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Federal Health Insurance Rate Reviews—A Status Report

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The Patient Protection and Affordable Care Act (''Affordable Care Act'') required the U.S. Department of Health and Human Services (''HHS'') to establish a process for the review of ''unreasonable'' health insurance premium rate increases in the individual and small group markets. As a result, federal regulations mandating the review of all rate increases of 10 percent or more in the individual and small group markets became effective on Sept. 1, 2011.[1]

In the seven months since the federal rate review regulations became effective, the Center for Consumer Information and Insurance Oversight (''CCIIO'') in the Centers for Medicare & Medicaid Services (''CMS'')[2] has completed 209 reviews of insurance premium rate increase filings. CCIIO determined that 142 of the reviewed premium rate increases represented ''unreasonable'' increases while 67 of the rate increases were deemed ''not unreasonable.'' It is our understanding that none of the filed rates that CCIIO deemed ''unreasonable'' have been rescinded or otherwise adjusted.

In promulgating its rate review regulations, HHS articulated specific goals, consistent with the objectives of health care reform, focused on empowering consumers and lowering health insurance costs. This article provides a summary of CCIIO's completed rate review determinations under the federal rate review program.

Rate Review Program Goals

According to CCIIO, the rate review mandate included in the Affordable Care Act is an unprecedented federal program intended to help moderate health insurance premium hikes and lower costs for consumers and businesses that buy health insurance in the individual or small group markets.[3] HHS has stated that the

[1] The federal rate review regulations are codified at 45 C.F.R. §§ 154.101–154.301. *See also* Rate Increase Disclosure and Review Rule, 76 Fed. Reg. 29,964 (May 23, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-05-23/pdf/2011-12631.pdf; *and* Rate Increase Disclosure and Review: Definitions of ''Individual Market'' and ''Small Group Market,'' 76 Fed. Reg. 54,969 (Sept. 6, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22663.pdf.

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These regulations implemented Section 2794 of the Public Health Service Act, as added by Section 1003 of the Affordable Care Act.

[2] CCIIO and CMS are agencies of HHS.

[3] Center for Consumer Information and Insurance Oversight, *Health Insurance Rate Review: Lowering Costs for*

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rate review ''policies bring an unprecedented level of scrutiny and transparency to health insurance rate increases.''[4] Rate review is ''expected to prevent unjustified premium hikes by insurance companies and to help provide those who buy insurance with greater value for their premium dollar.''[5] The program is designed to provide consumers with greater transparency and ''easy-to-understand information about the reasons behind rate increases.''[6] HHS has stated that the rate review program will prevent insurers from ''reaping the benefits of lower [medical] costs while maintaining higher [insurance premium] rates,'' and will ''curb premium increases by requiring vigorous reviews that assure cost estimates use verifiable medical trend data and realistic administrative cost projections.''[7]

Since September 2011, health insurance issuers serving the individual and small group markets have been required to submit justifications for and information about insurance premium rate increases that meet or exceed a federally established threshold to CCIIO and the applicable state. At this time, the threshold is a 10 percent increase, regardless of the amount of the base premium rate. The rate increases, underlying data, and justifications are subject to public disclosure.[8] CCIIO and the states use the justifications and information to examine and determine whether the premium rate increases that meet or exceed the federally established threshold are ''unreasonable.''

Rate increases affecting states with effective rate review programs are reviewed by those states, while rate increases in states determined not to have an effective rate review program are reviewed by CCIIO.[9] CCIIO has determined and published a list of those states that have effective rate review programs, which currently includes 44 states, the District of Columbia, and three U.S. territories.[10]

CCIIO Reviews to Date

Since November 2011 CCIIO has found that health insurance premium rate increases filed in the individual and small group markets in 12 states (Alabama, Arizona, Idaho, Louisiana, Mississippi, Missouri, Montana, Nebraska, Pennsylvania, Virginia, Wisconsin, and Wyoming) represented unreasonable rate increases.

