

January 16, 2012

Mr. Steven B. Larsen
Deputy Administrator and Director
Center for Consumer Information and Insurance Oversight
U.S. Department of Health and Human Services
200 Independent Avenue SW
Washington, D.C. 20201

RE: Objections to Florida's Request for Reconsideration of Denial of Request for Adjustment of Medical Loss Ratio Standard

Dear Mr. Larsen:

We are writing today in opposition to the request submitted by the Florida Office of Insurance Regulation (OIR) on December 30, 2011, for reconsideration of CMS' prior denial of OIR's request for an adjustment of the medical loss ratio (MLR) standard for the individual market. The request for reconsideration was supplemented on January 6 with e-mails. (For simplicity, we will informally refer to OIR's request for reconsideration as an "appeal" throughout this correspondence.)

First, we reiterate all of the objections and concerns we raised in our correspondence of October 27, 2011, responding to OIR's original request for adjustment of the MLR standard. Our additional objections to and concerns with assertions made in OIR's appeal are as follows:

1. Like OIR's original adjustment request, the appeal fails to meet the basic criteria set forth in federal regulations for approval of any adjustment of the MLR standard.

a. The original request process provided ample opportunity for OIR to make its case. The appeal adds nothing to that unsuccessful effort.

The volume of the record formed during the processing of OIR's original request is significant, and the period of time available during that processing period for OIR to supplement that record was extensive. Review of that record shows that no nexus whatsoever was established between the upholding of an unadjusted MLR standard and destabilization of the market. CMS appropriately and effectively refuted OIR's assertions in that regard at length.

The appeal adds little in the way of substance, and essentially amounts to an expression of dissatisfaction by OIR with CMS' determination. In particular, OIR insists, in almost tantrum-like fashion, that enforcement of the unadjusted standard will cause "permanent, irreparable harm to our market and the distribution channel for health products and services."

b. OIR's appeal rehashes many of the same flawed or irrelevant arguments that were raised in the original request that have already been addressed.

For the sake of brevity, we refer back to the record from the original adjustment request, including the comments we and others submitted in response as well as to CMS' determination letter. OIR continues to ignore basic considerations that undermine the credibility of their arguments, such as the irrelevance of the examples cited and the relief provided to insurers with limited experience. We believe it unnecessary to reiterate in full the flaws and deficiencies in OIR's request.

c. OIR's sole citation in the appeal appears to include an argument against the adjustment, as a well as a nonsensical reinterpretation of the applicable regulations.

The sole concrete item of supporting information cited by OIR in the appeal itself is a reference to correspondence sent by carrier American Enterprise to OIR dated October 24, 2011. It is noteworthy that American Enterprise waited until only 9 weeks before the end of the year to voice its concerns, although 2011 is the year for which retention of the unadjusted MLR standard would be most burdensome.

In quoting American Enterprise, OIR first notes that, because some states were granted waivers while others were not, and because the administrative requirements in those states for which waivers were granted were all different, the variation created a significant added administrative burden. However, this would seem to be an argument *against* granting adjustments.

However, the sentence OIR emphasizes from the American Enterprise letter reads: "The requirement for a waiver to be granted was 'sufficient' market disruption, rather than 'any' disruption, putting some small carriers and their customers at risk." As best as we can determine, OIR's assertion here is that, although the individual market will not be destabilized as a result of the enforcement of an unadjusted MLR standard, a few small carriers in an otherwise competitive market may nevertheless exit, and that in fact constitutes the requisite evidence of market destabilization. Not only does this argument have a fatal logical flaw, it amounts to making up a regulation to replace the one to which other states are subject.

2. The appeal demonstrates the extreme lengths to which OIR has gone to protect the interests of insurers at the expense of consumers, contrary to the both the letter and intent of PPACA.

a. OIR aggressively pursued input from one particular set of stakeholders in response to the denial of its original request, tainting any assumption of objectivity.

According to the Florida Current, an on-line reporting service that covers state government in Florida, it was OIR itself that initiated the recent effort to collect information from agents that served as the appendix to the appeal filed with CMS a week after the original appeal submission. That material constitutes the only supplement to the information included in the previously rejected MLR adjustment request:

[Florida Association of Health Underwriters] state legislative chair and Tallahassee agent Ken Stevenson said the OIR asked the association to contact its members, and he e-mailed about 500 agents two days before Christmas asking agents to share their experiences since health reform has passed.

By contrast, we were unaware that the appeal had been filed with CMS until reading about it in a national news article.

OIR has made it abundantly clear that it would readily sacrifice *all* of the accountability that the MLR statute and regulations require of insurers in order to keep even the smallest and inconsequential carrier operating in Florida. In the particular case of this adjustment, OIR would also readily deny policyholders access to at least \$140 million expected to be due to consumers as a result of insurers' inability or unwillingness to meet the standard, if such action would ensure that a carrier with negligible market share remains in the market.

