

Center for Consumer Information and Insurance Oversight
Department of Health and Human Services
ATTN: CMS-9999-FC
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

July 18, 2011

Dear Secretary Sebelius:

On behalf of millions of health care consumers and small businesses, we are writing to offer our views on the final rule with comment period **CMS-9999-FC, Rate Increase Disclosure and Review, §154.102 definitions of the “individual market” and “small group market.”**

The final rule promulgated by the Department of Health and Human Services will improve transparency and act as a backstop against excessive rate increases in the individual and small-group markets. In addition, the final rule requests comment on the treatment of association health plans and out-of-state trusts to determine whether to amend §154.102 definitions of “individual market” and “small-group market” to include them in the rate review process. We urge that these definitions be expanded to ensure that consumers purchasing association and out-of-state plans are protected by the individual and small-group provisions of the Affordable Care Act (ACA). In general, association plans should be regulated according to the Health Insurance Portability and Accountability Act (HIPAA) precedent, and there should be no exception or special treatment for rate review.

Association plans are clearly regulated as individual and small-group products.

The Affordable Care Act is built on the framework of HIPAA, which clearly regulates association health plans sold to individuals as part of the individual market and those sold to small-group plans as part of the small-group market. [45 CFR 144.102]. Section 1304 of the ACA only recognizes the aggregation of employer groups where aggregation of related companies is required under the Internal Revenue Code. How other arrangements involving more than one employer group are regulated – whether classified under state law as an association, trust, or multiple-employer welfare arrangement – depends on the size of the constituent groups. Therefore, associations that include small groups must comply with the small-group requirements, including rate review.

However, state regulation of associations varies. In some states, they are regulated in the same manner as under federal law. In others, associations are regulated as large-group products and, particularly in the case of out-of-state (or “national”) associations, there may be no regulation at all. A 2005 study found that of the 50 states requiring form filing for individual-market products, three had less stringent or no requirements for in-state associations and 19 had less stringent or no filing requirements for national associations. In addition, 19 of the 47 states requiring some type of rate filing in the individual market had less stringent or no requirement for in-state associations, as was the case for national associations in 26 states.¹

¹ Mila Kofman, Kevin Lucia, Eliza Bangit, and Karen Pollitz, “Association Health Insurance: Is It Time to Regulate This Product?” *Journal of Insurance Regulation*, Fall 2005, Volume 24, No. 1.

The question of the treatment of association plans with respect to the federal rate review standard arises because of the deference given to state definitions in §154.102. However, previous insurance bulletins resolved conflicts between state and federal rules regarding the application of Public Health Services Act (PHSA) Title XXVII in unambiguous terms:

[F]or the purpose of determining whether any particular insurance coverage is group rather than individual coverage within the meaning of title XXVII, it is irrelevant whether there is an association involved, and it is irrelevant whether the state law classifies association coverage as “group” coverage for purposes of state insurance laws.²

The same should apply to the amendments made by the ACA to Title XXVII of the PHSA, including treating association plans as individual or small-group plans for the purposes of rate review. There is no reason to exclude certain individuals and small businesses from these protections just because they happen to enroll in coverage through an association.

States should review the premium rates of association plans and out-of-state trusts.

Permitting states to use definitions that exempt association coverage from individual and small-group market rules will allow plans covering millions of people to bypass important consumer safeguards laid out in the ACA, including protection against unreasonable rate increases. Since the federal rate-review requirement has not been extended to the large-group market, and many states have similar regulatory gaps, consumers and small businesses in states where associations are considered “large group” would be left with no rate protection whatsoever within their association plans.

States should be required to review insurers’ premium-rate increases on individuals and small groups purchasing insurance through an association or out-of-state trust as a condition of having “effective rate review.” The rates of all plans sold in the state should be reviewed, including plans domiciled elsewhere. Insurers should comply with all disclosure requirements of the regulation, including releasing insurers’ justifications to the public. States that currently regulate association plans as large group or that have less stringent or no regulation of in-state associations or out-of-state trusts should be encouraged to strengthen their state laws to mirror HIPAA’s treatment of these plans in order to streamline enforcement of regulations today and in 2014. Immediately, HHS should undertake the rate review for purchasers of association and out-of-state trust plans where the state fails to perform such review. To the extent possible, adequate state regulation of association plans should be a factor in awarding Cycle II rate review grants, and states should be required within the first year of their Cycle II grant awards to make adjustments to their laws and regulations to adequately review association and out-of-state trusts.

Lack of transparency among association and out-of-state plans creates confusion.

