



October 27, 2011

Via email to MLRAdjustments@hhs.gov to the:

Center for Consumer Information and Insurance Oversight
U.S. Department of Health and Human Services

**Consumers Union Comments Regarding
Florida's Request for an Adjustment to the Medical Loss Ratio Regulation**

Consumers Union, the public policy division of *Consumer Reports*,¹ submits these comments to oppose the request for an adjustment (the "Request") to the medical loss ratio (MLR) requirement for the State of Florida submitted by the Florida Office of Insurance Regulation (FOIR) to the Center for Consumer Information and Insurance Oversight (CCIIO). The FOIR seeks to phase in the MLR requirement using a 68% minimum standard in 2011, 72% in 2012, and 76% in 2013, and then reaching the Affordable Care Act (ACA) required minimum of 80% in 2014.

We urge CCIIO to reject Florida's Request. Approval of the proposed adjustment will cause unnecessary financial harm to consumers. Based upon estimates from the FOIR of rebates with and without the requested adjustment, consumers could lose as much as an estimated \$144 million in rebates during the proposed three-year transition period if the adjustment is granted. Many of these consumers have not been receiving value for their premium dollars and need immediate relief from escalating insurance costs.

Also, as an initial matter, we have serious concerns that the FOIR "investigation" into the potential impact of the MLR rule did not sufficiently consider the views of policyholders and consumer representatives, and was instead designed to promote the opinion of industry representatives and insurance agents who overwhelmingly supported an adjustment.

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."²

¹ Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications. Its advocacy division, Consumers Union, works for health reform, food and product safety, financial reform, and other consumer issues in Washington, D.C., the states, and in the marketplace.

² Code of Federal Regulations, Title 45, Section 158.301.

The FOIR has not demonstrated that meeting the ACA MLR requirement as of 2011 will result in a destabilized individual market. According to the FOIR application, none of the fully or partially credible carriers in Florida that are subject to the MLR requirement have filed a notice of withdrawal, and several of the state's active carriers are projected to meet the requirement as of 2011. Given Florida's robust individual insurance market and existing statutory consumer protections in the unlikely event of a carrier withdrawing, we find that an adjustment is unnecessary.

The FOIR Investigation Did Not Appropriately Include Consumer Perspectives.

The Request states that the "Office conducted an investigation to determine the impact of the MLR provisions ... [and] in furtherance of that investigation the Office held two hearings." The hearings, held on May 4, 2010 and September 24, 2010, as well as affidavits "from interested parties" that the Office collected after the hearings, form the basis of the FOIR's "four primary conclusions relating to the impact of the MLR requirements on the individual market." However, a close examination of the structure of those hearings shows that they were designed only to gain feedback from carriers and agents who have a financial interest in obtaining an adjustment to the MLR requirement. The hearings were not designed to include the perspective of consumers, who stand to continue to pay too much for their insurance and will lose much of the rebates they are owed under the ACA if the adjustment is granted.

The agenda for the May 4, 2010 hearing lists three panels consisting solely of insurance carrier representatives, agents and other industry representatives.³ Given the importance of this new protection to Florida consumers, it is unacceptable that the FOIR did not ensure the presence of at least one consumer representative on any of the panels at the hearing to speak on behalf of current and future policyholders.

A second hearing on September 24, 2010 again ignored consumer interests. The FOIR invited formal testimony from five individuals representing carriers and agents.⁴ The FOIR then closed the official "evidentiary record" before allowing members of the public to speak at the hearing, according to the transcript. Therefore, any statements supporting the MLR rule that were made during the public comment period were excluded from the evidentiary record submitted to CCIIO to support the Request.⁵

³ Joint Hearing of the Office of Insurance Regulation and the Florida Health Insurance Advisory Board on Medical Loss Ratio (MLR), May 4, 2010. *Agenda available at:* <http://www.floir.com/siteDocuments/MLRHearingAgenda2.pdf>

⁴ Joint Hearing of the Office of Insurance Regulation and the Florida Health Insurance Advisory Board on Medical Loss Ratio (MLR), September 24, 2010. *Agenda available at:* <http://www.floir.com/siteDocuments/FHIAB/MLRHearingAgenda090242010.pdf>

⁵ A video of the hearing on FOIR's website shows that a representative of the Florida Public Interest Research Group and the Florida Alliance of Retired Americans spoke during the public comment period in favor of full implementation in 2011. He cited a study evidencing the benefits of an MLR rule and noted that carriers already had at least nine months to adjust their business models to comply. He also noted that he "just learned of the meeting yesterday," indicating that the hearing was not well publicized to consumers and consumer groups.