In its initial application of the federal rate review regulations in November 2011, CCIIO found that Everence Insurance Co.'s (''Everence'') premium rate increase of 11.58 percent in the small group market in Pennsylvania represented an ''unreasonable'' rate increase, while its 11.10 percent increase in the individual market in Montana did not. CCIIO focused on two factors in deciding that the Pennsylvania increase was unreasonable: (i) that the rate increase would result in a projected medical loss ratio (''MLR'') below the applicable federal standard of 80 percent,[11] and (ii) that the insurer's choice of assumptions used to calculate the rate increase were unreasonable. CCIIO stated that Everence improperly used its nationwide claims data to calculate a projected MLR of 81.80 percent in Pennsylvania, and that had Everence used its Pennsylvania-only claims experience—which CCIIO deemed reliable—it would have resulted in a projected MLR ''significantly lower than the 80 percent medical loss ratio that is required'' under current federal standards.[12]

By contrast, CCIIO determined that Everence's 11.10 percent increase in Montana was not unreasonable because, using what CCIIO deemed ''reasonable assumptions,'' the rate increase in Montana was estimated to result in an MLR at or above the federal standard.[13]

American Consumers and Businesses, available at http://cciio.cms.gov/resources/factsheets/rate_review_fact_sheet.html (last viewed April 13, 2012).

[4] U.S. Department of Health and Human Services, *2012 Progress Report: Health Reform is Opening the Insurance Market and Protecting Consumers*, available at http://www.healthcare.gov/law/resources/reports/rate-review03222012a.html (last viewed April 9, 2012).

[5] U.S. Department of Health and Human Services, *Review of Health Insurance Rate Increases*, available at http://www.healthcare.gov/news/factsheets/2011/09/ratereview09012011a.html (last viewed April 13, 2012).

[6] *Id.*

[7] U.S. Department of Health and Human Services, *Rate Review Works: Early Achievements of Health Insurance Rate Review Grants*, available at http://www.healthcare.gov/law/resources/reports/rate-review09202011a.pdf (last viewed April 13, 2012).

[8] U.S. Department of Health and Human Services, *Your Insurance Company & Rate Increases*, available at http://companyprofiles.healthcare.gov/ (last viewed April 12, 2012).

[9] 45 C.F.R. § § 154.210(a)–(b).

[10] Center for Consumer Information and Insurance Oversight, *List of Effective Rate Review Programs*, available at http://cciio.cms.gov/resources/factsheets/rate_review_fact_sheet.html (last viewed April 12, 2012). CCIIO has determined that Virginia only has an effective rate review program for the individual market. Therefore, insurance premium rate reviews in this state are split between the state regulators (individual market) and CCIIO (small group market).

[11] Federal MLR regulations require individual and small group market insurers to spend a minimum percentage of their premiums on medical costs, plan benefits, and quality improving activities. 45 C.F.R. pt. 158. Insurers that do not meet this requirement must provide rebates to policyholders. The current federal minimum MLR threshold for the individual and small group markets is 80 percent, unless the state has received an adjustment from HHS or the state imposes a higher MLR. As of April 13, 2012, HHS has only granted downward adjustments to seven states. For more information about the federal MLR requirements, see the Epstein Becker Green *Implementing Health and Insurance Reform* alert ''New Rules Issued on Medical Loss Ratio Requirements'' (January 2012), available at http://www.ebglaw.com/showclientalert.aspx?Show=15543.

[12] U.S. Department of Health and Human Services, *Everence Insurance Company Rate Review*, available at http://companyprofiles.healthcare.gov/states/PA/companies/78080/products/78080PA001/rate_reviews/33?search_method=rate_reviews (last viewed April 12, 2012).

