

HEALTH LAW ALERT

May 22, 2011

HHS Publishes Final Rule on “Unreasonable” Rate Increases Rule Affects Rate Increases Beginning September 1, 2011

The Department of Health and Human Services’ Center for Consumer Information and Insurance Oversight (“CCIIO”) today formally published its final “Rate Increase Disclosure and Review” rule (the “Unreasonable Rate Review Rule” or “Rule”). CCIIO delayed the effective date of the Rule’s review process from July 1 to September 1, 2011, but otherwise made few changes from the proposed rule (for more information on the proposed rule, see my 12/23/2010 Health Law Alert ([click here](#)) or see “Resources” page at tbixbylaw.com). Under the Unreasonable Rate Review Rule, either the State or CCIIO will review insurers’ rate increases when an insurer proposes a rate increase that equals or exceeds the Rule’s review threshold—initially 10%. The Unreasonable Rate Review Rule will not apply to the large group market or to “excepted benefits,” such as stand-alone dental and vision policies.

CCIIO expects to determine no later than July 1, 2011 which States have an “effective rate review program.” In these States, the State Insurance Commissioner (or equivalent State authority) will review proposed rate increases subject to and under State law. In other States, CCIIO will review rate increases that equal or exceed the threshold. In either case, insurers will be required to provide the regulatory agencies detailed information about rate increases and CCIIO will publish most of that information online, including data and assumptions used to justify the rate increase. Moreover, when the reviewing agency determines a rate increase is unreasonable, the insurer will be required to either withdraw the rate increase or “[p]rominently post on its [own] Web site” in a form and manner prescribed by CCIIO the reviewing agency’s determination that the rate increase is “unreasonable” in addition to other information. That information must remain on the insurer’s website for at least three years. CCIIO will also publish information about the “unreasonable rate increase” on its website. The Rule does not, however, give either State or Federal agencies authority to deny, postpone, or otherwise affect a rate increase.

The Unreasonable Rate Review Rule will affect rate increases that State law requires to be filed on or after September 1, 2011. With respect to rate increases that are not subject to State rate-filing requirements, the Rule affects rate increases going into effect on or after September 1. The final Rule is published at 76 *Federal Register* 29964 (May 23, 2011).

State-Specific Thresholds for Review of Rate Increases

Beginning in September 2012, CCIIO will apply State-specific thresholds for rate increases subject to review, rather than using the “transitional 10% threshold.” The State-specific thresholds will reflect local variations in health care trends from State to State. CCIIO will publish the State-specific thresholds “no later than June 1 of each year beginning in 2012.” CCIIO plans to “immediately begin work with the States and the NAIC to develop a process and identify data and methodologies for setting State-specific thresholds.”

Disclosure of Rating Information to Public

When CCIIO is reviewing a rate increase, insurers will be required to submit detailed documentation necessary to justify the increase. The final Unreasonable Rate Review Rule requires insurers to submit documentation “sufficient for [CCIIO] to conduct an examination satisfying the requirements of [the Rule] and determine whether the rate increase is an unreasonable increase” based on “[i]nstructions . . . provided in guidance issued by [CCIIO].” That documentation is not likely to be less-detailed than the information the proposed rule would have required, which was based on the “actuarial memorandum guidelines” in a National Association of Insurance Commissioners (NAIC) model regulation. This information included data such as average annual premium per policy, past experience, and any other alternative or additional data used, a general description and source of each assumption used in calculating the rate increase; the cumulative loss ratio, projected future loss ratio, projected lifetime loss ratio (combining cumulative and future experience) and a description of how each loss ratio was calculated.

CCIIO will post all of this documentation on its website, unless (a) the insurer designates the information as being confidential *and* (b) CCIIO determines the information qualifies as being confidential under Department of Health and Human Services Freedom of Information Act (“FOIA”) regulations. CCIIO may not be inclined to determine this information is confidential, however. CCIIO asserts that, because of State filing and disclosure requirements, the information already “appears to be widely available across the country [so] it may be difficult for an [insurance] issuer to assert that the information . . . is confidential or protected from disclosure under Federal law.”

Public Input for Rate Review Process

Although the Unreasonable Rate Review Rule does not require either CCIIO or States with “effective rate review programs” to hold public hearings on rate increases, the agencies that review rate increases will be required to implement a process for receiving public comments on rate increases subject to review. CCIIO explains that “allowing public input will encourage public participation in the rate review process, but be less burdensome than requiring all States with Effective Rate Review Programs [and CCIIO itself] to hold public hearings.”

Treatment of Associations: Request for Comments

The Unreasonable Rate Review Rule requires review of rate increases in the “small group” and “individual” markets, but generally relies on a State’s definition of those terms. Under this approach, the Rule does not apply to rate increases affecting small groups and individuals who buy health insurance through associations in States that treat an association as a single (large) group. Although CCIIO is “inclined to amend [these] definitions . . . to include coverage sold to individuals and small groups in all cases,” CCIIO is requesting comments on the subject before it makes a final determination. CCIIO has similar concerns about coverage sold through out-of-state trusts. CCIIO requests comments on several specific aspects of the issue. *See* 76 Fed. Reg. 29964, 29965-66 (May 23, 2011). Comments are due by 5 pm EST July 18, 2011.

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