We recognize that state public hearings on an MLR adjustment are optional under the federal rule. However, if a state does hold a hearing, it should be for the purpose of soliciting various viewpoints and data to form a fair and complete record. We believe the FOIR's failure to include consumer perspectives on hearing panels and in invited testimony, as well as the agency's exclusion of public testimony from the evidentiary record, should result in CCIIO giving little weight to the hearing records.

The FOIR Has Not Established a Reasonable Likelihood of Market Withdrawals or Barriers to Entry.

In reviewing the Request, CCIIO may take into account “[t]he number of issuers reasonably likely to exit the State or to cease offering coverage in the State absent an adjustment to the 80 percent MLR.”⁶

The “Financial Information by Issuer” [Petition Spreadsheet 3 (Revised 8-17-11)] shows that none of Florida's 20 active carriers have filed a notice of exit. Nonetheless, the FOIR's Request attempts to create fear of forthcoming market withdrawals, claiming that carriers “are loathe [sic] to admit that they are contemplating an exit from a market.” This unsubstantiated assertion is not evidence that carriers are “reasonably likely” to exit the market.

Additional attempts to forecast market withdrawals are inadequate as well. Attachment D of the Request explains that Blue Cross Blue Shield of Florida is discontinuing some of its individual insurance products but states the “company did not provide a reason for the discontinuance.” Carriers routinely close blocks of business and make changes to product offerings and the FOIR notes that the affected policyholders were offered comparable individual products. Appendix D lists a similar example from Golden Rule Insurance Company. These examples are not an indication of forthcoming market withdrawal or destabilization due to the new MLR requirements.

As noted in CCIIO's request for additional information to the FOIR, of the four carriers that have filed for withdrawal, none meet the full or partial credibility requirement and thus are not subject to the MLR rule. Additionally, section A of the Request references “106 other companies totaling almost 52,000 insureds who have less market share who are in a similar position.” We fail to understand why the FOIR points to what are very small, non-credible carriers as being likely to withdrawal due to the MLR requirement, when these carriers are completely exempt from the requirement.

The FOIR also argues that “achieving the MLR requirements in initial years is impossible” for new carriers because underwriting keeps claims low in the early years of entry. In the same vein, a representative of a carrier, AvMed Health Plans, which entered the individual market in 2009, testified that an 80% MLR effective this year is not workable because his company prices products using a lifetime loss ratio with low MLRs in the early years that are designed to keep pricing “smooth” for consumers in future years as underwriting wears off.

⁶ Code of Federal Regulations, Title 45, Section 158.330.

These arguments ignore the MLR rule's provisions that are designed precisely to prevent such barriers to entry. First, the rule allows carriers to defer experience of new policies when more than half of premium revenue is derived from newly issued policies.⁷ Second, the rule allows carriers to count payments into contract reserves created early in the life of a policy as claims, so long as they subtract later withdrawals from those reserves from claims.⁸ The preamble to the rule directly addresses the concerns that the FOIR and AvMed raised: "An issuer may establish contract reserves to reduce the need to increase premiums for a newly introduced product as the experience under the policy matures."⁹ Thus, the rule ensures that applying the MLR rule beginning in 2011 would not be a barrier to entry or jeopardize the viability of carriers that recently entered the market.

Finally, we note that Carrier H, Golden Rule Insurance Company, is expected to owe close to half of the total estimated refunds for 2011, according to the data submitted. The company also reported a high 12% after-tax profit margin (the year is not identified) and an estimated 68% PPACA MLR on its individual market products. This data indicates that Golden Rule customers are paying too much of their premium toward non-medical costs and are getting little value in return for their money. As part of UnitedHealth Group, which made about \$1.3 billion in profits nationally in just the third quarter 2011,¹⁰ Golden Rule is well-positioned to give money back to their Florida customers. Yet, under the state's proposal, Golden Rule would owe no rebates for the next three years.

Florida's Individual Insurance Market Is Among The Nation's Most Competitive And Several Carriers Already Meet The 80% Standard.

Looking again at the "Financial Information by Issuer," eight of the 20 active carriers have estimated PPACA MLRs of 80% or higher. Furthermore, all but three of the carriers are at or above the suggested 68% first year adjustment level requested by the FOIR and all but six carriers are above the second year requested level of 72%. Allowing a lower minimum MLR will substantially reduce carriers' incentive to add value for individual market consumers and would allow the carriers already above the requested adjustment levels to reduce value and increase premiums in an effort to lower MLRs and increase profit.

Importantly, the Florida individual insurance market is among the most competitive markets in the nation. Using the Herfindahl-Hirschman Index (HHI), the state has the 14th most competitive individual market and, unlike 30 other states and the District of Columbia, Florida's largest insurer holds less than 50% of the market.¹¹

⁷ Code of Federal Regulations, Title 45, Section 158.121.

