State-Specific Threshold Proposals
Guidance for States

I. Purpose

The purpose of this guidance is to inform States of the process for submitting proposals for State-specific thresholds to be effective from September 1, 2012 through August 31, 2013.

II. Introduction

The Patient Protection and Affordable Care Act (Pub. L.111-148) was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L 111-153) was enacted on March 30, 2010. The two statutes are referred to collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds new sections to the provisions of Part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets.

Section 1003 of the Affordable Care Act adds a new section 2794 of the PHS Act which directs the Secretary of Health and Human Services (the Secretary), in conjunction with the States, to establish a process for the annual review of "unreasonable increases in premiums for health insurance coverage," The statute provides that this process must require health insurance issuers to submit to the Secretary and the applicable State justifications for unreasonable premium increases prior to the implementation of the increases.

III. Authority

The charge to develop a system to review unreasonable rate increases was addressed by developing the concept of a "subject to review" threshold. The subject to review threshold is intended to identify the universe of rate increase requests that is most likely to include unreasonable increase proposals. The threshold defines rate increase requests that are required to be reviewed. The single national subject to review threshold for the initial year of the rate review program (September 1, 2011, through August 31, 2012) was established at 10 percent.

The preamble to the Notice of Proposed Rulemaking for the Rate Increase Disclosure and Review regulation (75 FR 81004 (Dec. 23, 2010)) explained that, in determining the appropriate subject to review threshold, a number of sources were considered. The sources included the medical component of the Consumer Price Index (CPI), the Center for Medicare & Medicaid Services' (CMS) National Healthcare Expenditures (NHE) data, the Standard & Poor's Healthcare Economic Commercial Index, and the limited rate increase data that was publicly available.

The Rate Increase Disclosure and Review Final Rule (45 CFR Part 154) ("the regulation") provides for the 10 percent national threshold to be applied for the first year of the program, and for State-specific thresholds to be established thereafter. It requires the Secretary to issue a notice by June 1 of each year announcing any State-specific thresholds that will apply for a 12-month period beginning on September 1 of that year. If no State-specific threshold is established, the 10 percent threshold will continue to apply.

The preamble states, "Our review of the limited data available suggests that the majority of increases in the individual market exceeded 10 percent each year for the past three years. . . . Trends are slightly lower in the small group market, but over 40 percent of increases still exceeded 10 percent." According to the preamble, "The 10 percent threshold established in this regulation exceeds these major indices and in doing so balances industry concerns that any threshold would be over-inclusive with the competing concern that it would subject to review too few rates that may be unreasonable."

At the time the national threshold was set, it was not known how many States would be deemed to have an Effective Rate Review Process and would therefore be reviewing rate increases and reporting their decisions pursuant to the regulation. Currently, 43 States and the District of Columbia are reviewing rate increases for non-association coverage in both the individual and small group markets. Most of those States review all rate increases, without regard to the 10 percent

threshold. Moreover, many of those States are requiring issuers to submit the same Preliminary Justification data that is submitted to CMS for all proposed increases at or above the national threshold.

In addition, based on available data, we believe that medical costs are not increasing at a faster rate than they were in December 2010, when the proposed regulation was published. This would appear to argue against any increase in the threshold for reviewing rate increases. The process described below would provide an opportunity for States to present evidence of unique conditions that would justify a threshold higher than 10 percent. However, based upon a review of available data, it would appear more likely that CMS would grant a request from a State that the threshold be lower than 10 percent.

IV. State Proposals

CMS' review of proposals will be guided by information included in the preamble to the regulation, which provides that State-specific thresholds would "be based on the same kind of analysis used in establishing the . . . 10 percent threshold, but would account for State-specific variations in rate increases based on the cost of health care, utilization patterns, and other factors affecting health insurance rates in a State. HHS would use trend data and other information made available to HHS from States receiving premium review grants and through the reporting and notification requirements of this . . . regulation to develop State-specific thresholds, when possible." The goal in establishing a State-specific threshold is the same as it was when the initial, national threshold was set: to capture as many rate increases as possible that ultimately will be determined to be unreasonable, while minimizing the burden on issuers of having to file rates that are likely to be found to be reasonable.

