



September 09, 2011

Karen Weldin Stewart, CIR-ML
Commissioner
Delaware Department of Insurance
841 Silver Lake Blvd.
Dover, DE 19904-2465

Re: Delaware's Request for Adjustment to Medical Loss Ratio Standard

Dear Commissioner Stewart:

This letter responds to the request by the Delaware Department of Insurance (“DDI”), pursuant to section 2718 of the Public Health Service (“PHS”) Act, 42 U.S.C. §300gg-18, for an adjustment to the 80 percent medical loss ratio (“MLR”) standard applicable to the individual health insurance market in Delaware. The DDI has requested an adjustment of that standard to 65 percent, 70 percent, and 75 percent for the reporting years 2011, 2012, and 2013, respectively.

Section 2718 was added to the PHS Act by section 1001 of the Affordable Care Act (“ACA”) and requires issuers in the individual market to spend at least 80 percent of premium dollars on reimbursement for clinical services and for activities that improve health care quality for enrollees. Beginning in 2011, if an issuer does not satisfy the MLR standards, it is required to provide rebates to enrollees.

Section 2718 permits an adjustment to the 80 percent MLR standard for a State’s individual health insurance market if it is determined that applying this standard “may destabilize the individual market in such State.” The regulation implementing section 2718, 45 CFR Part 158, provides that an adjustment should be granted “only if there is a reasonable likelihood” that application of the 80 percent MLR standard will destabilize the particular State’s individual health insurance market. (45 CFR §158.301.) The regulation also provides the criteria the Secretary may consider “in assessing whether application of an 80 percent MLR . . . may destabilize the individual market in a State that has requested an adjustment.” (45 CFR §158.330.) These criteria are discussed in Part III of this letter.

The Center for Consumer Information and Insurance Oversight (“CCIIO”) within the Centers for Medicare & Medicaid Services (“CMS”) has reviewed the DDI’s application, as well as the supplemental information that the DDI provided to CCIIO in response to questions raised

by the application and the public comments filed with regard to the application.¹ After a careful examination of these materials and consideration of the criteria set forth in the statute and implementing regulation, we have determined that the evidence presented does not establish a reasonable likelihood that the application of the 80 percent MLR standard will destabilize the Delaware individual market. Consequently, we have determined not to adjust the MLR standard in the Delaware individual market and, thereby, ensure that consumers receive the full benefit of this provision of the Affordable Care Act. This letter explains the basis of our decision.

I. Summary of the Delaware Application

CCIIO received the DDI's request for an adjustment to the MLR standard on May 12, 2011. Among the information that the DDI included in support of its request were aggregated data for the Delaware individual health insurance market, a brief description of products offered in Delaware by Aetna and Golden Rule, and three letters from agents and brokers in support of the DDI's application.

On May 26, 2011, CCIIO requested from the DDI information needed in order for Delaware's application to be deemed complete. CCIIO concurrently sent the DDI a letter requesting additional information in relation to information the DDI had previously submitted. After the DDI responded to these requests, the DDI's application was deemed complete on July 11, 2011, and the processing period provided for in 45 CFR §158.345 began.

In addition, CCIIO that same day posted notice on its website that any public comments regarding Delaware's application were due by July 21, 2011, as provided in 45 CFR §158.342. CCIIO received 11 public comments before and five public comments during that period, all of which are addressed in this letter.

II. Overview of the Delaware Individual Health Insurance Market

According to Exhibit I of the DDI's June 6 letter ("Exhibit I"), a little more than 16,500 Delaware residents obtained health insurance coverage through Delaware's individual health insurance market in 2010. Currently there are six issuers actively writing individual coverage in Delaware, of which only three have at least 1,000 life-years.² These three issuers are: (1) Blue Cross Blue Shield of Delaware ("BCBS"); (2) Golden Rule Insurance Company ("Golden Rule"); and (3) Aetna Life Insurance Company ("Aetna").

