DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Administrator
Washington, DC 20201

MAR - 8 2018

Governor C.L. "Butch" Otter
Office of the Governor State Capitol
P.O. Box 83720
Boise, Idaho 83720-0043

Director Dean L. Cameron
State of Idaho Department of Insurance
P.O. Box 83720
700 West State Street, 3rd Floor
Boise, Idaho 83720-0043

Dear Governor Otter and Director Cameron:

As you know, the Patient Protection and Affordable Care Act (PPACA)[1] is failing to deliver quality health care options to the American people and has damaged health insurance markets across the nation, including Idaho's. Most Idahoans who did not receive federal premium subsidies have been exposed to large premium rate increases since 2014. In fact, premium rates for coverage sold through the Exchange in Idaho have increased by 91.4 percent from 2014 to 2018. Additionally, Idaho health insurance issuers have been incurring significant losses in the individual market since 2014 – collectively over $300 million since 2014. As demonstrated by his October 12, 2017 Executive Order, "Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States," the President is committed to doing everything in his power to increase competition, choice, and access to lower-priced, high-quality health care options for all Americans.[2] A key component of that effort is providing states with as much flexibility as possible under the law to address the unique needs of their health insurance markets.

We sincerely appreciate your dedication to the people of Idaho and your efforts to address the damage caused by the PPACA. This Administration recognizes and supports the fundamental role states play in regulating insurance. We further recognize that states face unique challenges in repairing the individual health insurance market and we are committed to working with states to provide flexibility to do so.

However, the PPACA remains the law and we have a duty to enforce and uphold the law.

---

[1] The Patient Protection and Affordable Care Act (Public Law 111–148) was enacted on March 23, 2010. The Health Care Education Reconciliation Act of 2010 (Public Law 111-154), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this letter, we refer to the two statutes collectively as the "Patient Protection and Affordable Care Act" or "PPACA".

[2] Available at: https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-healthcare-choice-competition-across-united-states/.

Based on our review of Idaho Bulletin No. 18-01, *Provisions for Health Carriers Submitting State-Based Health Benefit Plans,* we have reason to believe that Idaho may not be substantially enforcing provisions of the PPACA. If a state fails to substantially enforce the law, the Centers for Medicare & Medicaid Services (CMS) has a responsibility to enforce these provisions on behalf of the State. This is certainly not our preference; we believe that Idaho has options within the law to meaningfully implement many of the policy proposals contained in the Bulletin, to address the crisis facing the state's individual health insurance market. I outline a few of those options below.

Idaho Bulletin No. 18-01 allows for the sale of new health products, called "State-based plans." The Bulletin appears to permit non-compliance with several provisions in Part A of title XXVII of the Public Health Service Act (PHS Act) with respect to these state-based plans. We have identified in Appendix A the PHS Act requirements that, based on the bulletin, it appears Idaho may not substantially enforce with respect to the state-based plans.

Under section 2723 of the PHS Act (42 U.S.C. § 300gg-22) and implementing regulations at 45 C.F.R. § 150.101, et seq., states have primary enforcement authority over the Part A market requirements with respect to health insurance issuers that issue, sell, renew or offer health insurance coverage in the state in the individual or group market. Pursuant to section 2723(a)(2) of the PHS Act, however, if the Secretary of the Department of Health and Human Services (HHS) makes a determination that a state has failed to substantially enforce a provision of Part A of title XXVII of the PHS Act, the Secretary must enforce that provision in the state. Accordingly, on behalf of HHS, CMS has a responsibility to enforce the Part A market requirements once a determination is made that a state is not substantially enforcing one or more of those provisions.

If CMS obtains information[3] that a state may not be substantially enforcing the Part A market requirements, CMS may initiate a process described in 45 C.F.R. § 150.209 through § 150.219 to determine whether a state is failing to substantially enforce these requirements.[4] 45 C.F.R. §§ 150.211 and 150.213 require CMS to send written notice to the state identifying the PHS Act requirements that may not be substantially enforced, describing the factual basis for the allegation of a failure to enforce, explaining that the consequence of a State's failure to substantially enforce PHS Act requirements is that CMS will enforce them, and advising the State that it has 30 days from the date of the notice to respond, unless the time for response is extended as described in 45 C.F.R. § 150.215. This letter serves as this notice, based on the issuance of Idaho Bulletin No. 18-01.