⁸ Code of Federal Regulations, Title 45, Section 158.140.

⁹ Code of Federal Regulations, Title 45, Part 158, at page 74874.

¹⁰ Citi Investment Research and Analysis, UnitedHealth 3Q11 Initial EPS Analysis, Oct. 18, 2011.

¹¹ Cox, Cynthia and Larry Levitt. *How Competitive are State Insurance Markets*, October 2011, Kaiser Family Foundation, available at: <http://www.kff.org/healthreform/upload/8242.pdf>.

The FOIR appears overly concerned that application of the rule this year will lead to “less choice” for consumers. With at least 20 active carriers in the state’s individual market, there is no reasonable likelihood that consumers will be harmed by lack of choices if the rule is in full effect in 2011. Consumers do need strong market competition to keep health insurance costs down and service up. And the new rule provides a level playing field for that competition. But consumers don’t need an endless number of health insurance choices if they are of poor value.

The FOIR’s Concern About Consumers’ Access To Agent Assistance Is Inconsistent With Its Stance On The Consumer Assistance Program.

Part C of the FOIR’s request states that “[a]ll of the impacts of the PPACA make professional health insurance advisers more necessary than ever” and “the MLR requirements [have] the potential to eliminate the agent – the professional health insurance adviser – from the transaction between the issuer and the insured.”

Given Florida’s refusal to submit a grant application for a fully federally-funded Consumer Assistance Program created by the ACA, this concern appears overstated. To date, 33 states representing a range of political and ideological leanings, including neighboring Georgia, have applied for and received funds to create Consumer Assistance Programs that will provide the type of professional health insurance assistance that the FOIR states is now “more necessary than ever.” We believe the FOIR would have sought this funding if the Office indeed has this concern.

The FOIR solicited views of many agents, who expressed concern that the rule will cause carriers to reduce their compensation and may result in fewer agents available for consumers. However, the benefits to consumers of the MLR rule far outweigh concerns about reduced access to agents, particularly as there is little evidence indicating that the rule is directly causing reduced access. For example, according to an NAIC study, states that already have higher MLR requirements have reported no impact on the availability of agents or brokers.¹²

Existing Statutory Requirements Protect Consumers In The Event Of A Market Withdrawal.

The FOIR Request lists state market withdrawal requirements found in Florida Statute Sections 627.6425 and 627.6487. These statutes protect Florida individual insurance consumers through several requirements including:

- Limiting return to the market for five years upon full withdrawal, thus giving insurers an incentive to remain.
- Requiring carriers that withdraw an individual market product to offer other existing products to affected consumers.
- Guaranteed issue of individual health insurance coverage to applicants who had 18 months of prior creditable coverage and restrictions from imposing pre-existing condition exclusions.

¹² Report of the Health Care Reform Actuarial (B) Working Group to the Health Insurance and Managed Care (B) Committee on Referral from the Professional Health Insurance Advisors (EX) Task Force Regarding Producer Compensation in the PPACA Medical Loss Ratio Calculation, Appendix B, May 26, 2011.

These statutory requirements make the possibility of market destabilization due to application of the MLR rule extremely remote because state law provides both incentives against market withdrawal and strong protections for individual market consumers in the event of market withdrawal.

Conclusion

To conclude, we note that the data submitted to support the FOIR's application appears incomplete and raises questions. For example, how is that Carrier Q has a reported MLR of 42% but an estimated PPACA MLR of 80.3% with no expected rebates? Why does Carrier B have an estimated PPACA MLR of 80%, but has millions in estimated rebates in 2011 through 2012 (the company did not answer the question in its response to CCIIO's request for clarification). Do the estimated PPACA MLRs in the spreadsheet, and the estimated rebates, take credibility adjustments into account? Also, the FOIR has not answered CCIIO's questions, as far as we know, as to why Carriers N, S, and L have MLRs of 65% or lower, yet the FOIR indicates that they would not owe rebates under its proposal. (See Question #5, CCIIO letter to the FOIR, July 20, 2011).

The FOIR has failed to establish a likelihood of a destabilized individual market and its process for determining whether an adjustment is needed was lopsided in favor of the insurance industry. **We urge HHS to reject the FOIR's proposal and apply the MLR rule in full, effective in 2011.** Consumers are struggling to afford quality health coverage in tough economic times and they need the benefits of the MLR rule, particularly the full amount of refunds owed to them, as soon as possible. The FOIR hasn't demonstrated that Florida consumers will be harmed by destabilization if the MLR is not adjusted, but consumers will be harmed if the FOIR's request is granted.