DEPARTMENT OF INSURANCE
STATE OF NORTH DAKOTA

Adam W. Hamm
Commissioner of Insurance

MEMORANDUM

TO: Legislative Council's Administrative Rules Committee

FROM: Melissa Hauer, General Counsel MH

DATE: June 11, 2009

SUBJECT: Adoption of Administrative Rules (pp. 71-188 of July 2009 Supplement) Regarding Medicare Supplement Insurance Minimum Standards

---

As requested, the following addresses the Administrative Rules Committee's questions regarding the adoption of administrative rules to Title 45 of the North Dakota Administrative Code by the North Dakota Insurance Department.

The committee requested testimony concerning the following:

1. **Whether the rules resulted from statutory changes made by the Legislative Assembly.**

   Answer: The rules did not result from statutory changes made by the Legislative Assembly.

2. **Whether the rules are related to any federal statute or regulation.**

   Answer: Yes. If a state does not adopt the rules, the state will be considered out of compliance with federal requirements, and the state will not be able to regulate Medicare supplement insurance (also known as "Medigap") plans. In that case, CMS would regulate Medigap business in place of the state.

   The rules implement the most current version of the NAIC Medicare Supplement Insurance Minimum Standards Model Act which was revised to comply with two federal laws: the

Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) and the Genetic Information Nondiscrimination Act of 2008 (GINA). These laws established strict deadlines for state adoption of these revisions: the revisions required by GINA must be implemented by July 1, 2009, and the revisions required by MIPPA by September 24, 2009.

3. **A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

   Answer: Notice of the rulemaking and the public hearing was published in all county newspapers as required by law. The Insurance Department also uses a basic mailing list to provide notice of each of its rulemaking projects. Additionally, the Department constructs relevant mailing lists for specific rulemaking. A public hearing was held on April 14, 2009, at the State Capitol, Bismarck, North Dakota. Oral comments as well as any written comments that have been received were considered and changes to the rules were made based on the comments received. The record was held open for written comments for 10 days after the hearing.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules.**

   Answer: Oral comments as well as any written comments that have been received were considered and changes to the rules were made based on the comments received.

5. **The approximate cost of giving public notice and holding any hearing on the rules, and the approximate cost (not including staff time) of developing and adopting the rules.**

   Answer: The Notice of Hearing was published once in all North Dakota official county newspapers which cost approximately $1,527. Approximately 1,000 notices were sent by electronic mail to insurance companies and interested

parties at no cost. Approximately 200 notices were sent by regular U.S. mail at a cost of approximately $84.

6. **An explanation of the subject matter of the rules and the reasons for adopting those rules.**

Answer:

OVERVIEW

The rules deal with insurance policies that are designed primarily as a supplement to reimbursements under Medicare for the hospital, medical or surgical expenses of persons eligible for Medicare. These policies are known as Medicare supplement or "Medigap" plans.

As explained in more detail in No. 2 above, states were granted authority to revise their Medicare supplement rules under the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA). In addition, Congress enacted the Genetic Information Nondiscrimination Act of 2008 (GINA) on May 21, 2008, which also calls for changes to the NAIC Medicare supplement model. The NAIC adopted revisions to the NAIC Model Regulation to implement the NAIC Medicare Supplement Insurance Minimum Standards Model Act, MIPPA and GINA. States must adopt the NAIC model revisions in order to continue to regulate the Medigap market.

Currently there are 17 different standardized Medigap plans in force (Plans A-L, High Deductible Plan F and High Deductible Plan J). After the modernization revisions are implemented, there will be 11 plans available (Plans A-D, Plan F, High Deductible Plan F, Plan G, and Plans K-N).

Plan H, Plan I, Plan J, and High-Deductible Plan J are eliminated. Prescription drug benefits were removed from these plans by federal law. Now that redesign has also eliminated Medigap Preventive Care and At-Home Recovery benefits, these plans have become unnecessary and duplicative of other plans. Plan E is also being eliminated because it is now unnecessary and duplicative of another plan.

New Plan M and new Plan N are created. These plans are designed to give beneficiaries new options for higher beneficiary cost-sharing with a lower premium.