[13] Examples of other ''not unreasonable'' rate review determinations include ODS Health Plan's rate increase of 25.98 percent in its small group products in Alaska, Coventry Health

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In the reviews announced in January 2012, CCIIO determined that premium rate increases filed by Trustmark Life Insurance Co. (''Trustmark'') of 13.00 percent in Alabama, Arizona, Pennsylvania, Virginia, and Wyoming were ''unreasonable,'' while a 13.00 percent increase in Louisiana was ''not unreasonable.''[14] As in the initial round, CCIIO found that the Alabama, Arizona, Pennsylvania, Virginia, and Wyoming increases were unreasonable based on two factors: (i) that the rate increases would result in a projected MLR below the applicable federal minimum standard of 80 percent,[15] and (ii) that Trustmark used nationwide claims data, as opposed to state-specific data, to calculate the increases.

By contrast, in determining that Trustmark's 13.00 percent increase in Louisiana was not unreasonable, CCIIO stated that ''although HHS did not conclude the issuer's use of national data was reasonable, the rate increase was not determined to be excessive because using either national or state experience, the rate increase would result in a projected loss ratio at or above the applicable Federal standard of 80%.''

In its most recent rate reviews, announced in March 2012, CCIIO determined that premium rate increases filed by John Alden Life Insurance Co. (''John Alden'') ranging from 11.00 percent to 24.00 percent in individual and small group products in Alabama, Arizona, Idaho, Louisiana, Mississippi, Missouri, Montana, Nebraska, Virginia, Wisconsin, and Wyoming were ''unreasonable,'' while a 17.00 percent increase in a Wyoming individual product was ''not unreasonable.'' In addition, CCIIO determined that premium rate increases filed by Time Insurance Co. (''Time'') ranging from 11.00 percent to 24.00 percent in individual and small group products in Arizona, Idaho, Mississippi, Montana, Virginia, and Wisconsin were ''unreasonable,'' while a 14.00 percent increase in an Alabama small group product was ''not unreasonable.''

Since none of the increases deemed ''unreasonable'' have been rescinded or otherwise adjusted, some have questioned whether HHS's goals of empowering consumers and lowering health insurance costs are being achieved.

As in the earlier rate review determinations, CCIIO found that the John Alden and Time rate increases were unreasonable because the increases would result in a projected MLR below the applicable federal standard and because CCIIO placed more weight on state-specific experience than on the national experience used by the issuers. In addition, CCIIO determined that the medical trend projections used in the filings were not supported by the issuers' claims data and that John Alden and Time, both of which underwrite and issue insurance products for Assurant Health, had combined their claims information for their filings. CCIIO explained that ''[i]t is not standard, acceptable practice for premiums collected and claims paid by two different issuers to be combined in the process of justifying a rate increase across both issuers. Pricing based on the combined experience of two different issuers not only forces artificially higher premiums on those insured by the issuer with the lower claims costs, but it also raises the risk of insolvency for some issuers with the higher claims costs because the pricing for those issuers will not reflect their higher risk.''

By contrast, in determining that John Alden's 17.00 percent increase for its Wyoming individual product was not unreasonable, CCIIO found that the projected MLR would be above the applicable federal standard of 80 percent. Although CCIIO did not accept the medical trend projections used in the filing, when CCIIO ''applied a more reasonable set of assumptions, the rate increase was still found to be not excessive.'' CCIIO used the same reasoning to determine that Time's 14.00 percent increase in its Alabama small group product was not unreasonable.

Once an insurance company receives notice that CCIIO has determined that its increases were ''unreasonable,'' the insurance company can either decline to implement the increases, implement lower increases, or implement the ''unreasonable'' increases and provide CCIIO with a ''final justification'' for the rate increases.

In its final justification, Everence explained that, even using Pennsylvania-only claims data, its two-year claims experience resulted in an MLR of 81.6 percent, approximately equivalent to the national experience

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and Life's rate increase of 10.90 percent in a small group product in Missouri, and Blue Cross and Blue Shield's increase of 18.00 percent in its individual products in Montana. In general, these rate increases were deemed ''not unreasonable'' because the projected loss ratios were at or above the federal standard of 80 percent.

