

HEALTH REFORM IMPACT

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HHS Proposes Review of Health Insurance Rate Increases

February 16, 2011

In response to the recent Health Reform Legislation¹, the Department of Health and Human Services (“HHS”) has issued proposed regulations (the “Proposed Regulations”) relating to the disclosure and review of unreasonable premium increases by health insurers. While stopping short of giving federal regulators the power to block increases, the Proposed Regulations would establish a rate review program to ensure that all rate increases that meet or exceed an established threshold are reviewed either by a state insurance regulatory agency or HHS to determine whether the rate increases are “unreasonable.” While this would mark the first federal scrutiny of insurance premium rate increases, the Proposed Regulations are not, as a practical matter, expected to present a material impediment to proposed rate increases on health insurance policies issued in Tennessee.

Overview of Rate Review Program

Under the Proposed Regulations², a rate increase of 10 percent or more would be considered “subject to review.” For future calendar years, HHS would offer to establish state-specific thresholds that take into consideration rates, underlying costs and healthcare trends that vary from state to state. The review process would then determine if the increase is, in fact, unreasonable. If determined to be “unreasonable” upon review, health insurers would be required to submit a justification for an “unreasonable” premium increase prior to the implementation of the increase.

Exemptions

Health insurance plans that enjoy “grandfathered” status under the health reform law are exempt from the Proposed Regulations. Also exempt are rates in the large group market (*i.e.*, large employers) and rate increases for “excepted benefits” such as dental and vision, and health insurance plans.

¹ References to “Health Reform Legislation” or “Health Reform” mean The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010.

² The Regulations implement section 2794 of the Public Health Service Act, entitled “Ensuring That Consumers Get Value For Their Dollars.” Public comments on the Regulations are due by February 22, 2011.

Details of the Proposed Regulations

The Proposed Regulations provide that HHS would adopt a state's determination of whether a rate increase is unreasonable if the state has an "effective" rate review program for rates filed in a particular market. Specifically, HHS would consider four main factors in evaluating whether a state has an effective rate review program as follows:

- Whether the state receives from health insurance issuers data and documentation sufficient to determine whether a rate increase is unreasonable;
- Whether the state effectively reviews the data and documentation submitted by health insurance issuers in support of a rate increase;
- Whether the state review examines the reasonableness of the assumptions used by the issuer in developing its rate proposal and the historic data underlying those assumptions; and
- Whether the state applies a standard set forth in statute or regulation when making the determination of whether a rate increase is unreasonable.

As noted by HHS, 43 of 50 states currently have a rate review process in either the individual or small group markets, or both. Accordingly, federal intervention may only be necessary in a handful of states. In those states where the review process is either absent or deemed ineffective, HHS would conduct a review of the proposed rate increases to determine whether they are unreasonable.

Where HHS conducts rate reviews, the standard for unreasonable would be whether the rate increase is "excessive," "unjustified," or "unfairly discriminatory." If HHS determines that a rate increase is unreasonable, HHS would provide its final determination to the health insurer.

Required Justifications for Insurers

In addition to the statutory requirement that a "justification" be filed before a rate determined to be "unreasonable" may be implemented, the Proposed Regulations provide that for rate increases "subject to review" a preliminary justification would have to be submitted to the applicable state and to HHS. The preliminary justification would be divided into three parts, of which the first two parts are intended to provide consumers with a description of the rate increase and the factors contributing to the increase, including both a descriptive and a quantitative analysis.

Health insurers would be required to complete parts one and two of the preliminary justification regardless of whether a state or HHS is the entity reviewing the rate increase. However, when HHS is reviewing a rate increase, the health insurer must submit the additional information required in part three of the preliminary justification to allow HHS to conduct a comprehensive actuarial review. Under the Proposed Regulations, parts one and two of the preliminary justification would be promptly posted on the HHS Web site. The information submitted in part three of the preliminary justification would be posted on the HHS Web site following HHS's determination as to the information's confidentiality.

Upon HHS's determination that a rate increase is unreasonable, if a health insurer chooses not to implement the increase or to implement a lower increase that is not "subject to review," the insurer would be required to provide a final notification of its decision to HHS. But, if the health insurer

implements an unreasonable rate increase, it would have to provide to HHS a final justification in response to HHS's determination of unreasonableness. HHS would post its final determination and the health insurer's final notification or final justification on its Web site. In addition, if the health insurer chooses to implement an unreasonable rate increase, it would be required to post its preliminary and final justifications and HHS's final determination on its own Web site. For consumers, the Proposed Regulations would make it easier to determine why a rate has been increased, as well as to allow consumers to potentially switch to a plan with lower rate increases.

Impact in Tennessee

Tennessee is one of the 43 states identified by HHS that already has in place a statutory requirement that proposed increases in health insurance premiums must be found reasonable by the Commissioner of Commerce and Insurance; specifically, the Commissioner must find policy benefits to be reasonable in relation to the premium charged by the carrier.³ Staff at the Department of Commerce and Insurance has confirmed that should the Proposed Regulations become final as proposed, there will be no HHS involvement in the Department's standard review of rate increases filed for use in Tennessee⁴. However, multi-state health insurers are advised to check with the various insurance departments in states where licensed to confirm whether each state has a rate review process identified by HHS as effective.

If you have questions regarding the information in this alert, please contact any of the attorneys in our Insurance and Managed Care Practice Group listed below.

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³ Tennessee Code Annotated § 56-26-102(a).

⁴ The Department is currently considering a legislative amendment that would strengthen and clarify Tennessee's rate review statute to ensure it fully conforms with the policy intent of the Proposed Regulations and federal Health Reform.