---

[3] 45 C.F.R. § 150.205 identifies sources of information that may trigger an investigation of State enforcement, including, in pertinent part, information learned during informal contact between CMS and State officials, a report in the news media, information from the governors and commissioners of insurance of the various States regarding the status of their enforcement of PHS Act requirements, and any other information that indicates a possible failure to substantially enforce.

[4] 45 C.F.R. § 150.203(b).

In accordance with 45 C.F.R. § 150.217, if at the end of the 30-day period (and any applicable extension), the State has not established to CMS's satisfaction that the State is substantially enforcing the applicable PHS Act requirements, CMS will consult with state officials, notify the state's officials of its preliminary determination that the state has failed to substantially enforce the requirements and that the failure is continuing, and provide the state a reasonable opportunity to show evidence of substantial enforcement. Under 45 C.F.R. § 150.219, if, after providing notice and a reasonable opportunity for the State to show that it has corrected any failure to substantially enforce, CMS finds that the failure to substantially enforce has not been corrected, CMS will notify the state of CMS's final determination. The final determination notice will identify the PHS Act requirements CMS is enforcing in the state and the effective date of CMS's enforcement in the state.

If CMS assumes enforcement authority, CMS will notify issuers in the state that they must submit policy forms and rate filings, as applicable, to CMS for review. After collection and review of policy forms and rate filings, as applicable, for compliance with the respective Part A market requirements, CMS will notify issuers of any concerns. CMS also will conduct targeted market conduct examinations, as necessary, and respond to consumer inquiries and complaints to ensure compliance with the Part A market requirements. CMS will work cooperatively with the state to address any concerns.

If any health insurance issuer that is subject to CMS's enforcement authority fails to comply with the PHS Act requirements, it may be subject to civil money penalties, as described in 45 C.F.R. § 150.301 through § 150.347. If CMS assumes enforcement authority in Idaho, CMS could shortly thereafter issue a cease and desist letter to any issuer who received approval from the state to offer Idaho state-based plans. If any issuer does not comply with the cease and desist letter by, for example, selling non-compliant plans in the State, CMS, as the primary enforcer, could initiate an investigation of the potential violation and based on the outcome, could impose a civil money penalty for each violation of up to $100 each day, for each responsible entity, for each individual affected by the violation, in accordance with 45 C.F.R. § 150.315.

At any time, a State that is willing and able may assume enforcement authority of the Part A market requirements. When that happens, CMS will work with the State to ensure an effective transition, as outlined in 45 C.F.R. § 150.221.

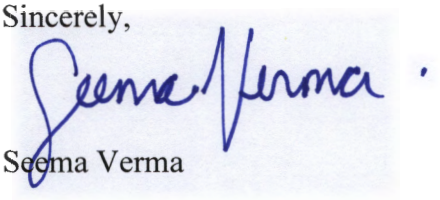
Pursuant to the process described above, Idaho has 30 days from the date of this letter to respond to the concerns that Idaho may not be substantially enforcing the identified provisions of the PHS Act based on Idaho Bulletin No. 18-01. The state's response should include any information that the State wishes CMS to consider in making the preliminary determination described in 45 C.F.R. § 150.217.

On February 21, 2018, in response to the President's Executive Order, the Departments of HHS, Labor, and the Treasury published a proposed rule that would expand the availability of short-term, limited-duration health insurance by allowing consumers to buy these plans with health coverage for any period of less than 12 months, rather than the current maximum period of less than three months.

Notwithstanding our concerns regarding the Bulletin's inconsistency with the Part A market requirements, we believe that, with certain modifications, these state-based plans could be legally offered under the PHS Act exception for short-term, limited-duration plans. I encourage you to continue to engage in a dialogue with my staff regarding this and other potential options.

