



**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

Roger A. Sevigny
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

BULLETIN

Docket No.: INS No. 11-019-AB

TO: All New Hampshire Licensed Health Carriers

FROM: Roger A. Sevigny, Insurance Commissioner 

SUBJECT: External Review and the Patient Protection and Affordable Care Act

DATE: September 12, 2011

The purpose of this bulletin is to clarify external review requirements for New Hampshire health insurance carriers in light of the federal Patient Protection and Affordable Care Act of 2009 ("ACA" or "the Act") and related federal regulations and determinations.

In order to ensure conformity with the Act, effective September 8, 2011 the New Hampshire Insurance Department ("Department") has altered its external review program in the following three respects:

1. There is no longer a minimum amount in controversy requirement to obtain external review. Previously, there was a minimum requirement of \$400 over the course of a policy year.
2. A claimant whose treating health care provider certifies that adherence to the standard external review time frames would seriously jeopardize the life or health of the covered person or would jeopardize the covered person's ability to regain maximum function, may obtain external review while pursuing an internal grievance and prior to the completion of this grievance.
3. The Department's list of approved independent review organizations ("IROs") for purposes of external review includes only IROs accredited by a nationally recognized accreditation organization.

These changes were ordered by a September 7, 2011 declaration of the legislative joint health care reform oversight committee. [Attachment A](#).

Background and Legal Authority

Since at least September 2000, New Hampshire law has required health insurance carriers to provide for external review. The external review provisions, RSA 420-J:5-a through 5-e, are housed in New Hampshire's managed care statute, RSA chapter 420-J. The Department has also adopted administrative rules, Ins PART 2703, governing external review. The external review requirements apply to fully insured health plans, but not to self-funded health benefits.¹

Under the ACA, each state must provide for external review meeting federal standards set forth in the Act. On July 29, 2011, based on discrepancies between state and federal law with respect to the three issues listed above, the federal Department of Health and Human Services ("HHS") determined that New Hampshire's external review process did not meet minimum federal standards adopted under the Act. Attachment B. If this HHS determination were to become final, as of January 1, 2012 all issuers of non-grandfathered health insurance plans and policies in New Hampshire's group and individual markets would be subject to the federally-administered external review process, rather than the longstanding state process.

To preserve its regulatory authority and prevent confusion, on August 22, 2011 the Department requested review of the HHS determination. Attachment C. The Department informed HHS that the joint legislative health reform oversight committee created in the recently enacted H.B. 601 (2011 N.H. Laws 264, codified as RSA chapter 420-N) had the ability to declare specific state law provisions preempted where they conflict with, and prevent the application of, specific provisions of the Act, and that the Department intended to seek a declaration from the committee on the external review provisions.

On September 7, 2011, in order to prevent the federal external review process from taking effect with respect to fully insured health insurance plans in New Hampshire, the oversight committee issued a declaration under RSA 420-N:6 finding that three specific New Hampshire provisions were inconsistent with, and prevented the application of, the Act and regulations adopted under the Act. Attachment A. The oversight committee declared the three provisions preempted, and ordered the Department to implement the requirements of the Act with respect to those three areas. Attachment A. The effect of this declaration is to retain the New Hampshire external review process for fully insured plans. Any provision of Ins PART 2703 that is inconsistent with the declaration is also preempted.

Self-Insured Employers

¹ Under Ins 2703.01(a), the external review requirements apply to any health carrier that makes an adverse determination concerning a covered person. In addition, RSA 420-J:3, XXV defines "managed care plan" to include any health care plan "that either requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with, or employed by the health carrier." These terms encompass all fully insured plans issued in the state other than non-network based indemnity plans. Self-funded plans are expressly excluded from the state's external review program. Ins 2703.01(b)(7).

Because New Hampshire's external review law applies only to fully insured plans, external review for health benefits provided by self-funded employers is covered by the federal external review process. Self-insured employers, third party administrators and health insurance carriers providing administrative services relating to such benefits should review the HHS regulations and guidance setting forth applicable deadlines and requirements for self-insured employers complying with the ACA's external review standards.

Within HHS, the external review program is administered by the Center for Consumer Information and Insurance Oversight ("CCIIO"), a part of the Centers for Medicare & Medicaid Services ("CMS"). The CMS/CCIIO website contains links to pertinent regulations and guidance documents: <http://cciio.cms.gov/resources/regulations/index.html#ea>

Please contact Jennifer J. Patterson, Life, Accident and Health Legal Counsel, at jennifer.patterson@ins.nh.gov or (603) 271-2261 with any questions about this bulletin.

