherwise (1) 23:1</p> <p>out (10) 9:12,16;10:8;11:7, 13;13:7;18:20;20:18; 27:16;28:13</p> <p>outline (2) 21:16;22:3</p> <p>out-of-network (3) 13:9;15:25;18:9</p> <p>outset (1) 14:23</p> <p>over (5) 10:11;12:20,22; 17:11;24:25</p> <p>overall (1) 27:20</p> <p>overarching (1) 26:2</p> <p>overburden (1) 27:11</p> <p>overemphasize (1) 14:6</p> <p>overspeak (1) 8:2</p> <p>overwhelmingly (1) 29:4</p>	<p>parents (1) 29:1</p> <p>PARKER (1) 3:14</p> <p>part (4) 13:8;18:25;24:25; 28:11</p> <p>participate (2) 6:1,4</p> <p>participation (1) 18:15</p> <p>particular (5) 5:11;14:2;18:25; 19:5;28:13</p> <p>particularly (1) 13:15</p> <p>parties (5) 9:14,15;22:10,22; 23:11</p> <p>parts (1) 13:16</p> <p>party (3) 26:21;27:8;28:7</p> <p>pass (1) 29:9</p> <p>passed (1) 14:9</p> <p>passing (1) 12:23</p> <p>past (1) 17:11</p> <p>patient (4) 15:25;16:1;18:7; 25:4</p> <p>patients (8) 12:22;13:9;18:19; 19:1;20:13;28:24,25, 25</p> <p>pay (3) 9:15;10:23;11:8</p> <p>payer (4) 10:5;11:4;20:17,21</p> <p>payers (5) 9:24;10:14,21;11:8; 29:3</p> <p>payer's (1) 11:10</p> <p>payment (3) 11:2,3;15:8</p> <p>payments (1) 11:11</p> <p>PBM (8) 2:12,15;7:9;24:23; 26:12,22;27:25;28:14</p> <p>PBMs (1) 26:17</p> <p>PCMA (9) 4::21:10;25:9,11; 26:8,16;27:12;28:6, 11</p> <p>PCMA's (2) 25:18;26:19</p> <p>peds-to-peds (1)</p>	<p>20:13</p> <p>pending (2) 26:15;27:7</p> <p>Pennie (1) 4:5</p> <p>people (1) 25:10</p> <p>per (1) 6:6</p> <p>periods (1) 22:12</p> <p>person (1) 6:6</p> <p>persons (7) 6:1,3,7,9;7:14; 29:17,21</p> <p>Pharmaceutical (1) 21:10</p> <p>PHARMACY (9) 1::2:6,8;5:17; 16:15;21:12;24:15; 25:2,6</p> <p>phone (1) 12:18</p> <p>phonetic (1) 28:12</p> <p>photocopying (2) 30:13,14</p> <p>physician (2) 12:20;18:20</p> <p>Physicians (11) 8:11,18,25;12:15, 25;13:14;14:10; 15:11,19;18:16,17</p> <p>plan (1) 22:5</p> <p>plans (6) 10:21,23;18:15,18; 19:4;22:5</p> <p>Please (1) 7:14</p> <p>PLP (1) 15:9</p> <p>point (6) 9:12;11:13;13:7; 18:3;21:19;22:1</p> <p>pointed (1) 9:16</p> <p>points (5) 17:13,15;25:14,15, 16</p> <p>Pope (8) 4:9;19:17,18,19,22, 25;20:1;21:4</p> <p>position (1) 25:19</p> <p>possible (2) 15:22;28:25</p> <p>posted (1) 5:23</p> <p>potential (1) 22:20</p> <p>potentially (2)</p>	<p>10:5;18:21</p> <p>PPPA (1) 4:</p> <p>Practice (4) 8:11,12,24;9:3</p> <p>practiced (1) 12:20</p> <p>precedent (1) 26:13</p> <p>predominant (1) 20:12</p> <p>preempted (3) 26:12,23;28:3</p> <p>preempts (1) 28:17</p> <p>prescribed (1) 19:9</p> <p>present (2) 4:3;8:7</p> <p>presentation (1) 6:9</p> <p>preservation (1) 16:2</p> <p>pressure (3) 29:6,7,8</p> <p>pretty (1) 11:21</p> <p>prevent (1) 14:17</p> <p>previous (1) 14:7</p> <p>previously (1) 14:10</p> <p>previously-contracted (1) 14:5</p> <p>primary (2) 10:9;11:12</p> <p>priority (2) 17:17;18:4</p> <p>Private (9) 8:10,12,24;9:3,3,13, 14,15,22</p> <p>privilege (1) 12:21</p> <p>probably (1) 24:2</p> <p>problem (2) 7:25;8:3</p> <p>procedural (1) 24:2</p> <p>Procedures (1) 5:10</p> <p>proceeding (1) 29:22</p> <p>Proceedings (2) 1:10;29:25</p> <p>process (5) 15:17;16:7;23:3; 28:20,22</p> <p>produced (1) 23:19</p> <p>prohibited (1) 10:25</p>
O				
<p>obligation (1) 20:17</p> <p>obligations (1) 22:10</p> <p>obviously (4) 22:2;23:14,21;27:2</p> <p>OCGA (2) 5:11,20</p> <p>OCI (2) 4:,5</p> <p>o'clock (1) 5:3</p> <p>October (2) 27:1;28:11</p> <p>off (2) 16:22;18:17</p> <p>offer (1) 19:5</p> <p>offered (1) 20:4</p> <p>Office (12) 3:5,10,15,20;4:,7; 6:3;7:6;11:18;21:19; 28:22;29:7</p> <p>Official (1) 5:10</p> <p>off-the-record (3) 7:18;16:19;19:15</p> <p>once (2) 9:21;13:21</p> <p>one (5) 18:20;20:15;21:22; 22:3;27:14</p> <p>ongoing (1) 29:12</p> <p>only (1) 18:5</p> <p>onto (1)</p>	<p>outset (1) 14:23</p> <p>over (5) 10:11;12:20,22; 17:11;24:25</p> <p>overall (1) 27:20</p> <p>overarching (1) 26:2</p> <p>overburden (1) 27:11</p> <p>overemphasize (1) 14:6</p> <p>overspeak (1) 8:2</p> <p>overwhelmingly (1) 29:4</p>			
	P			
	<p>pages (1) 30:8</p> <p>paid (4) 9:15,23;10:1;17:23</p> <p>pains (1) 23:8</p> <p>Pamela (1) 19:17</p> <p>parameters (1) 15:24</p>	<p>PBM (8) 2:12,15;7:9;24:23; 26:12,22;27:25;28:14</p> <p>PBMs (1) 26:17</p> <p>PCMA (9) 4::21:10;25:9,11; 26:8,16;27:12;28:6, 11</p> <p>PCMA's (2) 25:18;26:19</p> <p>peds-to-peds (1)</p>		

<p>prohibiting (2) 10:17,21</p> <p>prohibition (1) 11:1</p> <p>project (2) 8:23;12:7</p> <p>promulgate (1) 5:12</p> <p>promulgated (2) 24:17,23</p> <p>promulgating (1) 5:18</p> <p>pronunciation (1) 7:24</p> <p>Proposed (13) 2:11;5:16,20;6:1, 25:7;1,2;11:18;13:25; 17:25;18:24;22:6; 23:9</p> <p>protect (3) 28:24,25;29:1</p> <p>protecting (3) 13:8;29:2,2</p> <p>protections (1) 25:4</p> <p>provide (2) 14:25;15:3</p> <p>provided (2) 5:21;23:4</p> <p>provider (7) 17:23;18:5;20:13, 16,17,19,23</p> <p>providers (1) 17:22</p> <p>providing (2) 13:14;20:21</p> <p>provision (2) 10:21;14:8</p> <p>Prudent (2) 15:6,15</p> <p>Public (2) 1:12;25:11</p> <p>publication (1) 7:4</p> <p>published (2) 5:24;7:5</p> <p>Publisher's (1) 2:10</p> <p>purpose (1) 28:23</p> <p>pursuant (3) 5:7,9,19</p> <p>push (1) 10:7</p> <p>put (1) 26:5</p> <p>puts (1) 19:4</p> <p>putting (1) 13:15</p>	<p>qualified (1) 18:16</p> <p>quality (2) 19:3;22:24</p>	<p>15:7;18:25;20:11; 23:17;26:20;27:15; 28:6</p> <p>referenced (1) 23:25</p> <p>references (1) 18:22</p> <p>referred (1) 