Health Care Reform Update: Consumer Disclosure Notices; State Waivers; Expedited Appeal of Constitutional Challenge

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Consumer Disclosure Notices

On March 7, 2011, the Centers for Medicare & Medicaid Services ("CMS") published proposed consumer disclosure notices requiring insurers to provide public notice of any proposed rate increase of ten percent (10%) or more (the "Notice"). The Notices will be accessible on the Department of Health and Human Services' ("HHS") website and will give consumers detailed information about the insurer's proposed rate increase.

The notice requirements stem from the provision in the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (collectively the "ACA"), which requires the Secretary of HHS, in conjunction with the States, to establish a process for the annual review of rate increases of 10% or more in health insurance premiums for health plans that are not grandfathered from the provisions of the ACA. This process will require health insurers to submit to the Secretary and the applicable State a justification for a premium increase of 10% or more prior to implementing that increase. To that end, CMS published a notice of proposed rulemaking in December 2010 proposing regulations for the disclosure and review of premium increases, published at 75 F.R. 81004 (12/23/10) (the "Proposed Rate Review Regulation"). The Proposed Rate Review Regulation outlines the process that HHS plans to use when reviewing rate increases to determine which rates are subject to review and which are unreasonable.

Pursuant to the Proposed Rate Review Regulation, insurers are required to file a "preliminary justification" before a rate increase of 10% or more may be implemented. The preliminary justification must include a description of the rate increase and the factors contributing to and explaining the need for the increase. This information will be posted to HHS' website so consumers are on notice of proposed increases and have basic information about the factors the insurer asserts are causing the increase. The Notices published by CMS on March 7, 2011 provide the framework for insurers to post the preliminary justification information to HHS' website. There, consumers will be able to see what the insurer believes is driving the increase in premiums and what percentage of that increase will go to profits and administrative expenses. Instructions for completing the preliminary justification notice and other information regarding the Notices can be found at: http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp, under "CMS-10379."

A review of rate increases under the Rate Review Regulation could begin as early as July 2011.

State Waiver Regulations

HHS issued proposed regulations regarding the process by which states can apply for a waiver of certain

provisions of the ACA, published at 76 F.R. 13553 (3/14/11) (the "Proposed Waiver Regulations"). Under the ACA, the Secretary of HHS and the Secretary of the Treasury can grant "state innovation" waivers beginning January 1, 2017. These waivers will exempt states from certain health insurance coverage requirements under the ACA, including state insurance exchange and individual mandate requirements.

States seeking waivers must submit an application to the Secretary of HHS. If necessary, the Secretary will coordinate review with the Secretary of the Treasury. The Secretaries have 45 days to complete a preliminary review and make a determination as to whether the State's application is complete and complies with necessary requirements. To be complete, the application must include analyses, data, actuarial certificates, and other information sufficient to demonstrate that the State will implement an alternative approach providing insurance coverage that is at least as comprehensive, affordable and available as the coverage created under the ACA. To that end, States must submit detailed information, including: (i) a 10-year budget plan that is deficit neutral to the Federal government; (ii) a detailed analysis regarding the estimated impact of the waiver on health insurance coverage in the State; and (iii) information on the current health status of the relevant State population. This information will help the Secretaries fully assess the projected impact of the waiver.

Prior to submitting the waiver application, States must provide a public notice-and-comment period sufficient to ensure a meaningful level of public input on the waiver application. Similarly, a Federal public notice-and-comment period must be provided after the preliminary determination that a State's application is complete. To ensure meaningful notice and comment, the State's waiver application and supporting material will be available for public review and comment. The Secretaries will issue a final decision on the State's application within 180 days following the conclusion of the Federal notice-and-comment period. After approval of the wavier, States must conduct periodic reviews related to the implementation of the waiver and hold a public forum after the initial six months of the waiver's implementation and annually thereafter.

Although the ACA allows States to implement the waivers effective January 1, 2017, President Obama supports a bipartisan amendment to the ACA that will move the effective date to 2014. Although the amendment will only change the effective date of the waiver provision, it may allow States to draft and implement their own solutions to health reform before having the implement many of the ACA's provisions.

Expedited Appeal in Constitutionality Challenge

On January 31, 2011, Judge Roger Vinson of the United States District Court, Northern District of Florida, declared the ACA unconstitutional in its entirety. Judge Vinson held that the individual mandate provision exceeded congressional authority and could not be severed from the remaining provisions of the ACA. On February 8, 2011, the Department of Justice filed a Motion to Clarify asking the Judge if States can continue to implement the ACA while his ruling is being appealed, even though an appeal had not yet been filed. Judge Vinson issued an Order on March 3, 2011 converting the government's Motion to Clarify to a Motion to Stay, which was granted with the condition that the government file an appeal within

seven days of the Order and seek an expedited appellate review. On March 8, 2011, the government filed a notice of appeal to the Eleventh Circuit Court of Appeals. The Eleventh Circuit agreed on March 11, 2011 to expedite the appeal, thus setting a faster timeline for the submission of briefs and the rendering of a final decision.

As it stands, courts are split 3-2 in favor of the ACA. Courts upholding the constitutionality of the ACA include the U.S. District Court for the District of Columbia (holding that the ACA, along with its insurance mandate, is a valid exercise of congressional power); the U.S. District Court for the Western District of Virginia (ruling that the requirement for some employers to purchase coverage for employees and the individual mandate provisions were a valid exercise of congressional Commerce Clause power); and the U.S. District Court for the Eastern District of Michigan (holding that Congress was within its power under the Commerce Clause to enact the individual insurance mandate and asserting that the penalty for failure to purchase the mandate did not constitute an unconstitutional tax).

In addition to Judge Vinson of the District Court for the Northern District of Florida, Judge Henry Hudson for the Eastern District of Virginia declared the individual mandate provision unconstitutional. Virginia Attorney General Ken Cuccinelli sought to bypass the appellate court and petitioned the U.S. Supreme Court for an expedited review of Judge Hudson's decision. The Justice Department has opposed Attorney General Cuccinelli's petition, noting that there is no reason to short-circuit review by appellate judges, especially in light of the accelerated appeal of the Florida case.