ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

December 8, 2011

Via email to MLRadjustments@HHS.gov
The Honorable Kathleen Sebelius
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Texas Medical Loss Ratio Adjustment Request

Dear Secretary Sebelius:

We write to oppose the request for an adjustment to the medical loss ratio (MLR) requirement for the State of Texas submitted by the Texas Department of Insurance (TDI) to the Department of Health and Human Services (HHS). TDI requests an adjustment that would phase in the MLR requirement at 71 percent in 2011, 74 percent in 2012, 77 percent in 2013, and then reaching the Affordable Care Act (ACA) required minimum of 80 percent in 2014.

Adjustments to the MLR may be granted only if a state demonstrates that there is a "reasonable likelihood" that application of the requirement "may destabilize the individual market in the state."[1]

TDI has not demonstrated that meeting the ACA MLR standard is likely to result in a destabilized individual market. Texas carriers are financially well-positioned to provide rebates if they fail to meet the 80 percent MLR standard beginning in 2011, and carriers covering more than 93 percent of the individual market stated that they do not intend to exit. Further, at least 12 carriers are already pricing products to achieve an 80 percent MLR in 2011 or 2012, according to TDI.

Approval of the proposed adjustment will cause significant financial harm to consumers through the loss of estimated rebates totaling $125 million in 2011, and possibly losing as much as $260 million over three years (using the estimated rebates based on 2010 data spread over three years). Further, statutory requirements in Texas, the presence of numerous competitors, and the state high risk pool would protect individual insurance consumers from market destabilization.

[1] Code of Federal Regulations, Title 45, Section 158.301.

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The crux of TDI's application is that Texas carriers need a phase-in period, beginning in 2011 with the MLR standard remaining at the carriers' average 2010 MLR, because "carriers have not had sufficient time to change their business models in 2011 compared to 2010." TDI wants to exempt Texas carriers from the MLR standard that many of the nation's insurers must meet, without providing a clear explanation of why Texas carriers are uniquely unprepared to make any adjustment from the 2010 average MLR. Insurers in all states were aware of the requirement when the ACA became law on March 23, 2010, more than nine months prior to the effective date of the first MLR reporting period on January 1, 2011.

If TDI's application shows anything, it is that **Texas carriers should immediately begin providing more value to their policyholders.** It's true that Texas residents need strong market competition to keep health insurance costs down and service up. And the new requirement provides a level playing field for that competition. But consumers don't need an infinite number of health insurance choices if they are of poor value.

Further, TDI should be required to identify all carriers in its Attachment 2 spreadsheet, which contains responses to TDI's data call. We see no compelling reason for keeping the carriers' identities a secret, and no potential competitive harm in disclosure. While the carriers' names are identified in the public Supplemental Health Care Exhibits, the SHCE data does not always match TDI's Attachment 2 data, making it difficult and time-consuming for HHS and consumer groups to identify carriers.

TDI Has Not Shown That A Destabilizing Number of Issuers Are Reasonably Likely to Exit the State

Texas has more than 30 credible carriers covering individual market consumers. Blue Cross Blue Shield of Texas, Aetna, Golden Rule, Humana, United, and MEGA are just some of the major carriers competing for business in the state. TDI has not shown that the MLR rule is likely to diminish competition or result in a loss of carriers that will destabilize the market.

In gathering data from carriers to present the case for a medical loss ratio adjustment, TDI asked carriers "whether they intend to exit the market." **Carriers representing more than 93 percent of the Texas individual market indicated that they would not exit.**[2] Just **two** carriers answered a definitive "yes" when asked if they would exit. These two "mid-level" carriers have a total of 4,961 out of 744,988 individual market enrollees, representing just 0.67 percent of the Texas individual market. Because of their small size, the exit of these two carriers would not destabilize the market. Further, because TDI asked

[2] This figure excludes the carriers who were added in the revised application and did not answer a data call question as to whether they intended to exit. This figure also includes an assumption that enrollment for Southwest Life and Health Ins. Co. is 7,741, although we share HHS's concern about the discrepancy with enrollment of 995 reported on the company's SHCE. If we used 995, the carriers indicating they would not exit would cover 94.5 percent of the market.

only if – and not why – the issuers intend to exit, there is no evidence that the two issuers plan to leave because of the MLR rule.

