

April 23, 2014

Honorable Kathleen Sebelius
Secretary of Health and Human Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Making rate filings public

Cc: Marilyn Tavenner, Administrator of the Centers for Medicare and Medicaid Services
Mandy Cohen, Acting Director of CCIIO
Teresa Miller, Acting Director – Oversight Group
Doug Pennington, Rate Review Division - Oversight Group

Dear Secretary Sebelius:

The undersigned organizations and individuals, representing millions of consumers across the country, are writing to urge you to make public all health insurance rate information filed with HHS.

Insurance companies routinely designate a substantial amount of information in their rate filings--and even sometimes the entire rate filing--as trade secret or confidential information, and some state insurance departments routinely accept that designation. As a result, in many states the insurer's justification for the rates it proposes are unavailable to the public, making it difficult, if not impossible, for consumer groups to challenge proposed health insurance rate increases.

The Affordable Care Act was intended to change this situation, by requiring the Secretary to "ensure the public disclosure of information on [unreasonable] increases and justifications for all health insurance issuers." 42 U.S.C. § 300gg-94(a)(2). However, although in its rate review regulation HHS requires health insurers seeking to raise their rates to submit a three-part Rate Filing Justification for the increase, and has stated both in regulation and on its website that most if not all of this information is public, it has *not* in fact made such information public.

Specifically, Part I of the Justification, the Uniform Rate Review Template, must disclose among other things the insurer's historical and projected claims experience, its trend projections, and its claims assumptions related to benefit changes. 45 C.F.R. § 154.215(d). On its website, HHS states that a "user-friendly plan profile" summarizing the data the insurer submits in Part I is available to the public at Healthcare.gov, but we have been unable to find any such profile, user-friendly or otherwise.

Part II of the Justification, the Written Explanation of the Rate Increase, must include a narrative describing the data and assumptions used to produce the rate. 45 C.F.R. § 154.215(e). HHS states on its website that Part II is also posted on Healthcare.gov, but in fact no filings made after December 2012 appear to be posted there.

Part III of the Justification is the most important. It must contain an Actuarial Memorandum explaining the assumptions and reasoning which support the data set forth in Parts I and II, and it must be sufficient to enable the regulator to conduct an examination of the rate filing and to determine whether the proposed rate increase is unreasonable. 45 C.F.R. § 154.215(f). In its rate review and FOIA regulations, HHS says it makes public the entire rate filing, except what it has found to be trade secret. 45 C.F.R. § 154.215(h)(2); 45 C.F.R. § 5.65. However, HHS has made no such finding for any filing made after April 1, 2013. Moreover, for filings made before that date, which are available on Healthcare.gov, HHS has permitted insurers to designate the information necessary to determine whether a proposed rate increase is unreasonable as “confidential.”

In order to comment on proposed rates and assess their reasonableness, the public must have the information on which the increases are based. Therefore, the public must have access to *all* of the Part III data—in particular, both the underlying hard data and the assumptions, estimates, and projections the actuary makes to produce the rate. Furthermore, the public must have access to this information when it is useful: *before* the rates are approved or disapproved, in states that have such authority; and *before* rates are determined unreasonable, for rates that exceed the 10% potential unreasonableness threshold.

For 2015 individual and small group rates about to be filed with HHS, we urge that all rate filing information be made public upon filing for four reasons.

First, the ACA does not authorize HHS to withhold the rate filing information; rather it is required to be disclosed under the ACA. 42 U.S.C. § 300gg-94(a)(2). It is well-established that agencies are confined to the limits imposed by the statute. See *Gonzales v. Oregon*, 546 U.S. 242, 278 (2006). Under the ACA, the Secretary *shall* ensure the public disclosure of the information submitted by the insurers. Therefore, the information is required to be publicly disclosed without qualification.

Second, under the Freedom of Information Act the agency has the burden to justify redactions of information, 5 U.S.C. § 552(a)(4)(B), and neither HHS nor the industry has met its burden. A party claiming that information is trade secret or confidential must both describe with particularity the information it claims is trade secret and explain why the disclosure of such information would cause competitive harm. See *Centurion Industries, Inc. v. Warren Steurer and Associates*, 665 F.2d 323, 325 (10th Cir. 1981). See also *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1297 (D.C. Cir. 1983) (“Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency’s decision to withhold requested documents.”). Notably, the industry comments to 45 C.F.R. § 154.215 arguing that actuarial justifications and other Part III data should be kept confidential neither described the information to be kept confidential nor explained why the disclosure of such information could cause competitive harm. In response to these comments, HHS did not accept such arguments and cautioned that such arguments are unlikely to be successful since at least 12 states do not redact any information from rate filings. See 76 Fed. Reg. 29970 (May 23, 2011).