Insurance companies may begin marketing the new 2010 standardized

plans and benefits as soon as the state adopts these revised rules and companies get their 2010 policy forms and rates approved by the Insurance Department. Even though these plans may be marketed prior to June 1, 2010, they cannot have an effective date prior to June 1, 2010.

SECTION-BY-SECTION ANALYSIS OF CHANGES

A description of significant changes to each section of the rules is provided below. Revisions that are purely cosmetic or stylistic, including minor changes to cross-references or inclusion of effective dates, have not been included.

Section 45-06-01.1-02. A definition was added for "pre-standardized" plans, to refer to policies issued prior to the state effective date for revisions conforming to the Omnibus Budget Reconciliation Act of 1990 (OBRA '90). A definition was added for "1990 standardized" plans, to refer to policies issued on or after the state effective date for revisions conforming to OBRA '90 but prior to June 1, 2010. A definition was added for "2010 standardized" plans, to refer to policies issued on or after June 1, 2010.

Section 45-06-01.1-05. This section continues to be retained for transitional purposes and governs "pre-standardized" policies or certificates. A reference to "co-payment" was added. This update was made to mirror the new language in Sections 45-06-01.1-06 and 45-06-01.1-06.1.

Section 45-06-01.1-06. This section is retained for transitional purposes and governs "1990 standardized" policies or certificates. A reference to "co-payment" was added. This update was made to mirror the new language in Sections 45-06-01.1-05 and 45-06-01.1-06. Transition standards are provided which permit companies to offer existing policyholders the opportunity to exchange their current policy for a new policy without medical underwriting. The company has the choice whether or not to make such a transition available. If the company chooses not to make such a transition available, existing policyholders may still apply for a new policy, subject to medical underwriting, if they so choose.

Section 45-06-01.1-06.1. This new section applies to benefit standards. It includes standards for all modernized 2010 standardized policies effective on or after June 1, 2010. This section is intended to be similar to Section 45-06-01.1-06, which governs 1990 standardized policies and has been placed next to that section for ease of reference. This section

describes the new hospice benefit, which was created to be part of the basic (core) benefits. In contrast to the standards for the 1990 standardized additional benefits, there are no standards for the following benefits which have been eliminated or (in the case of the prescription drug benefits) are no longer applicable:

- 80% coverage of the Part B Excess Charge
- Basic Outpatient Prescription Drug Benefit
- Extended Outpatient Prescription Drug Benefit
- Preventive Medical Care Benefit
- At-Home Recovery Benefit

The descriptions of Plans K and L have been placed in Section 45-06-01.1-07.1, rather than Section 45-06-01.1-06.1.

Section 45-06-01.1-07. This section is retained for transitional purposes, and governs "1990 standardized" policies or certificates. No significant changes were made.

Section 45-06-01.1-07.1. This new section applies to plan standards. It includes standards for all modernized 2010 standardized policies effective on or after June 1, 2010. This section is intended to be similar to Section 45-06-01.1-07, which governs 1990 standardized policies and has been placed next to that section for ease of reference.

This language is intended to promulgate a new requirement in MIPPA. Medigap rules already require that carriers wishing to offer any Medicare supplement plan in a state must offer at least Plan A. MIPPA expands this requirement so that if a carrier wishes to offer any plan(s) in addition to Plan A, then they must also offer either Plan C or Plan F. This requirement is also reflected in a drafting note at the end of Section 45-06-01.1-07.1.

The makeup of Plans D and G have changed. The makeup for new Plans M and N have also been added. In addition, there are no standards for the makeup of Plans E, H, I, and J as those plans have been eliminated.

The full descriptions of the benefits contained in Plans K and L have been added to this section. This is a change from the format of Sections 45-06-01.1-06 and 45-06-01.1-07 for 1990 standardized policies.

The language describing new or innovative benefits has been updated slightly from the version in Section 45-06-01.1-07. In addition to stylistic

changes, this section deletes reference to prescription drug benefits, and also includes stronger language to reinforce the fact that these benefits should not impact the goal of Medigap simplification and should not be used to change or reduce benefits in any standardized plan.

Section 45-06-01.1-14. The benefit chart following this section was updated to reflect the new 2010 standardized plan designs and benefits. The chart for 1990 standardized plans has been deleted. The disclosures and detailed plan charts have also been updated to reflect the new 2010 standardized plan designs and benefits.