Attachment A: September 7, 2011 oversight committee declaration

Attachment B: July 29, 2011 DHHS letter to Department

Attachment C: August 22, 2011 Department letter to DHHS

Joint Health Care Reform Oversight Committee

Declaration on External Review

WHEREAS, this oversight committee has authority under RSA 420-N:6 to find that any specific provision within the insurance code (Title XXXVII) is inconsistent with and prevents the application of the Patient Protection and Affordable Care Act of 2009, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, including federal regulations and guidance issued thereunder (“the Act”), and

WHEREAS, upon the committee’s finding of inconsistency, the insurance commissioner may implement a specific provision of the Act as if it were state law, and thereby prevent the federal government from imposing its own process on the state; and

WHEREAS, the committee wishes to prevent a default to federal regulation and to preserve the state’s status as the sole regulator of the business of insurance within New Hampshire, and specifically to retain its external review authority under New Hampshire law; and

WHEREAS, on July 29, 2011 the federal Department of Health and Human Services determined, based on minor discrepancies between state and federal law, that New Hampshire’s external review process did not meet minimum federal standards adopted under the Act; and

WHEREAS, without further action by the committee, as of January 1, 2012 all issuers of non-grandfathered health insurance plans and policies in New Hampshire’s group and individual markets will be subject to the federally-administered external review process; and

WHEREAS, the department wishes to continue to be the entity providing external review to New Hampshire health insurance consumers, pursuant to long-standing New Hampshire law;

NOW THEREFORE, pursuant to its authority under RSA 420-N:6, the committee makes the following findings with respect to inconsistency between the Insurance Code and the Act in three specific areas relating to external review, and orders the commissioner to implement the requirements of the Act, as follows:

1. Amount in controversy

- a. 45 CFR 147.136(c)(2)(v), a federal regulation adopted under section 2719 of the Act, provides that a state external review process does not

meet federal minimum standards if there is a minimum amount in controversy to obtain external review of an adverse determination.

- b. RSA 420-J:5-a, I(d) provides that New Hampshire health insurance consumers shall have the right to external review of an adverse determination with respect to health insurance coverage only when the amount in controversy equals or exceeds \$400.
- c. RSA 420-J:5-a, I(d) is inconsistent with and prevents the application of 45 CFR 147.136(c)(2)(v) and section 2719 of the Act.
- d. In order to prevent a default to the federal external review process, the insurance commissioner shall not enforce the minimum amount in controversy requirement contained in RSA 420-J:5-a, I(d).

2. Simultaneous internal and external review in urgent care situations

- a. 45 CFR 147.136(c)(2)(iii), a federal regulation adopted under section 2719 of the Act, provides that a state external review process shall not meet federal minimum standards unless state law allows simultaneous internal and external review in urgent care situations.
- b. RSA 420-J:5-c, the provision of Title XXXVII that governs expedited external review, does not expressly allow a claimant to request simultaneous internal and external review in urgent care situations.
- c. RSA 420-J:5-c is inconsistent with and prevents the application of 45 CFR 147.136(c)(2)(iii) and section 2719 of the Act.
- d. In order to prevent a default to the federal external review process, the insurance commissioner shall allow a claimant meeting the expedited external review standards in RSA 420-J:5-c, I to proceed without first completing the internal review process in RSA 420-J:5.

3. Nationally accredited independent review organizations

- a. 45 CFR 147.136(c)(2)(viii) provides that a state external review process shall not meet federal minimum standards unless the state maintains a list of approved independent review organizations (“IROs”) accredited by a nationally recognized accreditation organization to perform external reviews.
- b. RSA 420-J:5-d requires the Department to maintain a list of approved IROs, but does not require that these IROs be accredited by a nationally recognized accreditation organization.

- c. RSA 420-J:5-d is inconsistent with and prevents the application of 45 CFR 147.136(c)(2)(viii) and section 2719 of the Act.
- d. In order to prevent a default to the federal external review process, the insurance commissioner's list of approved IROs for purposes of RSA 420-J:5-d shall include only IROs accredited by a nationally recognized accreditation organization.

As provided in RSA 420-N:6, the committee's order shall remain in effect until such time as the general court acts to amend RSA 420-J:5-a, RSA 420-J:5-c and/or RSA 420-J:5-d.

Voted and approved this 7 day of September, 2011.



Chair



July 29, 2011

The Honorable Roger A. Sevigny
Insurance Commissioner
21 South Fruit Street, Suite 14
Concord, NH 03301

Re: State External Review Process Determination

Dear Commissioner Sevigny:

This letter follows up on our discussions with your office regarding New Hampshire's external review laws. The Affordable Care Act ensures that all health care insurance consumers have access to strong external review processes under section 2719 of the Public Health Service Act (PHS Act).¹ In implementing this provision, the Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) have focused on ensuring that State external review processes can be maintained to the extent possible.² Over the past year, we have actively worked with States to provide guidance and assist States seeking to amend their external review processes to meet federal requirements.