According to the data in Exhibit I, the number of enrollees and market shares of Delaware individual health insurance market issuers in 2010 were:

¹ Unless otherwise noted, all documents and information described in this letter are posted on CCIIO's website at http://ccio.cms.gov/programs/marketreforms/mlr/mlr_delaware.html.

² Issuers with fewer than 1,000 life-years are not subject to rebate payments for the first reporting year. (45 CFR §158.230(d).) Life-years are the total number of months of coverage for enrollees during the year, divided by 12. (45 CFR §158.230(b).)

**Delaware Individual Market
Issuers' 2010 Enrollees and Market Share By Enrollment**

	Issuer	Enrollees	Market Share
1.	BCBS	9,862	59.7%
2.	Golden Rule	3,345	20.2%
3.	Aetna	2,946	17.8%
4.	Time	262	1.6%
5.	Freedom Ins Co	70	0.4%
6.	John Alden	46	0.3%
	TOTAL	16,531	100%

These numbers confirm the observations the DDI made in its June 8 letter that “BCBS, Aetna and Golden Rule are the dominant companies in the individual market” and that “BCBS has the overwhelming market share of the individual market in Delaware.”

According to the DDI’s application, the anticipated loss ratio (“ALR”) standard since January 1, 2010 for most of the products in the Delaware individual health insurance market (guaranteed renewable medical expense policies (“GRMEP”)) has been 60 percent. From December 17, 1984 to January 1, 2010, Delaware’s GRMEP ALR standard was 55 percent. According to the DDI, ALR is calculated as “the ratio of incurred claims to earned premiums for a given period.” In contrast to the Affordable Care Act’s MLR standard, Delaware’s ALR does not include adjustments for quality improvement activities, taxes, or credibility.

The DDI states that an issuer electing to withdraw from the Delaware individual health insurance market must provide at least 180 days notice to the Commissioner as well as its enrollees and may not reenter the individual market for five years.

The DDI notes in its application that “Delaware does not have mechanisms in place to provide consumers with options in the event issuers withdraw from the individual market.” Specifically, according to the DDI, Delaware does not require guaranteed issue in the individual market, and there is no issuer of last resort or Delaware-operated high risk pool.

III. Application of Regulatory Criteria to the Delaware Individual Market

Title 45 CFR §158.330 lists six criteria that the Secretary may consider “in assessing whether application of an 80 percent MLR ... may destabilize the individual market in a State.” They are:

- a) The 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 and the resulting impact on competition in the State;
- b) The number of individual market enrollees covered by issuers that are reasonably likely to exit the State absent an adjustment to the 80 percent MLR;

- c) Whether absent an adjustment to the 80 percent MLR standard consumers may be unable to access agents and brokers;
- d) The alternate coverage options within the State available to individual market enrollees in the event an issuer exits the market;
- e) The impact on premiums charged, and on benefits and cost-sharing provided, to consumers by issuers remaining in the market in the event one or more issuers were to withdraw from the market; and
- f) Any other relevant information submitted by the State's insurance commissioner, superintendent, or comparable official in the State's request.

The preamble to the regulation provides that 45 CFR §158.330 “does not set forth a single test” for determining whether application of an 80 percent MLR standard may destabilize the individual market in a State, but rather lists the “main criteria” to be considered in assessing such risk. (75 Fed. Reg. 74887 (Dec. 1, 2010).)

A. Number of issuers reasonably likely to exit the State

According to the DDI's June 6 letter, none of the three issuers with at least 1,000 life-years in Delaware's individual market – BCBS, Golden Rule, and Aetna – have provided a notice of exit to the DDI. However, in its June 8 letter, the DDI relates that “[a]lthough Aetna and Golden Rule have given no indication that they will exit the Delaware market, the Delaware Department of Insurance is concerned that if no relief from possible rebates is given to Aetna and Golden Rules [sic] via a reduced MLR requirement, it could cause companies to exit the market.” That letter also notes that “Aetna and Golden Rule have expressed interest in the DDI obtaining a waiver.”

