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***Proposed Rule from HHS Will Lead to Price Controls on
Insurance Premiums & Negative Consequences for Consumers***

EXECUTIVE SUMMARY

The Patient Protection and Affordable Care Act (commonly referred to as ObamaCare) grants vague and numerous powers to the Secretary of Health and Human Services. These powers, in many cases, are undefined and sufficiently vague to allow for a wide interpretation of the authority granted.

In December, HHS Secretary Sebelius solidified her powers to determine whether health insurance premium increases are “reasonable.” Secretary Sebelius proposed a new regulation, which calls for the following:

- In 2011, require that all insurers seeking rate increases of 10 percent or more in the individual and small group market publicly disclose the proposed increases and the justification for them. Such increases are not presumed unreasonable, but the federal government will be looking over the shoulder of state regulators to determine whether they are unreasonable.
- After 2011, a state-specific threshold will be set for disclosure of rate increases, using data and trends that reflect costs particular to that state.
- Under the proposed regulation, states with effective rate review systems would conduct the reviews. If a state lacks the resources or authority to do thorough actuarial reviews, HHS would conduct them. Meanwhile, HHS will continue to make resources available to states to strengthen their rate review processes.

Introduction

The Patient Protection and Affordable Care Act (commonly referred to as ObamaCare) amends and adds to the provisions of Part A of the Public Health Service Act (PHS) relating to the government's oversight of group health plans and health insurance issuers in the group and individual markets.¹ The Department of Health and Human Services (HHS) in December of 2010 proposed a new regulation to provide strict oversight of the health insurance market specifically focused on regulating increases in health insurance premiums.

The language of ObamaCare is sufficiently vague in describing the vast array of undefined powers granted to HHS and the HHS Secretary. One of the ambiguous responsibilities that ObamaCare grants the HHS Secretary is the authority to determine "whether [health insurance] rate increases are unreasonable."²

On December 21, 2010, Secretary Sebelius and the Department of Health and Human Services introduced a proposed rule to oversee the health insurance market and any annual premium rate increases. According to HHS, the proposed rule will purportedly provide greater transparency to health insurance costs. HHS Secretary Kathleen Sebelius stated in her official statement: "Year after year, insurance company profits soar, while Americans pay more for less health care coverage.... The Affordable Care Act is bringing unprecedented transparency and oversight to insurance premiums to help reign in the kind of excessive and unreasonable rate increases that have made insurance unaffordable for so many families."

While the Secretary may claim this new rule will protect consumers, the truth is that this federal rule will impose an unnecessary layer of federal regulations on top of those already existing state regulations that have long been in place to protect most consumers from unjustified premium increases.

How It Works

Under the proposed rule, beginning in 2011, insurance companies that serve small group or individual markets who raise their rates by 10 percent or more in a single year will be required to disclose and then justify their rate increases based on HHS criteria. The justification letter from the health insurance company will be posted on the HHS website. Approximately 9% of all Americans purchase their health

¹ Federal Register, Vol. 75, No. 246, December 23, 2010, "Proposed Rules," p. 81004.

² Federal Register, Vol. 75, No. 246, December 23, 2010, "Proposed Rules," p. 81004.

insurance in the individual market, and this new proposed regulation will specifically impact that segment of the population.

HHS's proposed regulation states the following:

- In 2011, require that all insurers seeking rate increases of 10 percent or more in the individual and small group market publicly disclose the proposed increases and the justification for them. Such increases are not presumed unreasonable, but will be analyzed to determine whether they are unreasonable.
- After 2011, a state-specific threshold will be set for disclosure of rate increases, using data and trends that better reflect cost trends particular to that state.
- Under the proposed regulation, states with effective rate review systems would conduct the reviews. If a state lacks the resources or authority to do thorough actuarial reviews, HHS would conduct them. Meanwhile, HHS will continue to make resources available to states to strengthen their rate review processes.

As Karen Ignagni, President of America's Health Insurance Plans, correctly noted about the proposed regulation: "It does not adequately factor in all of the components that determine premiums, including the cost of new benefit mandates and the impact of younger and healthier people dropping coverage." She also added: "Premium review must consider the unique circumstances of small employers that are struggling to afford coverage for their employees and of the individual market in which people move in and out of coverage, depending on whether they anticipate needing medical services."³ Clearly, the HHS regulation does not take these critical factors into account.

Impact on Federalism

Currently 43 of the 50 states already have in place some form of oversight and a review process to monitor premium increases in the private health insurance market. ObamaCare unnecessarily inserts the federal government into this state-level process of reviewing annual rate increases. According to the proposed rule,

³ <http://www.benefits-selling.com/News/2010/12/Pages/AHIP-fires-back-at-rate-review-rule.aspx>

the Secretary will have the authority to determine whether states' individual review and approval criteria for approving premium increases meets HHS's standards.⁴

On April 19, 2010, HHS established an Office of Consumer Information and Insurance Oversight to implement many of the provisions in the legislation that address private health insurance.⁵ ObamaCare does not specifically mention the need to create such an office, yet Secretary Sebelius has taken it upon herself to create this new bureaucracy to provide further regulatory oversight of the private health insurance market. According to this new office's website:

Our office is responsible for ensuring compliance with the new insurance market rules, such as the prohibition on rescissions and on pre-existing condition exclusions for children that take effect this year. It will oversee the new medical loss ratio rules and will assist states in reviewing insurance rates. It will provide guidance and oversight for the state-based insurance exchanges. It will also administer the temporary high-risk pool program and the early retiree reinsurance program, and compile and maintain data for an internet portal providing information on insurance options.⁶

This new office will take power and authority away from the individual states and create a more regimented bureaucracy in Washington, D.C.