23:3</p> <p>regard (7) 15:12;18:13;21:11, 17;22:12;25:11,22</p> <p>regarding (1) 25:19</p> <p>regardless (1) 12:24</p> <p>regards (1) 20:6</p> <p>regs (1) 11:5</p> <p>regulate (2) 25:6;26:17</p> <p>regulated (2) 21:20;23:7</p> <p>regulates (1) 18:5</p> <p>REGULATION (14) 1:5,6;2:7,9,12;5:17, 18,18;6:25;7:1,3; 21:13,22;24:23</p> <p>regulations (13) 5:6,13,15,20;10:13, 20;24:17,20;25:8; 26:4,12;28:14;29:10</p> <p>reinstated (1) 15:10</p> <p>rejected (1) 26:10</p> <p>rely (1) 11:5</p> <p>remain (1) 18:11</p> <p>remove (1) 18:10</p> <p>removing (1) 14:4</p> <p>renewing (1) 10:22</p> <p>Rep (1) 4:12</p> <p>Report (2) 5:25;7:5</p> <p>reported (1) 30:4</p> <p>Reporter (5) 1:12;8:14,17,20;9:1</p> <p>Reporters (1) 1:21</p> <p>represent (3) 8:19;24:15;30:8</p> <p>representation (2) 26:22;27:6</p> <p>representative (1)</p>	<p>6:14</p> <p>request (3) 17:24;23:25;26:3</p> <p>requested (3) 23:16;26:3;27:12</p> <p>requesting (2) 22:16;27:18</p> <p>requests (1) 20:4</p> <p>required (5) 15:15,25;18:15; 20:20;21:25</p> <p>requiring (1) 23:20</p> <p>resolution (1) 18:1</p> <p>respectfully (1) 17:24</p> <p>response (2) 22:24;29:19</p> <p>responsive (1) 22:13</p> <p>rests (1) 13:8</p> <p>retrospective (1) 15:12</p> <p>reversing (1) 15:13</p> <p>review (1) 29:22</p> <p>revisions (2) 16:5;22:6</p> <p>Reysold (5) 4:10;24:11,12,15; 29:15</p> <p>right (4) 8:4;23:4,12;26:15</p> <p>rightfully (1) 28:17</p> <p>rigorous (1) 10:17</p> <p>Room (2) 1:14;19:9</p> <p>RPR (2) 1:11;30:</p> <p>RULE (7) 1:5;5:8;7:8,10; 17:25;18:24;21:23</p> <p>rulemaking (2) 6:2;7:5</p> <p>rules (13) 5:12,15;9:20;11:18; 13:19,25;16:6;22:9, 14;23:11,17;24:7,20</p> <p>run (1) 27:15</p> <p>rural (1) 13:16</p> <p>Rutledge (1) 26:16</p>	<p>Safety (7) 3:,5,10,15,20;4:6; 5:4</p> <p>same (1) 20:10</p> <p>Sandy (1) 1:22</p> <p>Sarah (1) 4:</p> <p>save (1) 10:12</p> <p>saying (1) 11:19</p> <p>scope (1) 21:24</p> <p>Scott (1) 4:11</p> <p>seal (1) 30:16</p> <p>second (1) 18:3</p> <p>Secondly (1) 22:8</p> <p>Section (4) 11:18;18:10,11,23</p> <p>sections (1) 10:19</p> <p>seeks (1) 6:20</p> <p>seemed (1) 14:23</p> <p>selected (2) 17:20;18:2</p> <p>selecting (1) 16:7</p> <p>served (1) 20:13</p> <p>services (3) 18:6,8;19:5</p> <p>session (1) 26:9</p> <p>set (3) 9:22;11:16;22:14</p> <p>settled (2) 26:23,25</p> <p>seven (1) 6:19</p> <p>several (1) 6:13</p> <p>Shadix (1) 4:</p> <p>share (1) 25:10</p> <p>shed (1) 27:3</p> <p>sheet (2) 6:11;7:15</p> <p>Shield (1) 28:2</p> <p>shock (1) 25:10</p> <p>sic (2) 19:17;21:12</p>
