

March 27, 2013

Secretary Kathleen Sebelius
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Director John Berry
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Secretary Sebelius and Director Berry:

We write as the chief insurance regulators of our respective states and members of the National Association of Insurance Commissioners (NAIC) to request greater flexibility for states as key provisions of the Affordable Care Act (ACA) are implemented in our markets. The NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the United States. We appreciate the open and constructive dialogue that we have had with the federal government throughout the ACA implementation process and look forward to working together to protect consumers and insurance markets going forward.

The ACA, when fully implemented, will impose sweeping changes upon the health insurance industry and upon the regulation of health insurance products. As the state officials who are on the front lines, we are concerned that a number of recent regulations do not provide us with the flexibility we need to prevent unintended consequences, such as premium shock and adverse selection. We are also troubled that the recently published Final Rule governing the Multi-State Plan Program (MSPP) asserts federal preemptions that are wholly unnecessary and disruptive to both state insurance markets and the health insurance marketplaces that will open for business this October.

Rate Shock and Adverse Selection

Adverse selection is of great concern to state regulators. In a guaranteed issue, no pre-existing condition environment, the reward for waiting to obtain coverage until it is needed or switching coverage to minimize cost and maximize benefits will always exist, even with the tax penalties in federal law. There are many tools states use to limit adverse selections, such as, open enrollment periods (which the exchange and market reform regulations provide for), waiting periods, penalties for late enrollment, and others. In the small group market, states are also looking at ways to address adverse selection between self-insurance and full insurance. States need flexibility to develop a regulatory environment that will discourage adverse selection while preserving consumer protections and choices, rather than having the federal government prescribe open enrollment as the tool that states must use.

In particular, state insurance regulators are concerned about the impact the abrupt transition to adjusted community rating will have on premiums in many states, especially for those who are younger and healthier. While subsidies and higher cost-sharing options may be of some assistance, in most states these populations could have their individual market rates rise considerably in 2014. This potential "rate shock" could, in turn, result in their leaving the marketplace, despite the penalties, which are quite low in the first year and may not even be sufficient when fully phased in. States need as much flexibility as possible under the law to work with issuers to address this problem. States must be able to develop appropriate geographic areas, age bands and age curves, rate caps and other tools to benefit all consumers. While we understand the desire to have consistency for purposes of risk adjustment and enforcement, this needs to be weighed against the critical need to preserve healthy risk pools and competitive markets.

We again recommend that CMS provide states with the flexibility to phase in the 3:1 age factor ratio over a specific period of time to mitigate the rate shock for younger individuals and families. With a transition to the 3:1 age ratio, younger, healthier individuals will experience more gradual rate increases rather than large, one-time rate shocks and will be less likely to drop coverage and further destabilize the market. The phase-in of the 3:1 ratio would be uniformly applied within each state's

markets to ensure consistency across issuers. We recommend that states have the option to transition to the 3:1 ratio over a three-year period.

Geographic Rating

The final market reform rules create a safe harbor for states to specify geographic rating areas so long as the number of those rating areas does not exceed the number of metropolitan statistical areas in the state plus one. We urge CCIIO to revisit this standard or to provide states with maximum flexibility when evaluating geographic rating areas specified by states. While we understand the statute's requirement that rating areas be uniform across the state, we believe that in many states a greater number of uniform rating areas would achieve the statute's goal of greater transparency and comparability of plans without disrupting current issuer practices. States have expertise and understanding of their markets and are better able to determine rating areas in a way that ensures that rates are not reflective of morbidity or discrimination while minimizing disruption as regulators and issuers scramble to put many new requirements into place.

Small Group Rate Adjustments

We are concerned that small group issuers, whether they are participating in the SHOP exchange or not, will not be permitted to make changes, other than prospective trend increases if a state permits, in their index rates for the first two or three quarters of 2014. We have been told that because of HHS system constraints carriers must include any "trend increases" to future quarters in a single rate filing for each plan year. With the significant level of uncertainty involved in pricing health insurance products under the new market rules, it will be particularly important for issuers to review emerging experience, validate assumptions and make adjustments to rates charged for new policies to avoid excessive or inadequate rates. Neither the ACA nor state laws prohibit insurers from adjusting rates and we believe that such a prohibition will increase the risk of inaccurate pricing, prompting issuers to err on the side of higher, rather than lower premiums.