Through this process, the Departments have established two categories of State external review processes that will satisfy these statutory standards: 1) a State external review process that meets the 16 minimum consumer protections described in paragraph (c)(2) of the regulations as authorized under section 2719(b)(1) of the PHS Act (hereinafter referred to as "NAIC-parallel process"); or 2) a State external review process that meets the minimum standards established by the Secretary of Health and Human Services through guidance under section 2719(b)(2) (hereinafter referred to as "NAIC-similar process").³

We applaud your efforts and progress to date to provide a strong external review process. After reviewing the State of New Hampshire's external review process, the Center for Consumer Information and Insurance Oversight (CCIIO) has determined that it does not meet all of the standards of the NAIC-parallel process or the NAIC-similar process. In the attachment to this letter, CCIIO summarizes the components of New Hampshire's external review process that do not meet the components of an NAIC-parallel process or an NAIC-similar process.

¹ Section 2719 does not apply to grandfathered health plans. See interim final regulations regarding status of a group health plan or health insurance coverage as a grandfathered plan under section 1251 of the Affordable Care Act issued on June 17, 2010 (75 FR 34538), amended on November 17, 2010 (75 FR 70114).

² Regulations implementing PHS Act section 2719 were published on July 23, 2010, at 75 FR 43330, and amended on June 24, 2011, at 76 FR 37208.

³ HHS established these minimum standards in Technical Release 2011-02 on June 22, 2011, which can be found at: http://cciio.cms.gov/resources/files/appeals_srg_06222011.pdf. Beginning January 1, 2014, issuers of non-grandfathered health insurance plans and policies in a State with an external review process that does not satisfy the standards of the NAIC-parallel process will need to participate in a federally administered process.

We remain committed to working in partnership with your State to strengthen your external review process. Our goal is to ensure external reviews are conducted under State law, and we will provide whatever assistance we can to work with you and your State in the weeks ahead to meet that goal.

You may request that CCIIO re-evaluate your external review process. To do so, please send a letter to the attention of Ellen Kuhn, Director of the Appeals program in CCIIO at the Centers for Medicare & Medicaid Services (CMS) at externalappeals@cms.hhs.gov within 30 days of receipt of this determination letter. Please include the reason(s) why you believe that New Hampshire's external review process does meet the NAIC-parallel or NAIC-similar standards along with supporting documentation that you would like CCIIO to consider. CCIIO will re-evaluate New Hampshire's external review process and issue a redetermination within 30 days of receipt of your completed re-evaluation request.

If New Hampshire does not request a re-evaluation of the finding outlined in this letter, this finding is a final determination. Based on staff-level conversations, we are aware that New Hampshire is working on regulatory and/or sub-regulatory changes that aim to conform New Hampshire's external review process to the NAIC-parallel process standards or the NAIC similar process standards. If New Hampshire changes its external review process in the future, New Hampshire may request a new determination at any time.

Once a determination that New Hampshire's external review process does not meet federal minimum standards is final, all issuers of non-grandfathered health insurance plans and policies in New Hampshire's group and individual market will be subject to the Federally-administered external review process. These issuers may continue to follow the New Hampshire external review process during a transition period, but must make good faith efforts to come into compliance with federal law (e.g., inform HHS of Federal external review process elections, make appropriate modifications to consumer notices, etc.) and be fully participating in a Federally-administered external review process on January 1, 2012.

Please direct the health insurance issuers in your State to Technical Release 2011-02 as well as to the additional guidance on the CCIIO website ("Instructions for self-insured non-federal governmental health plans and health insurance issuers offering group and individual health coverage on how to elect a federal external review process") for more information on the Federally-administered external review process.⁴

As always, CCIIO welcomes questions from state regulators and remains available to provide technical assistance on proposed modifications to the external review processes. Please feel free to contact Veronica Morales at Veronica.Morales@cms.hhs.gov with any questions or concerns.

Sincerely,



Steve Larsen, Director
Center for Consumer Information and Insurance Oversight

cc: Kathleen Belanger
Jennifer Patterson

⁴ Guidance is available at http://cciiio.cms.gov/resources/files/hhs_srg_elections_06222011.pdf

Attachment – State of New Hampshire

Summary of Components – NAIC-Parallel Process

Please note that in addition to the summary below, the precise requirements of the NAIC-parallel process may be found at 45 CFR 147.136 and the exact paragraphs are noted in each bullet for your convenience.