For more information about the first federal rate review determinations, see the Epstein Becker Green *Implementing Health and Insurance Reform* alert ''HHS Announces First Insurance Premium Rate Review Determinations: Implications for Insurance Carriers and Future Rate Reviews'' (December 2011), available at http://www.ebglaw.com/showclientalert.aspx?Show=15241.

[14] Rate review filings and determinations are available at *Your Insurance Company & Rate Increases*, http://companyprofiles.healthcare.gov/.

[15] Trustmark projected that 70.50 percent of the total premium would be applied to the cost of providing medical services to policyholders, 26.50 percent of the premium would be needed to cover administrative expenses, and the remaining 3.00 percent would be an underwriting gain for the company.

and above the 80 percent federal standard.[16] Everence defended its use of two years of experience, as opposed to the one-year basis relied upon by CCIIO, stating that ''a longer experience period reduces premium volatility, which works better for group clients.''[17]

In its final justification, Trustmark explained that its premium increases were based on projected increases in the cost and utilization of medical services.[18] Trustmark defended its use of national claims experience, stating that ''[t]he fewer lives covered in a state, the more loss ratios can vary from year to year, and a small number of unexpected large medical claims can have a substantial impact. To not take this inherent volatility into account when pricing would be irresponsible and, over the long term, unsustainable.''[19] Trustmark emphasized that, if necessary, it will distribute rebates to consumers as required under the federal MLR regulations.

In its final justification, Assurant Health defended the John Alden and Time rate increases and explained that the companies combined ″state-specific medical trend experience with national data, in order to provide a more accurate forecast of future claims activity.″[20] Assurant Health further explained that John Alden and Time set premium rates using combined data because the companies' products are identical and are issued and administered as a common block of business in order to meet the MLR requirements.

Evaluating the Federal Rate Review Program

As previously noted, since the federal rate review regulations became effective on Sept. 1, 2011, CCIIO has completed 209 reviews of insurance premium rate increases that meet or exceed the federally established 10 percent threshold. CCIIO has determined that 142 of the reviewed rate increases represented ''unreasonable'' increases while 67 of the rate increases were deemed ''not unreasonable.'' Since, as we understand, none of the increases deemed ''unreasonable'' have been rescinded or otherwise adjusted, some have questioned whether HHS's goals of empowering consumers and lowering health insurance costs are being achieved.

Although difficult to measure, some have suggested that the increased scrutiny of insurance premium rate increases may be leading fewer insurance issuers to implement premium increases over the 10 percent threshold.

Increased Public Focus on and Greater State Scrutiny of Health Insurance Rates

The federal rate review program has successfully increased focus on and discussion of health insurance premium rates. To comply with the rate review regulations, health insurance issuers have publicly disclosed more information about how premiums are calculated and what they cover. Much of this information is available on HealthCare.gov, a website maintained by HHS that also provides information to help consumers understand and manage their health insurance needs. These resources offer consumers increased access to information to help them better determine what insurance products and coverage options meet their needs.

In addition to raising consumer awareness, the Affordable Care Act also enabled HHS to award over $100 million to the states to enhance their state rate review programs.[21] Most rate reviews are occurring at the state level, and many states have successfully limited premium increases of 10 percent or greater.[22]

Deterring Higher Rate Increases and Driving Down Medical Costs

Recent reports have stated that health care spending has grown at historically low rates,[23] and that the increase in average employee health benefit costs to businesses has slowed.[24] The federal rate review program may be a contributing factor. Although difficult to measure, some have suggested that the increased scrutiny of insurance premium rate increases may be leading fewer insurance issuers to implement premium in-

[16] Everence, *Everence Responds on Rate Increase in Pennsylvania*, Nov. 21, 2011, available at http://www.everence.com/showitem.aspx?id=13044.