<p>Q</p>	<p>R</p> <p>race (1) 9:20</p> <p>rate (5) 10:4,6;11:3;14:5,7</p> <p>rates (3) 9:22;11:17;13:13</p> <p>rather (1) 23:24</p> <p>rating (6) 18:21,23;19:2,3,3,7</p> <p>reading (1) 12:19</p> <p>real (1) 25:24</p> <p>really (3) 14:12;25:1,17</p> <p>reason (1) 10:24</p> <p>reasonable (4) 13:13;21:24;22:12; 25:16</p> <p>reasonably (1) 5:13</p> <p>receive (1) 18:8</p> <p>received (2) 7:8,9</p> <p>recently (1) 15:9</p> <p>recognize (5) 9:10;11:5,17;23:12; 24:1</p> <p>recognized (1) 15:9</p> <p>recognizing (1) 15:14</p> <p>recommend (1) 18:24</p> <p>recommends (1) 18:14</p> <p>record (4) 6:14;7:16;9:18; 30:9</p> <p>Records (2) 23:18,21</p> <p>recourse (1) 17:22</p> <p>red (1) 19:9</p> <p>redemption (1) 27:7</p> <p>reduce (3) 9:25;11:11;15:18</p> <p>reduced (1) 30:7</p> <p>reference (7)</p>	<p>S</p>		

side (1) 8:23	20:7	subject (1) 23:20	6:21;7:18;16:19; 19:15	10:16
sides (1) 15:22	specialty (2) 19:6;20:10	submission (1) 10:15	thinking (1) 18:19	Two (1) 3:16
sign (1) 6:10	specific (3) 10:20;14:7;27:25	submit (1) 27:11	though (2) 11:5;25:18	typewriting (1) 30:7
signature (1) 30:16	specifically (1) 10:19	submitted (4) 8:8;9:5;13:23; 17:14	thought (1) 21:15	U
signed (2) 7:15;29:7	speed (1) 11:9	submitting (1) 6:2	thoughts (1) 10:16	unanimously (1) 29:5
significant (1) 24:25	spent (1) 12:16	subsidiaries (1) 20:7	three (1) 21:14	unanticipated (1) 13:9
sign-in (2) 6:11;7:15	spirit (1) 24:21	subspecialty (1) 20:11	thrilled (1) 22:22	under (9) 9:17;10:6;11:17; 14:6;20:7;23:2;29:5; 30:7,15
similar (1) 20:10	spoken (1) 13:12	substantive (2) 24:2,4	throughout (2) 22:14,16	unhinges (1) 14:17
simply (1) 15:3	spot (1) 6:12	sued (2) 27:13,19	times (2) 28:10,11	unknowingly (1) 18:7
sit (1) 25:9	Springs (1) 1:22	suggested (3) 10:15;11:19;23:16	tirelessly (1) 17:10	unless (1) 30:14
situation (1) 23:7	staff (1) 23:11	Suite (4) 1:22;3:,,	Title (2) 5:10,14	up (2) 8:10;20:22
situations (1) 18:6	standard (4) 14:9;15:7,15;22:15	support (1) 11:2	today (11) 5:5,5;8:7;10:4;17:5, 9;18:4;21:9;24:5,14; 29:21	update (1) 25:2
six (1) 14:14	standpoint (1) 17:16	suppose (1) 12:22	today's (1) 6:4	upon (1) 30:12
six-month (1) 14:4	start (2) 8:21;9:21	Supreme (7) 26:15,21,24;27:8; 28:1,2,9	top (1) 27:23	use (3) 11:10,16,19
skew (1) 18:21	STATE (15) 1:2;4:,7;7:16;8:13; 9:13,17,22;11:4,16; 12:23;13:16;17:8; 22:5;23:24	surcharge (2) 27:23,25	toward (1) 21:20	used (2) 11:22;15:5
slowing (1) 10:18	stated (4) 5:25;6:5;25:18; 30:4	surcharges (4) 28:3,4,14,15	towards (1) 24:6	using (1) 11:6
small (1) 29:2	states (3) 26:17;27:13,19	sure (7) 7:15;8:22;16:23; 20:8;21:23;22:9,21	Tower (4) 1:13;3:,,	V
smoothly (1) 15:22	statute (11) 9:9,11;10:7,13; 18:25;21:24;22:4,7, 19;23:3,14	SURPRISE (12) 1:;2:5,12,14;5:19; 7:8;13:1,1;18:6,14; 25:9;26:6	track (1) 24:20	valuable (1) 13:10