Section 45-06-01.1-20.1. This section was added to conform to the Genetic Information Nondiscrimination Act of 2008 (GINA) and provide that an issuer of a Medicare supplement policy or certificate shall not deny or condition the issuance or effectiveness of a policy on the basis of the genetic information with respect to an individual. It further provides that the issuer shall not discriminate in the pricing of the policy or certificate, including the adjustment of premium rates, of an individual on the basis of the genetic information with respect to such individual. Definitions included here are for the purposes of Section 45-06-01.1-20.1.

7. **Whether a regulatory analysis was required by N.D.C.C. § 28-32-08 and whether a regulatory analysis was issued.**

   Answer: A Regulatory Analysis was prepared and a copy is attached.

8. **Whether a regulatory analysis or economic impact statement for small entities was required by N.D.C.C. § 28-32-08.1 and whether that regulatory analysis or impact statement was issued.**

   Answer: A Small Entity Economic Impact Statement and Small Entity Regulatory Analysis were prepared and a copy is attached.

9. **Whether a constitutional takings assessment was prepared as required by N.D.C.C. § 28-32-09.**

   Answer: A Takings Assessment was prepared and a copy is attached.

10. **If these rules were adopted as emergency (interim final) rules under N.D.C.C. § 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.**

    Answer: The rules were not adopted as emergency rules.

I hope that this response adequately addresses the concerns of the committee. I will be happy to try to answer any questions that you might have.

MH/njb
Attachments
cc: Adam Hamm, Insurance Commissioner

STATE OF NORTH DAKOTA

BEFORE THE INSURANCE COMMISSIONER

In the Matter of the Amendment Of Rules Regarding: Medicare Supplement Insurance Minimum Standards, North Dakota Administrative Code Chapter 45-06-01.1	))))))	**REGULATORY ANALYSIS, SMALL ENTITY ECONOMIC IMPACT STATEMENT, AND SMALL ENTITY REGULATORY ANALYSIS** **FILE NO. RU-08-228**

I. REGULATORY ANALYSIS

The North Dakota Insurance Department issues this regulatory analysis as required by N.D.C.C. § 28-32-08. An agency must issue a regulatory analysis if a written request for an analysis is filed by the Governor or a member of the Legislative Assembly or a proposed rule being adopted by the agency is expected to have an impact on the regulated community in excess of $50,000. *Id.*

The proposed rules are expected to have an impact on the regulated community in excess of $50,000.

A. The Classes of Persons Who Probably Will Be Affected by the Proposed Rules

The class of persons who will probably be affected by the proposed rules are insurance companies that sell Medicare Supplement policies and the consumers that buy them. Each of these classes potentially bears the burden and the benefit of these proposed rules.

B. A Description of the Probable Impact Including the Economic Impact of the Proposed Rules

Currently there are 17 different standardized Medicare Supplement plans in force. Certain plans were eliminated by the federal law known as the Medicare Improvements for Patients and Providers Act of 2008 (Public Law No. 110-175). Two new plans were also created to give Medicare beneficiaries new options for higher cost-sharing with a lower premium. States rules governing Medicare Supplement policies are based on a model regulation adopted by the National Association of Insurance Commissioners (NAIC). The proposed amendments are also based on NAIC revisions to the model regulation. States must adopt the NAIC model revisions in order to

continue to regulate the Medicare Supplement (also known as "Medigap") market. As a result, consumers will have more choice in the Medicare Supplement policies available to them and they could save money. Insurers will have new products to market and they will no longer be able to market some older products as required by the federal law noted above.

C. The Probable Costs to the Agency of Implementation and Enforcement of the Proposed Rule and Any Anticipated Effect on State Revenues

The probable cost to the agency of implementation and enforcement of these rules will be minimal. Companies that sell Medicare Supplement insurance are already required to conform to existing rules. The amendments to the rules will represent a change in the types of Medicare supplements that may be sold by insurers.

D. A Description of Any Alternative Methods for Achieving the Purpose of the Proposed Rules That Were Seriously Considered by the Agency and the Reasons Why the Methods Were Rejected in Favor of the Proposed Rules

The Insurance Commissioner considered continuing to enforce the Medicare Supplement rules that are currently in effect. The current rules, however, would not comply with the federal law known as the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), Public Law No. 110-175, or the Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law No. 110-233. This standard was rejected because it would not acknowledge the changes made by these federal laws to the Medicare Supplement insurance business as described above.