[17] *Id.*

[18] U.S. Department of Health and Human Services, *Trustmark Life Insurance Company Rate Review*, available at http://companyprofiles.healthcare.gov/states/AL/companies/17421/products/17421AL001/rate_reviews/81?search_method=rate_reviews (last viewed April 12, 2012).

[19] *Id.*

[20] U.S. Department of Health and Human Services, *John Alden Life Insurance Company Rate Review*, available at http://companyprofiles.healthcare.gov/states/AZ/companies/73893/products/73893AZ002/rate_reviews/236?search_method=rate_reviews (last viewed May 4, 2012); U.S. Department of Health and Human Services, *Time Insurance Company Rate Review*, available at http://companyprofiles.healthcare.gov/states/ID/companies/28218/products/28218ID018/rate_reviews/256?search_method=rate_reviews (last viewed May 4, 2012).

[21] U.S. Department of Health and Human Services, *Over $100 Million to Help States Crack Down on Unreasonable Health Insurance Rate Hikes* (Sept. 20, 2011), available at http://www.healthcare.gov/news/factsheets/2011/09/rate-review09202011a.html.

[22] Press Release, U.S. Department of Health and Human Services, *Affordable Care Act Holding Insurers Accountable for Premium Hikes* (Jan. 12, 2012). Connecticut limited one premium increase to 3.9 percent instead of the proposed increase of 12.9 percent. Some states have used their enhanced rate review authority to deny premium increases of less than 10 percent—for example, the New Mexico insurance division denied an increase of 9.7 percent and limited the premium increase to 4.7 percent.

[23] Centers for Medicare & Medicaid Services, *National Health Expenditures 2010 Highlights*, available at https://www.cms.gov/NationalHealthExpendData/downloads/highlights.pdf (last viewed April 13, 2012).

[24] Press Release, Mercer Consulting, *Employers Accelerate Efforts to Bring Health Benefit Costs Under Control* (Nov. 16, 2011), available at http://www.mercer.com/press-releases/1434885.

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creases over the 10 percent threshold. For example, a recent report from Massachusetts suggests that the state's strict review of insurance premium rate increases may be a contributing factor to the lowest levels of premium increases in years.[25]

Health insurance issuers have consistently cited greater medical costs as one reason for substantial premium rate increases. For example, in December 2011, Blue Shield of California cited increased provider reimbursement rates as one of the reasons its insurance premium rates had increased.[26] The threat of federal and state rate reviews has provided insurance issuers with ammunition to use in their contract negotiations with providers to seek lower increases in provider reimbursement rates. For example, it has been reported that insurers in Massachusetts have taken a harder line in contract negotiations with health care providers[27] and have successfully renegotiated contracts that limit payment increases to hospitals and physicians.[28] Insurance issuers may also use the threat of increased rate review scrutiny to encourage providers to consider alternative payment methodologies that help reduce unnecessary utilization.

Focus on MLR and State-Specific Claims Data

Some have suggested that CCIIO's reliance on projected MLR calculations to determine whether a rate increase is unreasonable is misguided. Under the Affordable Care Act, individual and small group market insurance issuers are required to provide rebates to policyholders if, based on actual claims experience, less than 80 percent of the premium was spent on medical care and health care quality improving activities.[29] The MLR rebate requirement effectively reduces otherwise ''unreasonable'' premiums on a retroactive basis. As such, it is possible that the focus on projected MLR as the basis for determining whether a premium increase is reasonable duplicates the MLR rebate requirements.

Reliance on projected MLR calculations in premium rate reviews may also raise concerns because different states have different MLR standards. Two states currently impose minimum MLR standards that are above the 80 percent federal threshold, while seven states have received approval from CCIIO for a minimum MLR below the 80 percent federal threshold in at least one, if not both, of the individual and small group markets.