Under 45 CFR §158.321(d)(2)(iii), applicants requesting an adjustment to the MLR standard are asked to calculate the estimated MLR for issuers in the State using the methodology provided for in the ACA and implementing regulation. The DDI's application calculates the estimated MLRs using data from calendar year 2010. These data will have a one to three year lag relative to each issuer's 2011 through 2013 results, the reporting years for which the DDI is requesting an adjustment to the 80 percent MLR standard.

The 2010 estimated MLRs are an imperfect proxy for the actual results issuers may generate if held to the 80 percent standard in 2011-2013. One reason for this is that the ACA was enacted at the close of the first quarter of 2010, presumably after pricing and other business decisions affecting MLRs had largely been made and implemented. Another reason historical data may constitute an imperfect proxy is that there can be year-to-year variability in issuers' claim experience, financial performance, and reported MLRs. Notwithstanding these limitations, the historical data remain the best available basis upon which to estimate the impact of the 80 percent standard in 2011-2013.

Three issuers in the Delaware individual market each had at least 1,000 life-years in 2010 and were thus at least partially credible (as defined in 45 CFR §158.230(c)). Therefore, only

these three issuers could be expected to be subject to rebate payments beginning in 2011 if their MLRs fall below the statutorily mandated 80 percent standard. The chart below shows, based upon the information provided by the DDI including the 2010 SHCEs,³ these three issuers' estimated 2010 MLRs, rebates based on 2010 MLRs and an 80 percent MLR standard, estimated 2010 pre-tax net gain in the individual market before payment of rebates, and estimated 2010 pre-tax net gain in the individual market if the issuer would have had to pay rebates in 2010.⁴

Delaware Individual Market
Credible Issuers' 2010 Estimated Federal MLRs, Rebates and Pre-Tax Net Gains
(\$ in millions)

Issuer	MLR After Credibility Adjustment	Estimated Rebates⁵	Pre-Tax Net Gain Before Rebates	Pre-Tax Net Gain After Rebates
BCBS	88.3%	\$0.0	(\$1.3)	(\$1.3)
Golden Rule	70.9%	\$0.8	\$1.9	\$1.1
Aetna	69.1%	\$0.6	\$1.9	\$1.3

BCBS, the dominant issuer in the market, had a 2010 MLR well in excess of the 80 percent MLR standard. According to Exhibit II to the DDI's June 6 letter, BCBS does not expect to owe rebates in 2011-2013. Thus, it is highly unlikely that section 2718's MLR standard will cause BCBS to leave the Delaware individual health insurance market. The DDI states in its June 8 letter that "BCBS has not expressed an interest in the waiver process."

The remaining two issuers – Golden Rule and Aetna – both had MLRs close to 70 percent after the credibility adjustments. These issuers must adjust some combination of their operations and financial targets in order to satisfy an 80 percent MLR standard. In its basic form under the ACA and implementing regulation, the MLR is the ratio of monies spent on incurred claims and quality improvement activities to premium revenue (as adjusted for certain State and Federal taxes and fees). (45 CFR §158.221.) Therefore, all other things being equal, Golden Rule and Aetna would either need to lower premiums or increase expenditures on claims or quality improving activities, or otherwise risk paying rebates to enrollees. Assuming that Golden Rule and Aetna did not reduce their administrative costs, either of these actions could lead to a decrease in profitability, which may be a consideration for each company in assessing whether to remain in the Delaware individual market. However, as shown in the chart above, both Golden Rule and Aetna would retain significant pre-tax net gains in the Delaware individual health insurance market even after payment of rebates under an 80 percent MLR standard. Expressed as a percentage of premium, the pre-tax net gain of Aetna and Golden Rule after payment of rebates would still be 19% and 12%, respectively. Therefore, the potential impact of rebates on

³ 2010 Supplemental Health Care Exhibit ("SHCE") that issuers file with the National Association of Insurance Commissioners ("NAIC"). The 2010 SHCEs were submitted to CCIIO with the DDI's June 8 letter.

⁴ "Pre-tax net gain" is the net gain or loss plus any Federal, State, or other taxes and fees paid, as reported on the 2010 SHCE.