solely (1) 15:3	statutory (1) 23:4	surprised (1) 28:8	Training (1) 1:14	vendor (2) 11:20;16:7
solution (1) 13:4	stayed (1) 21:23	suspicion (1) 25:23	transaction (1) 14:11	vendors (1) 11:6
somehow (1) 26:23	steering (1) 28:25	sweeping (2) 25:2;26:11	transcript (2) 30:4,13	verifiable (1) 15:4
someone (2) 12:16;20:20	STEPHEN (1) 3:14	sworn (1) 30:5	transparency (3) 15:18;18:14;25:5	versus (2) 20:14;28:2
sometime (1) 24:24	stick (1) 19:8	T	transparent (2) 11:22;15:4	Victor (2) 4:;7:20
sometimes (1) 18:18	still (1) 9:10	talk (5) 10:19;11:6;12:24; 25:20,20	Travelers (1) 28:2	Vide Conferencing (1) 1:21
somewhat (1) 20:22	street (2) 12:18;13:21	terms (7) 9:14,22;10:16,17; 11:10;22:9;29:11	tremendous (3) 26:1;27:9;29:6	view (1) 25:11
Sorry (3) 7:22;8:16;19:20	strengthen (1) 25:4	testifying (1) 21:6	tried (1) 26:8	vigorous (1) 10:17
sort (8) 9:20;10:11;11:9,14, 14,15;26:11;27:19	strong (1) 25:22	thereto (1) 30:17	Trojan (1) 27:18	visitors (1) 12:23
space (1) 23:23	strongly (1) 14:22	Thereupon (4)	trouble (1) 8:14	voluminous (1) 22:20
sparker@ocigagov (1) 3:	stuff (1) 28:19		true (1) 30:9	W
speak (5) 6:10,11;17:9;24:16; 29:21			try (3) 9:25;11:10;28:13	way (4)
specialties (1)			trying (1)	

9:6;10:7;22:21; 28:13 ways (1) 27:14 Weathington (1) 4: website (2) 5:24;11:23 welcome (2) 28:21;29:11 weren't (1) 28:7 West (4) 1:13;3:,, whose (1) 9:2 wish (1) 29:17 wishing (1) 29:21 withdrawn (1) 30:12 within (2) 21:23;23:14 without (1) 15:20 witness (1) 30:5 Womack (1) 4:5 wonderful (1) 19:23 work (5) 13:18,20;24:18,25; 28:21 worked (1) 17:10 working (4) 9:6;16:5;24:6; 25:23 writing (1) 25:19 written (9) 6:2;8:8;9:5,11,16; 10:15;13:23;29:10,10 WT (1) 4:6 wwwDamicoAssociatescom (1) 1:25	28:1 Z zero (1) 18:22 0 09 (1) 11:18 1 1 (4) 6:24;14:3;17:21; 30:8 10:00 (2) 1:16;5:3 100,000 (1) 12:22 106-05 (1) 10:19 106-06 (1) 10:20 11th (1) 15:10 120-2-106 (4) 1::2:5;5:19;6:25 120-2-106.65 (1) 18:10 120-2-97 (6) 1::2:6,8;5:17;7:2,3 122-106-11 (1) 18:23 12th (1) 17:15 13 (1) 14:5 14 (2) 22:17;25:13 140 (1) 1:22 161 (1) 17:7 19th (1) 1:14 1st (1) 17:19	21:12 29 (1) 30:8 2-97 (1) 23:3 3 3 (1) 7:2 30328 (1) 1:23 30334 (4) 3:,7,12,17 33 (2) 5:10,14 33-2-9 (1) 5:11 3rd (1) 30:18 4 4 (1) 7:3 5 5 (2) 7:5;25:13 50 (2) 28:10,11 50-13-4e (1) 5:20 5855 (1) 1:22 6 6 (8) 2:5,6,8,10,11,14,15; 7:7 645-6111 (1) 1:24 7 7 (1) 7:9 704 (2) 3:, 720 (1) 3: 770 (1) 1:24 789 (1) 18:13 8 888 (4) 14:8;17:25;18:4,12		
X	2			
Xs (1) 19:9	2 (5) 1:12;3:6,11,21;6:25 20 (1) 12:20 2011 (1) 24:24 2020 (2) 1:15;30:18 2021 (2) 17:19,21 20-2-97 (1)			
Y				
year (3) 23:5,12;25:1 years (6) 12:17,21;13:3; 14:13;17:11;24:25 York (1)				