In November, TDI supplemented its application by reporting that it has received withdrawal plans from four individual market issuers. Two of those, American Republic Ins. Co. and World Ins. Co., are part of the American Enterprise Group. As HHS noted in its decision on Indiana's application, American Enterprise Group is withdrawing in all states in which it does individual market business, and its decision to do so appears to be "not related to the risk of paying rebates in Indiana and elsewhere."[3] TDI did not provide an SHCE for Tower Life Ins Co. and gave no evidence to suggest it is withdrawing due to the MLR rule. The fourth company, National Health Ins. Co., had an adjusted MLR of 100.5% in 2010 and would not be subject to rebates. Thus, its exit also is unrelated to the MLR rule.

TDI reported that nine "mid-level" carriers indicated that they were "uncertain" as to whether they would exit the market. TDI builds its argument that "implementation of the MLR requirements in 2011 will significantly impact mid-level carriers in the individual market" by assuming that all carriers who responded "uncertain" to TDI's survey would in fact exit the market. For example, Appendix 3 of TDI's application estimates the regional impact of the MLR requirement based on the unjustified assumption that all mid-level carriers who responded "uncertain" to the survey will exit.

With respect to the top eight carriers – none of which stated that they would exit the market – TDI argues that their responses "likely understate the potential for market exit." TDI's justification for claiming "potential instability for large carriers" relies on an unattributed statement "at a technical workgroup meeting" in which carrier representatives indicated "that they would be reluctant to disclose plans to withdraw from the market due to the potential impact on current sales." This attempt to create doubt where carriers clearly indicated they would not exit the market is not sufficient evidence of forthcoming market instability.

TDI's estimates represent worst case scenarios versus reasonably likely scenarios of market destabilization. **Yet, even under this worst case scenario, less than 6.5 percent of enrollees in the individual market would be impacted.**[4] And, according to TDI's analysis, this worst case scenario would impact competition by changing the overall Herfindahl-Hirschman Index (HHI, a standard measure of competition) from 3,371 to 3,846. In other words, the market would be only slightly more concentrated, with the top

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[3] *See* Department of Health and Human Services, Letter to Commissioner Stephen W. Robertson, November 27, 2011, at pg. 6.

[4] Additionally, TDI inflates its estimate of affected individuals on page 17 of the request when it states "if all 17 mid-level and non-credible carriers that expressed doubt about remaining in the individual market were to exit, 47,000 individuals would be affected." It is not clear why the Department included non-credible carriers in this estimate, as those carriers are not subject to the MLR requirement. According to the Department's data, without non-credible carriers, the number of enrollees affected would be 46,832; with non-credible carriers, the number would be 48,267. Either way, these carriers represent less than 6.7 percent of the Texas market.

carrier continuing to dominate the landscape in most regions and numerous other smaller competitors serving the remaining enrollees.

The financial data submitted in the application also show that Texas carriers are well positioned to pay rebates if necessary for 2011. Of the state's eight largest carriers, representing 88 percent of the market, six are expected to pay rebates in 2011. Of those six, only two – Time Ins. Co. and Connecticut General Life Ins. Co. – have projected rebates that exceed consolidated net underwriting profits.[5] HHS already has found, based on the statements of Time's parent company, Assurant, that the company "has been able to successfully streamline its expense structure during 2011," mitigating concerns that the company would not be able to reduce expenses to remain profitable in 2011.[6] Connecticut General, meanwhile, has an RBC ratio of 704 percent, providing plenty of cushion if, in fact, its rebates exceed its profit margin, either in the individual market or on a consolidated basis.