⁵ The DDI's rebate estimates are calculated without subtracting taxes and fees from earned premium, as provided for in 45 CFR §158.240(c). The rebate estimates shown in the table above correct this error, and are consequently \$179,211 lower than the DDI's estimates.

the profitability of these two issuers does not appear to be likely to create a financial incentive for Golden Rule and Aetna to exit the market.

A number of public comments received by CCIIO assert in general terms that an adjustment to the 80 percent MLR standard is unwarranted due to the high profitability of issuers in the Delaware health insurance market; two comments specifically highlight the fact that both Golden Rule and Aetna generate sufficient gains in the Delaware individual market to remain profitable even after payment of rebates.

B. Number of enrollees covered by issuers that are reasonably likely to exit the State

As stated previously, none of the three issuers with at least 1,000 life-years in Delaware's individual market – BCBS, Golden Rule, and Aetna – have provided a notice of exit. Although the DDI expresses concern that Golden Rule and Aetna may withdraw absent an adjustment to the 80 percent MLR standard, as discussed in Part A above, both these issuers would remain substantially profitable in the Delaware individual market even after payment of rebates under an 80 percent MLR standard, and thus are not likely to have a sufficient financial incentive to withdraw. Furthermore, an issuer electing to withdraw from the Delaware individual health insurance market may not reenter the individual market for five years. This is a significant disincentive to exiting the market for an issuer who will remain substantially profitable even after payment of rebates. Golden Rule and Aetna provide coverage to 3,345 and 2,946 enrollees, respectively.

C. Consumers' ability to access agents and brokers

The DDI asserts that without an adjustment to the MLR standard, the major issuers in the Delaware individual market will reduce the level of agent compensation, “resulting in a huge decrease in the number of active agents selling individual health insurance products.”

According to the DDI's June 8 letter, Delaware has “over 2,000 agents licensed for the health line of authority, but there is no way of determining how many sell in the individual market.” This letter also states that “[p]rior to 2011, agent commissions ranged from 10% - 20%, the commissions were reduced to and [sic] average of 4% - 10%.” The letter also notes that “[i]n talking with agents, it appears that if the MLR [adjustment request] is granted, agents would be able to negotiate the current levels up somewhat.” Three agent and broker organizations and a brokerage firm have submitted comments supporting the DDI's application and expressing a general apprehension that an 80 percent MLR standard may affect agents' and brokers' compensation and ability to continue to service Delaware consumers.

As discussed previously, only three issuers in the Delaware individual market are expected to be subject to rebate requirements: BCBS, Golden Rule, and Aetna. In 2010, BCBS had an 88.3 percent MLR, and the DDI has not indicated, nor does it appear likely, that BCBS will need to reduce its commission rates in order to keep its MLR at or above 80 percent. According to Aetna's SHCE, Aetna was already paying a relatively low percentage of its premiums (2 percent) as commissions in the Delaware individual market in 2010. Given this low number, it is not clear that Aetna is likely to further reduce its level of agent compensation.

On its SHCE, Golden Rule reported commissions that were relatively high at 10 percent of earned premium. However, as discussed previously, Golden Rule would retain a substantial portion of its pre-tax net gain even after payment of rebates under an 80 percent MLR standard, and assuming that its commission rates remain unchanged. Therefore, it is not clear that Golden Rule would find it necessary to reduce commissions to meet an 80 percent MLR standard. Nor is it clear that any potential reduction in the commissions associated with Golden Rule's business in the individual market would be sufficient to so significantly impair the profitability of a large enough number of Delaware agents and brokers as to jeopardize consumers' ability to access agents and brokers.

Finally, we also note that one of the public comments relates that "data on agent commissions in Delaware provided by the National Association of Health Insurance Underwriters ["NAHU"] to the NAIC show most insurers have retained commissions at current levels for the past three years, even though increased premiums have in fact resulted in increased commissions, since commissions are generally written as a percentage of premium." The same commenter notes that "[t]he federal rule ... does not guarantee that broker and agent's compensation will never be reduced, but rather tha[t] consumers must have adequate access to brokers and agents." Her assessment is that "[n]o evidence is provided that implementation of an 80 percent MLR will reduce access." We note that, according to NAHU's report to the NAIC, at least eight out of nine Delaware issuers that reported data to NAHU did not reduce commissions between 2010 and 2011.

