



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.

**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

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>.

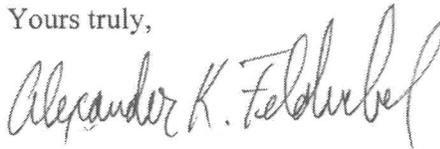
The members of the oversight committee have now been appointed, and it plans to hold its first meeting on September 7, 2011. At that meeting, the Department plans to seek a preemption declaration with respect to the three provisions of New Hampshire's external review law that CCIIO has identified as 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 black ink that reads "Alexander K. Feldvebel". The signature is written in a cursive style with a large, prominent initial 'A'.

Alexander Feldvebel
Deputy Insurance Commissioner