Indeed, the state's largest carrier in the individual market, Blue Cross Blue Shield of Texas, holds $8.6 billion in surplus and reports an RBC ratio of 1,083 percent. The other seven largest carriers all hold RBC levels more than twice the NAIC recommended minimum. Again, combined with BCBSTX, these carriers represent 88 percent of the Texas market and this financial strength further signals the likelihood that the Texas market will adjust to the new requirement without destabilization. In addition, actual rebates may be less than projected rebates because they are based on 2010 data. Carriers have since had time to adjust their business models to come closer to meeting the MLR standard.

Given the financial strength of the major Texas carriers, and the large number of competitors in the market segment, Texas consumers should not be denied the full rebates or lower premiums that would be forthcoming. For too long, they have paid too much of their premium dollars toward excessive profits and surplus, and inefficient administration.

TDI Has Not Demonstrated That Consumers' Access to Brokers and Agents Would Be Limited

TDI's application asserts that to meet the new requirement "carriers may reduce commission rates if they are not limited contractually. Reductions are likely to result in less access to agents by consumers." The application further states that "limiting access to agents and brokers will prevent many Texans from receiving meaningful information in order to make health insurance decisions." TDI provides no information or data to indicate the extent of contractual limitations or whether access to brokers and agents may be impaired. Instead, TDI relies on a statement by an unidentified industry representative at a technical workgroup meeting who stated that a "mutual holding company" has already begun to cut agent commissions.

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[5] Based on net underwriting profits reported in Attachment 2. The carriers' identities were derived by comparing Attachment 2 data with SHCE data.
[6] *See* Department of Health and Human Services, Letter to Commissioner Stephen W. Robertson, November 27, 2011, at pg. 8.

In fact, mounting evidence shows that assertions of reduced broker compensation and reduced access to brokers due to the MLR rule are unfounded:

- In Texas, of eight individual market carriers surveyed, only one reduced commissions on individual market business from 2010 to 2011, from 15 percent to 12 percent. Across all markets, of 16 carriers surveyed in total, only one more reduced commissions, from 5 percent to 4.5 percent in the small group market.[7]

- An NAIC study found that "states with higher MLR requirements have not observed any problems with consumer access to insurance or to producers."[8]

- The Insurance Information Institute found that employment of agents and brokers increased by 5,500 nationally between July 2010 and June 2011.[9]

Additionally, Texas has a new program to assist consumers in finding alternate coverage in addition to agents and brokers that would help alleviate any impact on access. The state's federally-funded new program, housed in TDI, is specifically designed to fill the need for consumer assistance. The Texas Consumer Health Assistance Program (CHAP) states on its website that representatives can help consumers "enroll in a health plan, including the Pre-Existing Condition Insurance Plan (PCIP)" in addition to multiple other areas of assistance. In stakeholder meetings, TDI has described extensive bilingual outreach efforts resulting in an increased call volume.

<u>State Law Protects Consumers From Market Exit And Provides Incentives For Carriers To Remain</u>

The application for adjustment requires an explanation of state market withdrawal requirements. Appendix 1 of TDI's application is an excerpt from the state insurance code which prohibits insurers that exit the individual market from returning to the state's market for five years.[10] Under this rule, insurers that exit the market in 2012 or 2013 will be prohibited from selling coverage in 2014 to the greatly expanded and subsidized market in Texas. Additionally, the state requires that insurers must provide notice to TDI and to consumers at least 180 days in advance of market withdrawal.[11]

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[7] National Association of Health Underwriters, data provided to NAIC.
[8] NAIC, Report of the Health Care Reform Actuarial (B) Working Group to the Health Insurance and Managed Care (B) Committee on Referral from the Professional
[9] Insurance Information Institute, Insurance Industry Employment Trends: 1990-2011, September 2011, powerpoint presentation.
[10] Texas Insurance Code § 827.006. TDI asserts that companies exiting only one line of business may reenter the market with approval of the Commissioner at any time, citing Section 7.1808 of the Texas Administrative Code, Title 28 (28 TAC § 7.1808). However, exit from the individual market is governed by Section 3.3038(f) (28 TAC § 3.3038(f)), which bars reentry to the market for five years.
[11] 28 Texas Administrative Code § 3.3038.