CCIIO's reliance on state-specific claims data to determine the reasonableness of premium rate increases and the projected MLR also raises questions. Many of the individual and small group products that are subject to federal rate review only cover a small number of individuals in each state. For example, CCIIO has determined that premium increases were unreasonable with respect to insurance products that covered approximately 100 people in one state and 700 people in another. As one insurance carrier pointed out, an MLR may vary greatly from year to year and is significantly impacted by the number of individuals included in the plan.[30] Although the federal MLR regulations acknowledge that claims data from a minimum number of individuals is necessary to credibly calculate the MLR,[31] it appears that CCIIO has not considered this credibility issue when conducting the federal premium rate reviews.[32]

Focus on Rate 'Increases' as Opposed to Actual Rates

The rate review determinations issued by CCIIO focus on the insurance issuer's premium rate increase. Yet, these determinations do not indicate how the issuer's rates compare to similar products in the same market. While a particular rate *increase* may be relatively high, it does not tell consumers whether the *actual premium rate* for that product is competitive with rates for similar products sold by other insurers. For example, an 11 percent increase on a product with a relatively lower premium can actually cost consumers less than a 9 percent increase on a similar product with a relatively higher premium. In 2010, a Massachusetts panel of hearing officers found that looking at a percentage rate increase rather than examining the actual premium rate is a flawed methodology.[33]

Timeliness of CCIIO Reviews

One goal of the rate review program is to allow consumers access to timely information so that they can make better health insurance purchasing decisions. Although the rate review regulations state that ''CMS will make a timely determination whether the rate increase is an unreasonable rate increase,''[34] it has generally taken CCIIO two to three months or more to issue its rate review determinations. We understand that many of the premium increases submitted under the federal rate review regulations have been implemented well before CCIIO completed its review. CCIIO's determinations that rate increases are ''unreasonable'' would be more useful to both consumers purchasing health insurance and to those insurance issuers that might consider modifying their rate increases if CCIIO was able to

[25] Robert Weisman, *Health Insurers Hold Back on Rate Increases in Mass.*, The Boston Globe (Jan. 21, 2012).

[26] Julie Appleby, *Blue Shield of Calif., UCLA Tussle Over Rates*, Capsules (Dec. 14, 2011).

[27] Weisman, *supra* note 25.

[28] Robert Weisman, *Partners Recasts Deal with Tufts, Limiting Pay*, The Boston Globe (Jan. 19, 2012).

[29] 45 C.F.R. pt. 158.

[30] U.S. Department of Health and Human Services, *Trustmark Life Insurance Company Rate Review*, *supra* note 18.

[31] 45 C.F.R. § 158.230(c). An MLR is considered fully credible if it is based on the experience of 75,000 or more life-years and is considered partially credible if it is based on the experience of at least 1,000 life-years and fewer than 75,000 life-years. An MLR is noncredible if it is based on the experience of less than 1,000 life-years.

[32] This also differs from the guidance and conclusions included in rate reviews completed by some of the states that have effective rate review programs. For example, in one completed review, Iowa specifically stated that an issuer's use of nationwide experience was ''better than its Iowa only experience.'' U.S. Department of Health and Human Services, *Gundersen Lutheran Health Plan Rate Review*, available at http://companyprofiles.healthcare.gov/states/IA/companies/27651/products/27651IA001/rate_reviews/90?search_method=rate_reviews (last viewed April 13, 2012).

[33] For more information about the Massachusetts Division of Insurance case, see the Epstein Becker Green Client Alert ''Massachusetts Division of Insurance Rate Disapprovals Show Mixed Results; Implications for National Health Reform'' (October 2010), available at http://www.ebglaw.com/showclientalert.aspx?Show=13553.

[34] 45 C.F.R. § 154.225(a).

make these determinations before the increases went into effect.

Conclusion

The federal rate review program has successfully increased discussion of insurance premium rate increases and empowered more states to exercise their authority to review rate increases. However, an analysis of the federal rate review determinations completed to date suggests that there are still issues and questions regarding the operation and effectiveness of this new federal rate review program for individual and small group market health insurance premiums.

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