I hope that we will continue to work together to explore ways in which Idaho may achieve its policy goals with respect to State-based plans while retaining its role as the primary enforcer of the Part A market requirements. I look forward to working closely with you and your staff on these matters, as well as on other ways we can support Idaho's efforts to repair its health insurance markets, including with respect to the state's section 1115 demonstration waiver and section 1332 state innovation waiver applications.

Sincerely,



Seema Verma

Appendix

Idaho Bulletin Compared to Federal Law[5]

The following table identifies those PHS Act requirements that, based on Idaho Bulletin No. 18-01, CMS believes Idaho may not substantially enforce with respect to the State-based plans.

Idaho Bulletin No. 18-01	PHS Act Provision
Preexisting Condition Coverage Carriers must waive any preexisting condition exclusion for any applicant with evidence of qualifying previous coverage within 63 days of when the new state-based plan coverage takes effect.	**Sec. 2704. Prohibition of Preexisting Condition Exclusions or Other Discrimination Based on Health Status** A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.
Premium Rates Age rating must not exceed a 5:1 ratio among individuals or dependents ages 20 and older. The same age factor must apply to all dependent children up to age 26. The dependent child factor must fall within the 5:1 ratio, and a premium may be charged for each child. The bulletin permits tobacco use as a consumer-level adjustment from the plan adjusted index rate if used as a single factor that does not vary by age or geography. The bulletin does not specify that such rate shall not vary by more than 1.5 to 1.	**Sec. 2701. Fair Health Insurance Premiums** With respect to the premium rate charged by a health insurance issuer for health insurance coverage offered in the individual or small group market, such rate shall vary with respect to the particular plan or coverage involved only by (1) whether such plan or coverage covers an individual or family; (2) rating area, as established in accordance with section 2701(a)(2); (3) age, except that such rate shall not vary by more than 3 to 1 for adults; and (4) tobacco use, except that such rate shall not vary by more than 1.5 to 1.

[5] Idaho Bulletin No. 18-01 is silent on several provisions of Federal law including, but not limited to, the standard and expedited exception requests for review of a decision that a drug is not covered by a plan as required by 45 C.F.R. § 156.122(c), which implements section 2707 of the PHS Act and section 1302 of the PPACA; coverage for individuals participating in approved clinical trials as required by section 2709 of the PHS Act; the prohibition of rescissions pursuant to section 2712 of the PHS Act; and coverage of dependent students on medically necessary leave of absence as required by sections 2728 and 2753 of the PHS Act. The bulletin is also silent on the Women's Health and Cancer Rights Act of 1998 and the Genetic Information and Nondiscrimination Act. Whether further action is required on our part in these areas and the areas listed in the chart in this appendix will be dictated by the nature of Idaho's answer and the information provided in response to this letter.