States are encouraged to include in their proposals both qualitative and quantitative data and information they believe will support their case for moving the 10 percent default threshold. CMS encourages States to include a broad range of data and information and to avoid reliance on a limited set of factors when preparing proposals.

Proposals may include State-specific factors that are predictive of variation in rate increases and may include both analytically-oriented items and policy-oriented items. Examples of both are listed below. No one item listed here would likely support a State-specific threshold proposal on its own, but might be effective when combined with other factors.

The following are examples of *analytically*-oriented factors that might have predictive validity for rate increases either in combinations, or when paired with policy-oriented factors:

- History of average rate increases in individual and small group markets;
- Benefit design (such as deductible levels);
- Mix of open versus closed blocks;
- Mix of individual versus small group (overlaid with association versus non-association);
- Actual loss ratios consistently higher or lower than the projected loss ratios filed;
- Aggregate MLR levels for the business in the State (with MLR levels far enough below the State MLR threshold to put downward pressure on rate levels); and
- Various State-specific factors that individual States may be able to prove have caused their average requested rate increases to be substantially higher or lower than the current 10 percent threshold, such as:
    - medical cost increases,
    - provider network consolidation or expansion.

Analytically-oriented factors relevant to State-specific thresholds should meet two criteria:

- First, factors should be objectively measurable and the State should prove that they have predictive validity in determining attributes of the distribution of rate increases for a State.
- Second, they should not be subject to gaming.

Once the State has validated that a particular factor or set of factors has predictive validity and is not subject to gaming, it could attempt to show that a significant majority of the items indicate the need for a higher or lower threshold. Then, the State might propose moving the threshold in the appropriate direction to create a State-specific threshold.

Below, are examples of *policy*-oriented factors that States may consider in a proposal to move their threshold. These are the types of subjective factors that a State would present in a narrative report:

- The competitiveness of State markets;
- The scope and effectiveness of a State's rate review program;
- The effectiveness of a State's public comment process;
- A large volume of public comments about the need to move the threshold;
- Evidence of gaming by the industry (such as a recent unusual volume of rate increase requests just below the present threshold, especially when compared with the history of rate increases over a number of years);
- Evidence that the burden on industry due to a given threshold is more or less than previously had been assumed;
- Approvals above and/or disapprovals below the present threshold that might demonstrate a need to move the State's threshold; and
- Other policy considerations that may be unique to a particular State.

Finally, when all factors submitted as part of a State-specific threshold proposal are considered in total, the proposed threshold should meet the following policy criteria:

- Effectively capture rate increases that may be found to be unreasonable upon review;
- Be low enough to provide for the disclosure of a meaningful amount of public information about rate increases; and
- Balance the first two needs with the potential issuer, State, and HHS burden associated with rate increases that are not likely to be found unreasonable.

V. Process

States wishing to propose a State-specific threshold to be used for the twelve month period beginning September 1, 2012, should submit proposals to HHS no later than May 1, 2012. States are encouraged to submit proposals earlier than the deadline, if possible.

Proposals may be submitted by email to: ratereview@cms.hhs.gov, or by regular mail at:

Center for Medicare and Medicaid Services
Center for Consumer Information and Insurance Oversight
Room 739H
200 Independence Avenue
Washington, DC 20201
ATTN: State-specific Threshold Review

CMS will post a list of all pending State-specific threshold proposals on the Center for Consumer Information and Insurance Oversight website at http://cciio.cms.gov/. Instructions for accessing the proposals and providing public comment on them will be posted with the list.

CMS will review the proposals and provide States with its determinations by June 1, 2012. To complete its review, CMS may need additional, follow-up information from a State. Should that become necessary, it will benefit the State to respond as quickly as possible to the request for information.

Questions about the process described here should be directed to: Sally McCarty, Director of Rate Review, at sally.mccarty@cms.hhs.gov.