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Center for Consumer Information and Insurance Oversight
Department of Health and Human Services
Baltimore, MD
Sent electronically via <http://www.regulations.gov>

RE: Comments on individual and small group coverage sold through associations, file code CMS-9999-FC, Rate Increase Disclosure and Review, §154.102 definitions of the "individual market" and "small group market"

To Whom It May Concern:

Northwest Health Law Advocates (NoHLA) and Sprague Israel Giles submit these comments supporting the inclusion of associated health plans (AHPs) in the definition of "small-group market." NoHLA is a nonprofit legal organization working to improve access to affordable, quality health coverage. Sprague Israel Giles, Inc. (SIG) is a Seattle insurance broker known for its vigorous representation of individuals and groups seeking affordable quality health insurance. SIG also serves its community as an advocate for reforming insurance markets to improve the coverage, quality, and access to coverage that insurers provide to consumers.

NoHLA and SIG comment jointly based on our experience in Washington State's regulatory environment, which presents an example of an insurance market dominated by unregulated AHPs. In 2010, Washington had 224,160 people enrolled in small group association plans and 242,775 in large groups, for a total of 466,935 in association plans. Washington's experience is instructive, illustrating what could occur in many states if the new HHS rules do not include AHPs in the small group market definition.

The Washington Market and Regulations

In Washington State, small group plans are subject to community rating, rate review by the Office of the Insurance Commissioner, and medical loss ratio requirements. By contrast, with some exceptions for disability insurers, large group carriers are not subject to community rating, rate-review or medical loss ratio requirements. In Washington, AHPs are considered large groups and are therefore not subject to regulatory oversight.

AHPs dominate the small-group insurance market in Washington, a trend attributable to AHPs' ability to underwrite based on risk and group size. By joining an association and thereby constructively becoming a large group, small groups with lower risks are able to select based on price. AHPs are able to offer plans that are more attractive to low-risk groups.

While groups insured through AHPs in Washington have, on average, lower rates than others, the carriers offering these plans have little accountability or transparency regarding the rates they are charging. It is unknown whether the plans are inappropriately profiting off these low-risk consumers, and there is a complete lack of information about their loss ratios.

The AHP impact in Washington and Anticipated Effects on the Exchange

Because Washington law allows AHPs to avoid rate review, community rating, and medical loss ratio requirements, the small group insurance market in Washington is bifurcated. Lower-risk enrollees pay lower premiums in associations than enrollees in the general market. On the one hand, these AHP enrollees are advantaged relative to those in the community-rated markets. On the other hand, they have little bargaining power and are thus in a position to be easily victimized by plans that have no accountability regarding rates or loss ratios. The Washington State market may be a predictor of what could happen in the exchange if HHS does not apply small-group rate review policies to AHPs.

Since 1995, when Washington State law exempted AHPs from small group underwriting and rate regulations, small employers have moved in large numbers to association carriers. The result has been a greater concentration of high-risk small groups in the community-rated pools.¹ Low-risk groups seek association coverage because associations are not subject to community-rating standards, and therefore, they are able to obtain lower premiums based on the group's health status and, over time, the group's claims experience. In contrast, higher-risk groups are forced into the community-rated pools, increasing premiums for everyone in those pools.

Based on the Washington experience, we anticipate similar effects in the Exchanges if HHS does not require that small groups in AHPs be regulated the same as other small groups. Without such regulation, we anticipate an aggregation of high-risk groups in our state's Exchanges. This will result in increased premiums to the detriment of the federal government and those not receiving subsidies, both of who will have to pay the difference between the premiums paid by low-income individuals and the rising, actual, premiums. In addition, subsidized enrollees who would otherwise choose a gold or platinum plan may be unable to because of increased premiums.

Recommendations

NoHLA and SIG are grateful to have the opportunity to respond to HHS's request for comments on §154.102(9) and applaud your inclination to "amend the definitions of individual market and small group market in §154.102 to include coverage sold to individuals and small groups through associations in all cases."

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

We support this position and recommend that plans sold through associations be included in the definition of individuals and small groups so as to place them on a level regulatory playing field. Otherwise, AHPs will avoid small group consumer protections that are necessary to protect general market small groups with limited bargaining power. The result would be the creation of loopholes for plans to avoid ACA transparency and accountability.

Moreover, we recommend that this principle should apply not just to rate review but also to all requirements of the ACA, such as community rating, essential health benefits, and medical loss ratios. AHPs should be classified as small group plans when sold in the small group market, and as individual plans when sold to individuals. As the Washington experience indicates, this is essential to avoid an aggregation of high risk in the exchanges. If HHS does not treat AHPs similarly to Exchange products, this aggregation of risk will inevitably lead to unaffordable premiums for many enrollees, increased spending of federal dollars for subsidized enrollees, and higher costs for all enrollees in the gold and platinum plans. Furthermore, if AHPs are not subject to rate review and approval requirements, AHP enrollees, while still receiving lower premiums than those in the exchanges, are susceptible to inappropriate pricing by AHPs.

In an environment where higher risk and lower income individuals are pooled, and low-risk individuals in AHPs are not protected by rate review and other regulatory protections of the ACA, it will thus be impossible to achieve the primary purpose of the Affordable Care Act: to provide “quality, affordable healthcare for all Americans.”²

The Affordable Care Act has the potential to improve the ability of all citizens to obtain adequate and affordable healthcare, and it is vitally important that those purchasing coverage from Association Health Plans play by the same rules and are offered the same protections as those purchasing from Exchange plans.

Thank you for your consideration of our comments.

Sincerely,

Janet Varon, Executive Director
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Northwest Health Law Advocates

Sean Corry, President
Sprague Israel Giles

² Patient Protection and Affordable Care Act, Title I