Idaho Bulletin No. 18-01	PHS Act Provision
Annual Limits The Department will consider health plans with an overall annual dollar benefit limit of no less than $1 million per individual. Any individual reaching $1 million in annual paid benefits must be assisted by the carrier in transitioning without a break in coverage to one of the carrier's exchange-certified health plans.	**Sec. 2703. Guaranteed Renewability of Coverage** If a health insurance issuer offers health insurance coverage in the individual or group market, the issuer must renew or continue in force such coverage at the option of the plan sponsor or the individual, as applicable, unless one of the general exceptions provided in section 2703(b) of the PHS Act is met. An individual reaching $1 million in annual paid benefits does not constitute such an exception. **Sec. 2711. No Lifetime or Annual Limits** A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish lifetime or annual limits on the dollar value of benefits for any participant or beneficiary on essential health benefits under section 1302(b) of the PPACA.
Medical Underwriting/Risk Factor Underwriting criteria must be limited to those questions found on the Idaho Universal Health Statement Addendum and available claims data. The resulting risk factor must follow Idaho Code and therefore must not result in a premium more than 50% above or below the carrier's filed plan adjusted index rate after applying all allowable case characteristics.	**Sec. 2705. Prohibiting Discrimination Against Individual Participants and Beneficiaries Based on Health Status** A group health plan, and a health insurance issuer offering group or individual health insurance coverage, may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health status-related factor in relation to the individual or any dependents enrolled under the plan. **Sec. 2701. Fair Health Insurance Premiums** With respect to the premium rate charged by a health insurance issuer for health insurance coverage offered in the individual or small group market, such rate shall not vary with respect to the particular plan or coverage involved by any other factor not described in Section 2701(a)(1)(A).
Essential Health Benefits The bulletin omits from its list of minimum health benefits coverage of pediatric services, including oral and vision care, and habilitative services. Additionally, the bulletin states, "Maternity must be included in at least one state-based plan."	**Sec. 2707. Comprehensive Health Insurance Coverage** A health insurance issuer that offers health insurance coverage in the individual or small group market is required to ensure that such coverage includes the essential health benefits package required under section 1302(a) of the PPACA. Section 1302(b)(1)(D), 1302(b)(1)(G) and 1302(b)(1)(J) of the PPACA define maternity and newborn care; rehabilitative and habilitative services and devices; and pediatric services, including oral and vision care, as essential health benefits, respectively.
Prescription Drugs The bulletin includes prescription drugs as a minimum required benefit but only provides generic, brand-	**Sec. 2707. Comprehensive Health Insurance Coverage** The bulletin does not specify that issuers must cover the greatest of (i) one drug in every United States Pharmacopeia (USP) category and class; or (ii) the same number of prescription

Idaho Bulletin No. 18-01	PHS Act Provision
name, and specialty drugs as examples.	drugs in each category and class as the EHB-benchmark plan, as required by 45 C.F.R. § 156.122(a)(1), which implements section 2707 of the PHS Act and section 1302 of the PPACA.
Maximum Out-of-Pocket Maximum out-of-pocket provisions shall be inclusive of all deductibles, copayments, coinsurances, or other cost-sharing for all minimum health benefits. The maximum out-of-pocket is allowed to be partitioned to have a separate maximum for specific services, such as a medical maximum out-of-pocket separate from a prescription drug maximum out-of-pocket.	**Sec. 2707. Comprehensive Health Insurance Coverage of the PHS Act and Sec. 1302 Essential Health Benefits Requirements of the PPACA** • The term ''cost-sharing'' includes deductibles, coinsurance, copayments, or similar charges; and any other expenditure required of an insured individual which is a qualified medical expense (within the meaning of section 223(d)(2) of the Internal Revenue Code of 1986) with respect to essential health benefits covered under the plan. • The cost-sharing incurred under a health plan with respect to self-only coverage for a plan year beginning in a calendar year after 2014 shall not exceed the dollar amounts in effect under section 223(c)(2)(A)(ii) of the Internal Revenue Code of 1986 for self-only and family coverage, increased by an amount equal to the product of that amount and the premium adjustment percentage under section 1302(c)(4) for the calendar year. • The cost-sharing incurred under a health plan with respect to coverage other than self-only coverage for a plan year beginning in a calendar year after 2014 shall not exceed twice the dollar amount in effect under section 223(c)(2)(A)(ii) of the Internal Revenue Code of 1986, increased by an amount equal to the product of that amount and the premium adjustment percentage under section 1302(c)(4) of the PPACA for the calendar year. If the amount of any such increase is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.
Preventive Services The bulletin includes preventive care as a minimum required benefit but only includes physicals and immunizations as examples. The bulletin does not state that coverage without cost sharing of the preventive services specified in section 2713 of the PHS Act is required.	**Sec. 2713. Coverage of Preventive Health Services** A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— (1) evidence-based items or services that have in effect a rating of ''A'' or ''B'' in the current recommendations of the United States Preventive Services Task Force; (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the

Idaho Bulletin No. 18-01	PHS Act Provision
	comprehensive guidelines supported by the Health Resources and Services Administration. (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.