The State of New Hampshire's external review process does not meet the required components of an NAIC-parallel process as follows:

- Under the NAIC-parallel process standard, if exhaustion of internal appeals is required prior to external review, exhaustion must be unnecessary if – (a) the issuer (or plan) waives the exhaustion requirement; (b) the issuer (or plan) is considered to have exhausted the internal appeals process by failing to comply with the requirements of the internal appeals process except those failures that are based on de minimis violations that do not cause, and are not likely to cause, prejudice or harm to the claimants; or (c) the claimant simultaneously requests an expedited internal appeal and an expedited external review. (*See* 45 CFR 147.136 (c)(2)(iii)). New Hampshire has no provision that allows the claimant to simultaneously request an expedited internal appeal and an expedited external review in urgent care situations.
- Under the NAIC-parallel process standard, there cannot be any restriction on the minimum dollar amount of a claim in order for it to be eligible for external review. (*See* 45 CFR 147.136 (c)(2)(v)). New Hampshire has a claims threshold of \$400 in order for a claim to be eligible for external review.
- Under the NAIC-parallel process standard, the State process must provide for the maintenance of a list of approved IROs (only those that are accredited by a nationally recognized private accrediting organization) qualified to conduct the external review based on the nature of the health care service that is the subject of the review. (*See* 45 CFR 147.136 (c)(2)(viii)). New Hampshire does not require the use of accredited independent review organizations (IROs) to conduct external reviews.

Summary of Components – NAIC-Similar Process

The State of New Hampshire's external review process does not meet the required components of an NAIC-similar process as follows:

- Under the NAIC-similar process standard, if exhaustion of internal appeals is required prior to external review, exhaustion must be unnecessary if – (a) the internal appeal process timelines are not met; or (b) in an urgent care situation, the claimant files for an external review without having exhausted the internal appeal process. These requirements may not be articulated in a State's external review statute but may be established in other areas of State law, rules, or procedures – for example, those that apply to internal appeals, claims payment practices, or other areas of State oversight. New Hampshire has no provision that allows the claimant to simultaneously request an expedited internal appeal and an expedited external review in urgent care situations.

- Under the NAIC-similar process standard, there cannot be any restriction on the minimum dollar amount of a claim in order to be eligible for external review. New Hampshire has a claims threshold of \$400 in order for a claim to be eligible for external review.



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Roger A. Sevigny
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

August 22, 2011

Ellen Kuhn
Director, Appeals Program
Center for Consumer Information and Insurance Oversight
Centers for Medicare & Medicaid Services
Department of Health & Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: New Hampshire External Review Program Determination

Dear Ms. Kuhn:

I am writing to request a reevaluation of the July 29, 2011 determination by the Center for Consumer Information and Insurance Oversight ("CCIIO") that New Hampshire's external review program does not meet either the NAIC-parallel or the NAIC-similar standard as required under the Affordable Care Act ("ACA"). Specifically, CCIIO determined that there are differences between the state and federal standards with respect to (1) minimum amount in controversy, (2) opportunity for simultaneous internal & external review and (3) accredited IRO requirements.

As you know, the New Hampshire Insurance Department ("Department") is now in a position to make the changes necessary to achieve consistency between the state and federal review programs. Specifically, 2011 N.H. Laws Chapter 264 (formerly HB 601), which took effect July 14, 2011, creates a legislative health care reform oversight committee with authority to declare specific provisions of state law that are inconsistent with the ACA preempted, thus triggering implementation of the stricter federal requirements as state law. See <http://www.gencourt.state.nh.us/legislation/2011/HB0601.html>.

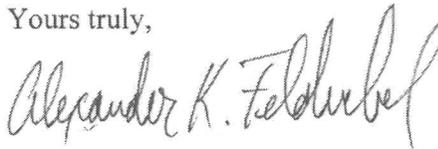
The members of the oversight committee have now been appointed, and it plans to hold its first meeting on September 7, 2011. At that meeting, the Department plans to seek a preemption declaration with respect to the three provisions of New Hampshire's external review law that CCIIO has identified as being inconsistent with the federal requirements. Issuance of this declaration, which will be accompanied by an Insurance Department

Bulletin, will result in New Hampshire's external program meeting the NAIC-parallel standard under the ACA.

In order to avoid unnecessary confusion among New Hampshire consumers and health insurance issuers, the Department is seeking re-evaluation now, prior to the oversight committee's September 7 meeting, rather than allowing CCIIO's July 29, 2011 determination to become final. If the determination becomes final, issuers will be required to make "good faith efforts" to participate in the federal external review system, an effort that we believe will be unnecessary, and will certainly be very confusing to consumers, when New Hampshire's program later meets the federal standard.

Thank you for your consideration of this request. The Department will inform CCIIO promptly of the outcome of the September 7 meeting. If the Department obtains the above-referenced preemption declaration at this meeting, we will file a new or supplemental request for re-evaluation at that time. Please do not hesitate to contact me or the Department's LAH Legal Counsel Jennifer Patterson with any questions.

Yours truly,

A handwritten signature in cursive script that reads "Alexander K. Feldvebel". The signature is written in dark ink and is positioned below the "Yours truly," text.

Alexander Feldvebel
Deputy Insurance Commissioner