In sum, based upon the facts the DDI presents in its application, it is not clear that implementation of an 80 percent standard in the Delaware individual health insurance market would cause consumers to become unable to have adequate access to agents and brokers.

D. *Alternate coverage options*

As noted before, the DDI expresses concern that Golden Rule and Aetna may leave the Delaware individual health insurance market, even though neither issuer has provided a notice of exit. Golden Rule provides coverage to 3,345 enrollees, while Aetna does so for 2,946 enrollees.

The DDI states in its June 8 letter that "it is not likely" that remaining issuers in the Delaware individual market would pick up all the enrollees of Golden Rule and Aetna if either or both of those issuers left that market. Additionally, as the DDI points out, Delaware does not require guaranteed issue in the individual market, and enrollees of exiting issuers seeking replacement coverage from the remaining issuers would be subject to medical underwriting. As the DDI further points out, if such enrollees are unable to obtain coverage from the remaining issuers due to pre-existing conditions, these enrollees would be left without coverage for six months before becoming eligible for the PCIP.⁶ Therefore, there is a risk that some consumers may be temporarily left without coverage if either Aetna or Golden Rule were to exit the market; however, as discussed in Parts A and B above, it is our assessment that the likelihood of market exit by either issuer is low.

⁶ The Federal Pre-Existing Condition Insurance Plan. See generally, <https://www.pcip.gov/FAQ.html>.

E. Impact on premiums, benefits, and cost-sharing of remaining issuers

In its June 8 letter, the DDI explains that if Golden Rule or Aetna does withdraw from the market, “[p]remiums [of remaining issuers] will increase at the same rate whether or not the DDI request is granted.” The DDI advises that “[t]he DDI has a very strong rate review process and most approved increases are below 10%.” Thus, it does not appear that the potential impact on premiums, benefits, and cost-sharing of remaining issuers should be a factor in evaluating Delaware’s request for an adjustment to the MLR standard.

F. Other relevant information submitted by the State

The DDI expresses concern that Coventry, which, according to the DDI, is planning to enter the Delaware individual market, would cancel its plans absent an adjustment to the MLR standard. The DDI explains that Coventry is “still deciding what to do” and had “expressed interest in the outcome of the Department of Insurance’s MLR [adjustment] application.” The DDI did not further elaborate upon how the outcome of its MLR adjustment application would impact Coventry’s decision-making regarding whether to enter the Delaware individual health insurance market.

Nor does the DDI address in its application what impact the MLR regulation’s provision regarding newer experience, 45 CFR §158.121, might have upon Coventry’s possible entry into the market. That provision allows an issuer with 50 percent or more of its experience during an MLR reporting year resulting from new business to exclude the experience of these policies from MLR calculations for that reporting year. Thus, Coventry likely would not be subject the MLR regulation’s rebate requirement the first year it enters the Delaware individual market, nor would it be subject to rebates until it accumulated more than 1,000 life-years in that market. In sum, there is insufficient evidence to conclude that implementation of an 80 percent MLR standard will discourage Coventry from offering coverage in Delaware.

IV. Summary of Public Comments

As part of its application, the DDI has provided letters it received from the Delaware Chapter of the National Association of Insurance and Financial Advisors (“NAIFA-DE”), the Delaware Life and Health Agent Advisory Council, and a Delaware brokerage firm. Those letters stress that, due to the potential for significant cuts to agent compensation, Delaware consumers could face major disruption to the services provided by agents and brokers unless an adjustment to the 80 percent MLR standard is granted. The DDI has also provided two comments that it received from Delaware residents shortly after filing its application, one of which was also submitted directly to CCIIO. Those comments express in general terms strong opposition to the DDI seeking an adjustment to the 80 percent MLR standard.