Punishing Insurance Companies

ObamaCare places an unprecedented number of requirements on private health insurance companies. These requirements include, but are not limited to:

- Prohibition on pre-existing exclusions
- Requirement to include adult children on policyholder's plan
- Prohibition on lifetime coverage limits
- Prohibition on annual coverage limits
- Restrictions (and reporting requirement) on any premium increase of more than 10%.

Meeting these mandates will be expensive for insurance companies and will increase premiums. At the same time, the new law stipulates that health insurance companies are required to publicly justify annual rate increases.

⁴ Federal Register, Vol. 75, No. 246, December 23, 2010, "Proposed Rules," p. 81025.

⁵ Curtis W. Copeland, "New Entities Created Pursuant to the Patient Protection and Affordable Care Act," (Washington, DC: Congressional Research Service), 7-5700, July 8, 2010, 3-4.

⁶ See <http://www.hhs.gov/ociio/index.html>

From an economic standpoint, rising premiums are easily understandable and quiet predictable. The non-partisan Congressional Budget Office concluded that on their own ObamaCare's new coverage mandates would cause premiums to increase 30% by 2016.⁷ So in the face of dramatically rising premiums caused by the new legislation, HHS has proposed a regulation that will further burden insurance companies with the requirement to comply with additional federal standards governing potential rate increases.

One of the consequences of the new federal coverage mandates is that it reduces health insurance companies' accountability to the consumer. Health insurance companies will instead tailor their insurance products in an effort to obtain bureaucratic approval even if those policies fail to meet the needs of consumers. So too, ObamaCare puts health insurance providers in a position where they are ultimately accountable to the Department of Health and Human Services – and not consumers – so that insurance providers will focus their resources on satisfying new reporting requirements for HHS's website. Furthermore, there is great potential for government abuse under this new rule. The *Wall Street Journal* warns that this regulation "is typical of the vast ad hoc powers that Obamacare handed to regulators," and it will be wielded "to punish the insurance industry for rising health costs that the new entitlement is already turbo-charging."⁸

Driving Insurance Companies Out of Business

The proposed rule would give the Secretary unchecked power to determine what is an "unreasonable" premium increase." The regulators at HHS who crafted the proposed regulation devoted four pages to explaining how HHS will determine if a rate is "unreasonable." As an initial point, any premium increase of 10% will be considered *per se* unreasonable as the proposed rule states that such an increase would automatically be subject to a government review by HHS bureaucrats.

As these bureaucrats begin the process of reviewing price increases – which could lead to the establishment of arbitrary price controls – insurance companies will

⁷ For example, the Congressional Budget Office has concluded that the additional coverage requirements imposed by ObamaCare will directly increase premiums 27 to 30 percent by 2016. See Congressional Budget Office letter to Senator Evan Byah (November 30, 2009), available here: <http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf>. CBO did note other factors, if implemented, would offset this increase reducing the overall net increase.

⁸ "Sebelius's Price Controls," *The Wall Street Journal*, December 22, 2010. Available at: <http://online.wsj.com/article/SB10001424052748703581204576033591200257356.html>

become less profitable, and in many cases, will be forced out of business. Fewer insurance providers will mean fewer consumer choices.

Government-established price controls that establish a maximum price below the actual cost to produce a good or service could potentially lead to increased demand but would certainly lead to decreased supply. With decreased profits, producers have less incentive to continue providing the product, and eventually exit the market. The inescapable reality is that government price controls tamper with the free market, yielding fewer consumer options. The health insurance industry is no different. If Secretary Sebelius uses this regulation to impose price controls on insurance premiums there will be fewer companies providing individual and small-group plans. With fewer market participants there will be fewer consumer choices.

Implications of this Proposed Regulation

The proposed HHS regulation will significantly alter the current health insurance industry. First, it undermines already existing and properly functioning state authority regarding oversight of the health care industry. Second, this regulation poses the potential for other negative consequences and could lead to:

- The concentration of more power in the hands of Washington bureaucrats;
- An insurance market that is less – not more – responsive to consumers;
- Potential price controls and ultimately fewer consumer choices;
- A far lower level of understanding by consumers and less transparency (despite the Secretary’s assertion to the contrary). The rule states HHS will post copies of premium increase letters on the HHS website. It is unlikely that HHS would allow insurance companies to post such a letter explaining that ObamaCare is the primary reason for any increase in premiums, even when there is provable correlation between the two;
- Price increases over the long term. True competition, in the absence of government interference, will always benefit the consumer in the form of better service or lower prices. On the other hand, the proposed regulations will drive insurers from the market place. This regulation also encourages health insurance companies to be **MORE** responsive to HHS bureaucrats rather than consumers. The net result is that this rule will harm consumers; and
- Fewer consumer choices as previously discussed.

Conclusion

ObamaCare saddles the private health insurance industry with expensive mandates to cover pre-existing conditions, adult children (up to age 26) of policyholders, and to eliminate annual and lifetime coverage limits. At the same time that the federal government is dictating expanded coverage and incentivizing people to wait until they have a medical condition before getting an insurance policy – changes that will necessarily cause premiums to skyrocket - the federal government is also placing onerous burdens on the insurers to justify rate increases.

It is a basic principle of economics that mandating coverage for more services and procedures while simultaneously eliminating insurers' ability to limit costs with lifetime and annual coverage limits will necessarily drive up premium costs. The regulations proposed by the Department of Health and Human Services ignores economic reality and could lead to the establishment of arbitrary price controls. Such a policy would have the net effect of forcing insurers to drop small group and individual plans and eventually to exit the market altogether.