II. SMALL ENTITY ANALYSES

N.D.C.C. § 28-32-08.1 requires that an agency prepare a regulatory analysis and an economic impact statement of the impact of the rule changes on a small entity. "Small entity" is defined by state law to include small businesses, small organizations, and small political subdivisions. *Id.* "Small business" is defined to mean a business entity, including its affiliates, which is independently owned and operated and employs fewer than 25 full-time employees; or has gross annual sales of less than $2,500,000. *Id.* "Small organization" means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. *Id.* "Small political subdivision" means a political subdivision with a population of less than 5,000. *Id.*

A. Small Entity Economic Impact Statement

1. Small entities subject to the proposed rule

The small entities that may possibly be subject to these proposed rules are insurers and insurance producers that meet the statutory definition of "small entity".

2. Administrative and other costs required for compliance with the proposed rule

The administrative and other costs required for compliance with the proposed rules are expected to be minimal. The rules will require compliance with those standards already required by federal laws.

3. Probable cost and benefit to private persons and consumers who are affected by the proposed rule

There could be some cost to private persons and consumers since the proposed rules affect the kinds of Medicare Supplement policies that may be offered to the public. The probable benefits to private persons and consumers include furthering consumer choice by offering new Medicare Supplement products that could save some consumers money by lowering their premiums.

4. Probable effect of the proposed rule on state revenues

There is expected to be no effect on state revenues from the proposed rules.

5. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule

The Commissioner considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. In those instances where alternative methods of achieving the purpose of the proposed rule were available, the alternatives were not selected because of the potential costs associated with them or because they were not equally effective in assuring that companies that sell Medicare Supplement insurance policies are complying with the federal laws noted above.

B. Small Entity Regulatory Analysis

1. Establishment of less stringent compliance or reporting requirements for small entities

Less stringent reporting requirements for small entities were considered. The proposed rules do not, however, impose any new reporting requirements. Less stringent compliance requirements were also considered but they were not appropriate to achieve the goal of assuring insurance company compliance with federal laws governing Medicare Supplement policies.

2. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities

The Commissioner considered less stringent schedules or deadlines where possible. States must, however, conform their statutes or regulations to the NAIC

model law revisions for GINA requirements by July 1, 2009, and for MIPAA requirements by September 24, 2009.

3. Consolidation or simplification of compliance or reporting requirements for small entities

To the extent possible, compliance or reporting requirements for small entities were simplified or made less onerous or made as streamlined as possible. The federal laws noted above (GINA and MIPPA) established the dates by which the Medicare Supplement changes go into effect. These delayed effective dates give Medicare Supplement issuers time to file and get their 2010 Medicare Supplement policy forms and rates filed and approved by their state insurance regulators.

4. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule

Small entities were not given different standards to comply with than large entities. All companies selling Medicare Supplement policies, regardless of size, will be required to comply with the proposed rules.

5. Exemption of small entities from all or any part of the requirements contained in the proposed rule

Small entities were not given different standards to comply with than large entities.

DATED this 12 day of February, 2009.

Melissa Hauer
Special Assistant Attorney General
General Counsel
N.D. Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, ND 58505
(701) 328-2440

STATE OF NORTH DAKOTA

BEFORE THE INSURANCE COMMISSIONER

In the Matter of the Amendment Of Rules Regarding: Medicare Supplement Insurance Minimum Standards, North Dakota Administrative Code Chapter 45-06-01.1	))))))	**TAKINGS ASSESSMENT CONCERNING AMENDMENT OF N.D. ADMIN. CODE CH. 45-06-01.1** **FILE NO. RU-08-228**

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than 50 percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.

2. The purpose of proposed amendments to rules is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.

3. The reasons the proposed amendments to rules are necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.

4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than $0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than $0.

5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.

6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

DATED this 12 day of February, 2009.

Melissa Hauer
Special Assistant Attorney General
General Counsel
N.D. Insurance Department
600 East Boulevard Avenue, Dept. 401
Bismarck, ND 58505
(701) 328-2440