Temporary Reinsurance Program

We also strongly recommend that HHS abandon its plan to create a national pool for reinsurance collections and payments and replace it with reinsurance program that is operated on a state by state basis, as intended by the statute, which calls for the establishment of a reinsurance program "in each state." This modification would allow the transitional reinsurance program to stabilize individual insurance markets in each state, which differ significantly in size and other characteristics, rather than spreading contributions and payments across the nation as if there were one national market. The uniform per capita national contribution rate specified in the Proposed Notice is inappropriate because health care costs vary widely between different states and would force states that have succeeded in restraining the growth of health care costs to subsidize states in which costs have grown rapidly.

Data Collection

In several of our comment letters on proposed regulations, we have expressed our concern about the amount of data requested of health insurance issuers and about the administrative burden and costs of collecting and reporting it. State insurance regulators work to ensure that all of the information collected from issuers is necessary to enforce laws and regulations. We encourage federal officials to continue to review the data and other information requested of issuers and to work with state insurance regulators to ensure this data collection does not result in unnecessary costs that will be passed along to consumers. Additionally, we request that CCIIO eliminate or reduce the current rate review data reporting for Premium Review grantee states, as much of the data will now be captured through the new Unified Rate Review Template. We also request that CCIIO work with states to provide flexibility to reduce or delay the grant reporting requirements for Premium Review grantees during the months of April through August of this year, given the heavy filing workflow that states will be experiencing during this time.

Multi-State Plan Program

In December 2012, the NAIC provided formal written comments to the Office of Personnel Management (OPM) regarding its proposed rules for the MSPP. While there were many aspects of the proposed rules that we supported, including the requirement for MSPP issuers to comply with state rate and form review processes and the application of the ACA's single risk pool requirement to Multi-State Plans (MSPs), there were other aspects of the rule that we had serious concerns about. We were disappointed to learn that many of the issues we cited either were not addressed or were made worse in the final regulations published on March 11.

In particular, by replacing a standard by which state rate review determinations would be respected by OPM except in cases where a state's refusal to approve a rate request was "arbitrary, capricious, or an abuse of discretion" with a standard that allows OPM to disregard a state rate review determination if it feels the state's failure to approve a rate would "prevent OPM from operating the MSPP," OPM invites MSPP issuers to engage in brinksmanship during the rate review process. If, as we expect, only a handful of issuers choose to participate in the program, these issuers could exert tremendous pressure over

OPM by threatening to withdraw from the program if OPM does not approve rates that cannot be approved by state regulators because they are either excessive or inadequate. Despite OPM's assurances that a disagreement over rates would rarely, if ever occur, we are concerned that the temptation to play state regulators and OPM off against each other may prove too great for some issuers.

While we understand that the statute grants OPM the authority to negotiate MSP rates, it does not absolve these state-licensed issuers of state law prohibitions against using unapproved rates. We do not believe that this poses an insurmountable conflict. OPM will be free to negotiate rates with MSPP issuers, so long as those rates meet state law requirements as not being inadequate, excessive, or unfairly discriminatory.

We were also concerned that the final rule removed criteria in the proposed rule that would be used in determining whether OPM believed it could preempt the application of a state law providing consumer protections to enrollees of a MSP. In our comments last December, we suggested changes that would have improved these criteria and given states a more concrete understanding of the circumstances in which OPM would assert preemption. We were therefore dismayed to see that in the final rule these criteria were eliminated altogether, increasing uncertainty in states as to how OPM will make decisions about whether it believes it can preempt a state law. We look forward to discussions with OPM to gain a better understanding of what types of state requirements it believes would not apply to MSPs and MSPP issuers.

Finally, we continue to have serious concerns about OPM's decision to require enrollees in MSPs to utilize the OPM external review process, rather than the state process available to enrollees in every other plan. We are particularly concerned that courts could determine that application of this provision of the final rule would trigger the level playing field provision in section 1324 of the ACA, preempting state external review protections for consumers in other plans in the state. While we understand that OPM believes that the way it has structured the requirement will not trigger section 1324, we are concerned that a court may not agree.

We look forward to further discussions of all these issues and to working together to ensure that provisions of the ACA are implemented in a way that provide important protections to consumers in each of our markets while minimizing avoidable disruptions. Please do not hesitate to call upon us if we can be of any additional assistance in this regard.

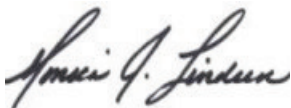
Sincerely,



James J. Donelon
NAIC President
Louisiana Insurance Commissioner



Adam Hamm
NAIC President-Elect
North Dakota Insurance Commissioner



Monica J. Lindeen
NAIC Vice President
Montana Commissioner of Securities & Insurance



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