Combined, these requirements protect consumers by incentivizing insurers to remain in the market and providing consumers with sufficient time to shop amongst the wide array of carriers in the market. And TDI has authority to modify or restrict the withdrawal plan if other coverage options are inadequate. Further, the state's high risk pool is open, and does not have an open enrollment period, so that qualifying consumers can enroll at any time if they cannot find alternative coverage.

Texas' Largest Carrier Must Be Held Accountable Through Immediate Enforcement Of The MLR Standard

Although TDI chose not to release the names of the carriers, it's clear that "Carrier A" is Blue Cross Blue Shield of Texas (BCBSTX), a division of Health Care Service Corp. (HCSC), as it is the only carrier in Texas with approximately 400,000 individual market covered lives. With 56.1 percent of the individual market in Texas, it is relevant to focus specifically on BCBSTX to review the potential impact the new MLR requirement will have on consumers and the company's ability to meet the MLR requirement.

We have concerns that an MLR adjustment will remove the much-needed incentive for BCBSTX to immediately begin providing more value to its individual market customers. BCBSTX is a mutual company, based in Illinois. In the past several years, the company has increased premiums while amassing an extraordinary amount of surplus. The NAIC recommends a minimum risk-based capital ratio of 200 percent and the Blue Cross Blue Shield Association requires a higher threshold of 375 percent. However, BCBSTX reports an RBC level of 1,083.8 percent, more than five times higher than the NAIC minimum level and almost three times higher than the Blue Cross Blue Shield Association requirement. At the end of the third quarter of 2011, HCSC held $8.6 billion in surplus. At the end of 2010, the company had the highest overall underwriting margin – 6.3 percent – of any non-public Blue Cross Blue Shield plan, according to an industry report.[12]

While BCBSTX holds this extraordinarily high RBC level, the company has continued to increase premiums on its customer-owners. Looking specifically at the time period following passage of the ACA in March 2010 through April 2011, BCBSTX submitted requests for rate increase for plans in its individual market on 31 separate occasions, with increases ranging from 2.68 percent to at least 17.8, according to data supplied to Consumers Union by TDI. Although BCBSTX had ample notice of the forthcoming MLR requirement and its need to increase the medical loss ratio for individual market products, the company continued to raise premiums.

In considering TDI's application, we urge you to consider the need for BCBSTX and other carriers to improve value for Texas consumers.

[12] Carl McDonald, Citi, 2010 Non-profit Blue Cross Financial Analysis, at pg.6.

Conclusion: The Department Has Not Demonstrated A Reasonable Likelihood Of Destabilization And Multiple Factors Suggest The Texas Individual Market Can Adjust To The Medical Loss Ratio Requirement

In its request, TDI states that "ultimately, the Department believes that the insurance industry will be able to achieve the minimum MLR provisions of the PPACA." We agree with this assessment, but disagree with TDI's assertion that carriers need a transitional period. Figures provided in the request demonstrate that, on average, credible carriers in Texas have underwriting profits exceeding rebates. When considering expenses as well as profits, carriers have room to adjust business models to both remain profitable and provide rebates to customers.

TDI's request dismisses key facts that demonstrate that Texas carriers do not require an adjustment to the MLR standard to prevent market destabilization. In crafting a case for an adjustment, TDI unreasonably uses a worst case scenario. Carriers representing more than 93 percent of individual market policyholders clearly stated in a survey that they do not intend to exit the market absent an adjustment.

TDI's unfounded concern about potential market destabilization is far outweighed by the loss of up to $260 million in rebates or reduced premiums that consumers will miss out on if this adjustment is approved. Texas has existing statutory authority that gives carriers incentives against market withdrawal and protects consumers in the event of a carrier exit. The state's robust individual market provides multiple options for consumers and the state high risk pool is open to Texans who cannot find adequate alternate coverage.

We urge the Secretary to deny TDI's application for an adjustment to the medical loss ratio and require Texas carriers to begin providing more value to their customers now.

Sincerely,

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