In addition, CCIIO received 15 other comments, from consumers, a public interest organization, and NAHU, between the time CCIIO received the DDI’s application on May 12, 2011 and the closing of the public comment period on July 21, 2011. Only two of those comments, one from NAHU and one from a Delaware consumer, support the DDI’s application,

concurring with the DDI's concern that implementation of an 80 percent MLR standard may cause some Delaware individual market issuers to leave the market.

Most of the 13 remaining comments, including one from the Delaware Alliance of Health Care Reform, strongly object to the DDI's application in general terms. Two more detailed consumer comments note that neither Aetna nor Golden Rule has stated that it intends to leave Delaware, and both companies are operating in many States that have not requested adjustments. These two commenters also point out that both companies are making large profits in their non-group business in Delaware and could pay estimated rebates for the foreseeable future and remain profitable.

We acknowledge the views and concerns expressed in these comments. They are discussed, many in great detail, in the body of this letter.

V. Conclusion

As described at the outset of this letter, section 2718 of the PHS Act permits the Secretary to adjust the 80 percent MLR standard in the individual market if it is determined that applying this standard "may destabilize the individual market in [the] . . . State." The regulation implementing section 2718 provides that an adjustment should be granted "only if there is a reasonable likelihood" that application of the 80 percent MLR standard will destabilize the particular State's individual health insurance market. (45 CFR §158.301).

After applying the standards and criteria set out in section 2718 and 45 CFR Part 158 to the information submitted by the DDI, we conclude that the evidence presented does not establish a reasonable likelihood that implementation of an 80 percent MLR standard may destabilize the Delaware individual market. We reach this conclusion for the reasons outlined in the analysis under the criteria set out above, and based on the specific characteristics of the Delaware individual market addressed in that analysis.

As noted in Part III.A above, no issuers have provided notice of withdrawal from the Delaware individual market. Three issuers were at least partially credible in 2010 and would thus be expected to be subject to MLR rebate provisions. However, the largest of these three, BCBS, would not owe rebates because it had an MLR of 88% and has not expressed an interest in the DDI's request for an adjustment to the MLR standard. Although the other two issuers, Golden Rule and Aetna, would be expected to owe rebates assuming they do not adjust their business models, both these issuers generated significant profits in the Delaware individual market and would remain substantially profitable even after payment of rebates. There is no basis to conclude, based on these facts, that there is a reasonable likelihood that these issuers may leave the market. Consequently, no enrollees are likely to require alternate coverage due to withdrawal of any issuer.

As discussed in Part III.C above, while the DDI, as well as four public commenters from the agent and broker community, expresses concern that an 80 percent MLR standard will reduce consumers' access to agents and brokers, none provide specific data to support this concern. On the contrary, one of the public comments points out that data recently provided by NAHU to the

NAIC do not show commission rate reductions in Delaware. Furthermore, in light of BCBS' high MLR and Golden Rule's and Aetna's high profitability, it is not immediately obvious that any of these three issuers would need to reduce commissions in order to meet an 80 percent MLR standard. In sum, there is insufficient evidence to conclude that an 80 percent MLR standard would significantly reduce consumers' ability to access agents and brokers in Delaware.

As further discussed in Part III.F, while the DDI expresses concern that, absent an adjustment to the 80 percent MLR standard, Coventry may cancel its plans to enter the Delaware individual market, the MLR provisions are specifically designed to accommodate the circumstances of new market entrants.

For these reasons, we conclude that an adjustment to the 80 percent MLR standard in the Delaware individual market is not appropriate.

Pursuant to 45 CFR §158.346, the DDI may request reconsideration of the determination issued in this letter. A request for reconsideration must be submitted in writing to MLRAdjustments@hhs.gov within ten days of the date of this letter, and may include any additional information in support of such request. A determination on a request for reconsideration will be issued within 20 days of the receipt of the request.

Please contact me should you have any questions.

Sincerely,

/Signed, SBL, September 9, 2011/

Steven B. Larsen
Deputy Administrator and Director,
Center for Consumer Information
and Insurance Oversight