Third, an examination of the HHS confidentiality exemption, 45 C.F.R. § 5.65(b)(4), supports the conclusion that the public should have access to the Part III data. Under the regulation,

information can be withheld if it meets one of four tests. The regulation supplies four questions to assist HHS with determinations of confidentiality under these tests:

1. HHS determines whether the requested information is of a type customarily held in strict confidence. HHS has found that at least 12 states release this information; therefore, it cannot reasonably be said to be “customarily held in strict confidence.”
2. HHS determines the general custom and usage of the information in the relevant business. Again, HHS has found that at least 12 states make the entire rate filing public; it therefore is not the general custom in the insurance industry to keep this information non-public.
3. HHS determines how many and what types of individuals have access to the information. The public obviously has access to information in the 12 or more states that make all rate filings public--including in the most populous state California with some 38 million residents-- and in other states the actuarial functions and processes for setting rates are known throughout the industry.
4. HHS determines the degree of expected financial injury if information is disclosed. The disclosure of data supporting an insurer’s proposed rate increase will not cause financial injury to that insurer because it is legally bound, in most states, to set its rates either so that they are not “excessive, inadequate or unfairly discriminatory” or so that they provide benefits that are “reasonable in relation to premiums charged.” One insurer’s access to another’s rate information will not affect the rate insurers charge because, unlike firms in unregulated industries, insurers are not permitted to maximize their profits, but rather must set their rates based on their costs and the state’s legal standards.

For the above-stated reasons, disclosure of Part III data cannot cause insurers competitive injury.

Finally, the making and acceptance of ACA rate review grants support public disclosure. HHS has made rate review grants to states, in part, for the purpose of increasing public disclosure, and in seeking those grants states have pledged to publicly disclose rate filings. In fact, on its website HHS has noted how the grants have increased “the transparency of the health insurance rate review process.” By not posting the information on which proposed increases are based, HHS is frustrating its goal of transparency, which it has sought to effectuate by making rate review grants, and which it highlights on its website.

For all of these reasons, the balance of interests between releasing rate filing information to persons affected by rate increases and the commercial interests of the industry weighs decidedly in favor of public disclosure. Accordingly, we request that HHS make public the complete rate filing information (Parts I, II and III), both the information it already possesses as well as future rate filing information upon receipt.

Further, we request an immediate face-to-face meeting in order to discuss our concerns. We request that this meeting take place before May 1st, when the first rate justifications for 2015 may be filed. For further information and to schedule a meeting, please contact DeAnn Friedholm, Health Reform Director, Consumers Union at 512-788-2888 or dfriedholm@consumer.org.

Thank you for your consideration of our request.

Signed:

~National Organizations~

- American Association on Health and Disability
- American Cancer Society Cancer Action Network
- American Nurses Association
- Community Catalyst
- Consumers Union, the policy and advocacy arm of *Consumer Reports*
- Families USA
- Mental Health America
- U.S. PIRG
- United Policyholders
- Young Invincibles
- Sargent Shriver National Center on Poverty Law, Illinois
- Kentucky Equal Justice Center
- Covering Kentucky Kids and Families
- Consumers for Affordable Health Care - Maine
- Maryland Women's Coalition for Health Care Reform
- Health Care for All - Massachusetts
- Michigan Consumers for Healthcare
- Minnesota Citizens Federation Northeast
- Greater Minnesota Health Care Coalition
- Missouri Health Advocacy Alliance
- MO Alliance for Retired Americans
- Jackson County Community Mental Health Fund, Missouri
- Missouri Centers for Independent Living (MOCIL)
- Saint Louis Effort for AIDS
- Mental Health America of Eastern Missouri
- Missouri Association for Community Action
- Missouri Family Health Council
- New Jersey Policy Perspective
- NJ Appleseed Public Interest Law Center
- Health Action New Mexico
- Interfaith Worker Justice, New Mexico
- League of Women Voters, New Mexico

~State Organizations~

- Arizona PIRG
- Consumer Watchdog, California
- Health Access California
- California PIRG
- Colorado Consumer Health Initiative
- Florida Alliance for Consumer Protection (FLACP)
- Florida CHAIN
- Georgians for a Healthy Future
- Campaign for Better Healthcare, Illinois
- American Nurses Association - Illinois
- AIDS Foundation of Chicago
- Illinois Public Health Association
- EverThrive Illinois

- New Yorkers for Accessible Health Coverage
- Citizen Action of New York
- Health Care For All - New York
- Community Service Society of New York
- North Carolina Justice Center
- UHCAN Ohio
- Single Payer Action Network of Ohio (SPAN Ohio)
- Oregon PIRG
- Center for Public Policy Priorities, Texas
- Texans Care for Children
- Legacy Community Health Services, Texas
- Utah Health Policy Project (UHPP)
- Voices for Utah Children
- Office of the Health Care Advocate, Vermont Legal Aid
- Virginia Poverty Law Center
- Northwest Health Law Advocates, Washington
- WA State Labor Council, AFL-CIO
- Washington State Nurses Association
- Tim Jost, NAIC Consumer Representative
- Jesse O'Brien, NAIC Consumer Representative, Oregon
- Christina Postolowski, NAIC Consumer Representative
- Andrea Routh, NAIC Consumer Representative, Missouri
- Jean Neal, Health Consumer, Board Member of the Missouri Health Advocacy Alliance

*NAIC Consumer Representatives
and Individuals*

- Elizabeth Abbott, NAIC Consumer Representative, California
- Amy Bach NAIC Consumer Representative, California
- Kathleen Gmeiner, NAIC Consumer Representative, Ohio
- Marguerite Herman, NAIC Consumer Representative, Wyoming