This continues the pattern we described in our response to OIR's original request. We note that OIR boasts at page 2 of the appeal:

Contrary to what was asserted in the letter of denial, Florida law is quite specific that public hearings must be noticed and the information published in the Florida Administrative Weekly (FAW) 21 days before the hearing. Public testimony is always welcomed.¹

This example is illustrative of OIR's approach to public engagement and involvement. In fact, the sole substantive portion of the FAW notice reads, under the obscure "Financial Services Commission" heading:

GENERAL SUBJECT MATTER TO BE CONSIDERED: Public Hearing on Medical Loss Ratio by Office of Insurance Regulation in conjunction with the Florida Health Insurance Advisory Board.²

While industry stakeholders were being vigorously recruited for their participation at the hearing, consumers and their advocates would have had to wade through a hundred pages of unrelated information, recognize the vague announcement as pertinent (although the process for requesting an MLR adjustment had not even been defined at the time), and then requested additional information from OIR.

3. OIR improperly blames – at times directly, at other times by implication – the challenges faced by agents and brokers on the anticipated enforcement of the unadjusted MLR standard in the individual market.

a. In the appeal

With respect to the arguments made in the appeal, OIR is again hopelessly vague and fails to meet any reasonable standard for reconsideration.

OIR first notes that "[a]gent and broker compensation has been compressed over time." This is a specific acknowledgement that the factors and trends driving that unfortunate development pre-date the passage of PPACA and the establishment of the MLR standard.

OIR further indicates that "the trend escalated following the passage of federal legislation." This is an

¹ Florida Current, "State insurance regulator asks life and health agents for help," January 4, 2012.

² Florida Administrative Weekly, Volume 36, Issue 35, pp. 107-108.

indication that those same factors persisted after its passage, and these of course were unrelated to the MLR requirements. As you know, these same factors have contributed to skyrocketing insurance premiums overall.

Third, OIR freely interchanges references to the MLR standard in the individual market and its overarching concerns about the MLR standard, how it has been defined, and how it has been enforced. Neither the adjustment request nor the appeal of its denial is a remotely appropriate forum for attacking the MLR framework as a whole. Only the impact of the inability of the state to secure the specifically requested adjustment to the MLR standard in the individual market can be considered in this context. Broader pontifications are intentionally misleading.

Finally, if the MLR requirement has contributed to an unfortunate reduction in agent and broker compensation levels, that has not been quantified or documented in a way that allows a legitimate cost-benefit analysis. The appropriate type and level of policy relief cannot be determined without more precise analysis of the causal factors and the relative size of their impact. To state an obvious example, if the primary causes of any decline in compensation were already in effect prior to the passage of PPACA, then an adjustment of the MLR standard will not only harm consumers, but it will have little or no effect on agent or broker compensation. Based on a reading of the appeal, OIR is “flying blind” with respect to these issues.

OIR’s misrepresentations border on professional malpractice, and the disturbing nature of that conduct is only mitigated by its efforts to champion the interests of agents. Even then, as a regulator charged with protecting the public interest, the decision to override ethical impulses against drawing unwarranted conclusions that harm consumers or making politically motivated statements disguised as objective analysis cannot be justified.

The fact is, *both* brokers and consumers have suffered as a result of the insurer practices that the MLR standard is intended to curtail. Insisting that policyholders in effect provide an emergency subsidy to agents while shielding insurers from any additional accountability is in direct contradiction to PPACA and the fundamental responsibilities of a regulator.

b. In the supplemental material

The additional “evidence” of the impact of the unadjusted standard on agents provided to CMS on January 6, 2012, is not compelling. From the approximately 500 e-mail sent to agents soliciting information³, 21 responses were received, a 4 percent response rate. Of these:

- i. Several responses failed to include any description of any concrete connection between agents’ experiences and the MLR requirements *per se*.
- ii. Several other responses pertained strictly to the impact of the MLR standard on the group market, or at best, about both the individual and group markets.
- iii. A number of responses were purely speculative in nature.

³ Per the Florida Current article.

- iv. Few responses addressed the agent-specific criterion relevant to the adjustment request, namely “whether absent an adjustment to the 80 percent MLR standard consumers may be unable to access agents and brokers.”
- v. Only 3 of the responses were notarized; none were sworn affidavits that pass muster as formal evidence in the sense that OIR has described in the past.
- vi. Most importantly, most responses specific to the issue of reduced commissions in the individual market attribute the reductions to insurers’ practices.

We do not dispute that an unspecified number of agents have experienced an unspecified amount of income loss as a result of the establishment of the 80% MLR standard in the individual market. That said:

- i. In order to meet the criteria for an adjustment, OIR must demonstrate that access to agents and brokers is likely to be compromised. The limited, anecdotal information provided in the supplement fails to reach that bar.
- ii. Access to agents is only one factor among many that must be considered in evaluating the likelihood of destabilization. Taken as a whole, OIR’s appeal utterly fails to pass muster.
- iii. The responses indicate that the cause of any potentially diminished access to agents would be the direct result of changes in compensation schemes made by *insurers* in response to the MLR standard, rather than by the establishment and enforcement of the standard itself.

Affirming insurers’ decision to disproportionately inflict financial pain on agents in order to successfully avoid requirements to provide appropriate value for premiums paid entirely would constitute a grave injustice for policyholders and make a mockery of the law. **Insurers must not be permitted to evade accountability to one group of stakeholders as a means of evading accountability to another.**

+++++

For all of the reasons above, we ask that you dismiss OIR’s request for reconsideration with prejudice, and encourage OIR to work in support of the interests of both consumers and agents. Thank you in advance for your continued consideration.

Sincerely,
 Florida CHAIN
 Florida Center for Fiscal and Economic Policy