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HEALTH LAW ALERT
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Proposed Rule Would Require Review of "Unreasonable" Rate Increases

States, HHS to Scrutinize Increases of at Least 10%, Publish Data and Findings

Large Group Market Not Affected

The Department of Health and Human Services' Office of Consumer Information and Insurance Oversight ("OCIIO") today formally published a proposed rule that would subject rate increases of 10% or more in the small group and individual markets to Federal or State scrutiny. Although the proposed rule would not confer authority on either State or Federal agencies to deny, postpone, or otherwise affect the rate increase, OCIIO would publish on its website data about the increase as well as regulatory findings concerning the reasonableness of the rate increase. Moreover, if the agency reviewing the increase determines an insurer's rate increase is "unreasonable," the insurer would be required to either withdraw the rate increase or "prominently post on its [own] website" data about the rate increase, the regulatory agency's determination that the rate increase is "unreasonable," and the insurer's response to the agency's determination.

A State Insurance Commissioner (or equivalent State authority) would review rate increases in the individual and small group markets, provided that the State has an "effective rate review program" (see box, next page) with respect to the applicable market. OCIIO would conduct the review for other rate increases. OCIIO "expects that a significant majority of States would currently meet the standards for having an effective review process in one or both of the individual or small group markets." The proposed rule would not apply to the large group market or to "excepted benefits," such as stand-alone dental and vision policies.

OCIIO emphasizes that the proposed rule "would not prevent any health insurance issuer from implementing a rate increase permitted by State law . . . or result in any delay in an issuer's ability to implement a proposed rate increase." Rather, the goal of the proposed rule (and the goal of Congress in including the underlying provision in the Affordable Care Act) is to make the "rate review process be transparent." Indeed, most of the information insurers submit concerning a rate increase would be posted on the OCIIO website, including data and assumptions used to justify the rate increase.

The proposed rule would affect rate increases beginning on July 1, 2011 and is published at 75 *Federal Register* 81003 (Dec. 23, 2010). Comments on the proposal are due by February 22, 2011.

Rate Increases Subject to Review

OCIIO's review of national trends led the agency to conclude that 10% health insurance rate increases are higher than "major indices" of medical inflation, such as the medical component of the Consumer Price Index (which has ranged recently from 3.7% to 4.4%). Accordingly, the 10% figure provides an appropriate threshold for subjecting rate increases to review. OCIIO acknowledges that no simple threshold—such as 10%—can be used to determine that a rate increase is "unreasonable." Indeed, OCIIO recognizes that rate increases of more than 10% may be reasonable and rate increases of less than 10% may be unreasonable. But, the 10% threshold "balances the regulatory burdens that would be imposed on both the agency and the industry if every rate increase, no matter how small, were to be reviewed for unreasonableness against the potential harm to consumers should a small, but unreasonable, increase not be reviewed."

Beginning with rate increases in calendar year 2012, OCIIO would replace the 10% threshold with State-specific thresholds for rate increases that would be subject to review. The State-specific thresholds would reflect local variations in health care trends from State to State. OCIIO would publish the State-specific thresholds in the Federal Register by the September 15 before the calendar year in which the threshold would apply.

To recognize "the primary role States have in reviewing rates today," the proposed rule would use State-law definitions of "small group" and "individual" markets for reviewing rate increases. In States that do not have such definitions, the proposed rule would default to the definition of those terms in the Public Health Service Act, though the "small group" market would include employers of not more than 50 employees (rather than the default standard adopted in the Affordable Care Act of 100 employees).

State's Effective Rate Review Program

Under the proposed rule, a State has an effective rate review program for the individual or small group market if, with respect to rate increases in that market:

- The State collects data and documentation from an insurer sufficient to determine whether a rate increase is unreasonable;
- The State effectively reviews the data and documentation;
- The State examines the reasonableness of the insurer's assumptions used in developing the rate increase proposal and the historic data underlying those assumptions; and
- The State applies a standard established by statute or regulation in determining whether a rate increase is unreasonable.

Unreasonable Rate Increases

In a State with an "effective rate review program" for either the small group or individual market (see box on right), OCIIO would defer to the State's definition of an "unreasonable" rate increase and to the State's determination of whether a rate increase qualifies as being "unreasonable." Thus, for example, many States would deem a rate increase to be "unreasonable" if the increase met the State's statutory standard of being "excessive, inadequate, or unfairly discriminatory."

For markets in which a State does not have an effective rate review program, the proposed rule establishes a three-part definition of an "unreasonable" rate increase to apply to proposed increases. Under this Federal standard, a rate increase is "unreasonable" if the rate increase is:

1. **Excessive**. The proposed rate increase is excessive if (a) the rate increase results in a projected medical loss ratio below the Federal standard (80% in the small group and individual markets); (b) one or more of the assumptions on which the rate increase is based is not supported by substantial evidence; or (c) the choice of assumptions (or combination of assumptions) is unreasonable.

2. **Unjustified**. The rate increase is unjustified if the insurer provides incomplete or inadequate data to justify the increase or the insurer otherwise fails to provide a basis for determining the reasonableness of the rate increase.

3. **Unfairly Discriminatory**. The rate increase is unfairly discriminatory if it results in premium differences between insured persons in similar risk categories that do not reasonably correspond to differences in expected costs or that are not permissible under applicable State law.

Comprehensive Actuarial Review

Whether a rate increase is to be reviewed by a State with an effective rate review program or by OCIIO, the proposed rule would require an insurer to submit to OCIIO a "preliminary justification" of the rate increase. The preliminary justification would contain a "thorough description of the rate increase, including both a narrative description and a quantitative analysis." OCIIO would "promptly make available to the public on its website" all information submitted about the rate increase.

When OCIIO is reviewing the increase, the insurer would also be required to submit documentation necessary to justify the increase. The specific data OCIIO would require is based on the "actuarial memorandum guidelines" in a National Association of Insurance Commissioners (NAIC) model regulation. OCIIO would post all of this additional documentation on its website, unless (a) the insurer designated the information as being confidential and (b) OCIIO determined the information qualified as being confidential under Department of Health and Human Services Freedom of Information Act regulations.

A State agency (in a State with an effective rate review program) or OCIIO, as applicable, would then conduct a "comprehensive actuarial review" of the rate increase to determine whether the rate increase was "unreasonable." OCIIO would permit the State to conduct the actuarial review process under State law and would adopt the State's determination of the reasonableness (or unreasonableness) of a rate increase, provided that the State furnished to OCIIO the State's final determination of whether a rate increase is unreasonable within five business days of making the determination.

OCIIO would publish on the OCIIO website its own or the State's (as applicable) "final determination" of whether the rate increase is reasonable and notify the insurer of the determination. Although the insurer could elect to implement an "unreasonable" rate increase (assuming it was permitted to do so by State law), the insurer would be required to furnish OCIIO a "final justification" of the rate increase. This final justification would be posted on the OCIIO website and the insurer would be required to "[p]rominently post on its website" all of the information OCIIO publishes about the rate increase, including OCIIO's (or the State's) finding that the rate increase was unreasonable and the insurer's final justification. The insurer would be required to keep the information on its website for at least three years. The insurer could avoid prominently publishing information about the "unreasonable" rate increase on its own website only by abandoning the rate increase.

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