Unfortunately, at the time of enrollment consumers may not be aware of the protections they are losing. Consumers are often uninformed or misled about products sold to them. For example, they may purchase insurance without knowing they also are being enrolled in an association. In other cases, consumers have been subject to misleading marketing from insurers and brokers “which induced some people to mistake limited-benefits coverage for comprehensive group

² CMS Transmittal No. 02-02, “Application of Group and Individual Market Requirements Under Title XXVII of the Public Health Service (PHS) Act When Insurance Coverage is Sold To, or Through, Associations.” August 2002.

health insurance.”³ Association plan enrollees also may falsely believe the plan offers the “buying power” of group coverage, when, in fact, association plans experience rate each individual or small-employer group, rather than the association as a whole. Misleading marketing tactics foster this belief. Some associations advertise “group rates” and “group benefits.”⁴ As we make consumers aware of their new protections under the ACA, we must also ensure that those benefits are available as broadly as possible.

Downstream effects of this decision threaten the viability of the exchanges.

If associations are not regulated in the individual or small-group markets, millions of consumers and small businesses could potentially lose the ACA’s individual and small-group market protections against health-status and gender rating, the limitation on age rating, and guaranteed access to the essential benefits package.

Having multiple sets of rules also creates the potential for adverse selection against the regulated individual and small-group markets and, in 2014, against the health insurance exchanges. Association plans could use marketing and underwriting approaches to cover only the healthiest individuals and groups, leaving less-healthy, higher-risk people to be covered in the regulated market and the exchanges. Allowing associations to cherry-pick the healthiest risks drives up the cost of insurance for everyone else and ultimately increases the cost of health insurance tax credits paid by the federal government. Exacerbating the problem, these plans would be excluded from provisions of the ACA meant to minimize adverse selection, like the requirement for a single risk pool and the states’ risk adjustment systems. Over time, the “shadow market” of unregulated association plans would proliferate in some states and threaten the viability of the exchanges. Exchanges would be left with a pool weighed down with significantly higher risks, making participation in the exchanges less attractive to insurers and driving up insurance prices for consumers and small businesses.

The experience of states should be instructive. Regulators in states with laws that exempt associations from small-group rules point to the risks of shifting small businesses to the association market. Washington Insurance Commissioner Mike Kreidler indicates that a 1995 law exempting association health plans from the small-group definition and community rating statutes has led to a dramatic shift in how small employers enroll for coverage and has “resulted in a concentration of poorer risk in the community-rated small-employer and individual pools.”⁵ Likewise, the insurance commissioner of Montana urged HHS to specify that coverage-type determinations occur at the employer level, because in states like Montana where this insurance is considered large group, “many minimum protections guaranteed by the ACA to small employers would be avoided” and “failure to resolve these legal issues now may result in the community-rated risk pools created in 2014 losing a significant portion of their members in some states.”⁶

³ Mila Kofman, Kevin Lucia, Eliza Bangit, and Karen Pollitz, “Association Health Plans: What’s All the Fuss About?” Health Affairs, Vol. 25, no. 6, 2006.

⁴ Mila Kofman, Kevin Lucia, Eliza Bangit, and Karen Pollitz, “Association Health Insurance: Is It Time to Regulate This Product?” Journal of Insurance Regulation, Fall 2005, Volume 24, No. 1 page 36.

⁵ Mike Kreidler, Washington Insurance Commissioner, Comment letter to OCIO on OCIO-9999-P, February 1, 2011.

⁶ Monica J. Lindeen, Montana Commissioner of Securities and Insurance, Comment letter to CCIIO on OCIO-999-P, February 22, 2011.

HHS should take a uniform approach.

Permitting association plans to avoid the ACA's insurance regulations would cause myriad problems for consumers and regulators. Instead, HHS should apply its regulatory structure under HIPAA to ensure that association plans sold to individual consumers and small businesses are appropriately regulated in the individual and small-group markets, including for purposes of rate review.

Thank you for the opportunity to offer these comments. Regulating association plans and group trusts under the new individual and small-group markets rules will not only provide clarity and consistency to states, but it will also ensure the full application of ACA protections intended for individuals and small businesses.

Sincerely,

Health Care for America Now
Consumers Union
Families USA
Community Catalyst
Main Street Alliance
American Federation of State, County & Municipal Employees (AFSCME)
National Partnership for Women & Families
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
National Education Association
American Cancer Society Cancer Action Network
Service Employees International Union (SEIU)
The Arc of the United States
Dialysis Patient Citizens
Health Access California
BluewaveNJ
Community Organizations in Action
Alliance for a Just Society
Community Access National Network (CANN)
National Women's Law Center
National Association of County Behavioral Health & Developmental Disability Directors
United Spinal Association
Raising Women's Voices for the Health Care We Need
Epilepsy Foundation
American Medical Student Association
Timothy Stoltzfus Jost