DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop C4-21-26
Baltimore, Maryland 21244-1850

Date: January 10, 2014

Subject: The Sale of Individual Market Policies to Medicare Beneficiaries Under 65 Losing Coverage Due to High Risk Pool Closures

I. Purpose

This bulletin sets forth circumstances under which the Secretary has determined that issuers may sell individual market health insurance policies to certain Medicare beneficiaries under age 65 who lose state high risk pool coverage. As this bulletin explains, for sales to these individuals, HHS will not enforce the anti-duplication provisions of section 1882(d)(3)(A) of the Social Security Act (the Act) from January 10, 2014 to December 31, 2015.

II. Guidance

There is a small population of Medicare beneficiaries under age 65 who currently obtain supplemental coverage through state high risk pools (approximately 6,000 people nationwide). These beneficiaries are disabled or have end stage renal disease (ESRD). Unlike beneficiaries over age 65, these beneficiaries have no guaranteed federal right to purchase Medicare supplement insurance, and have obtained coverage through their States' high risk pools, which pay their cost-sharing under the original, fee-for-service Medicare program. Under the Patient Protection and Affordable Care Act (ACA), starting in January 2014, health insurance companies are required to issue policies without using traditional underwriting procedures, even for high-risk individuals. As a result, at least three states have announced their intent to close their high risk pools between February 1, 2014, and April 1, 2014, and several other states have indicated that they may do so in the next two years. With the exception of individuals under age 65 who are receiving Medicare, persons who were previously receiving insurance through state high risk pools will generally be eligible to purchase insurance in the individual market, both inside and outside the Marketplace. In some states, individuals under age 65 with Medicare have a right under state law to purchase Medicare supplement insurance, but in other states, there is no such right.

Section 1882(d)(3)(A) of the Social Security Act makes unlawful the sale of health insurance that duplicates a beneficiary's Medicare benefits, if the issuer has knowledge that the policy will duplicate Medicare benefits. This prohibition applies to the sale of a health insurance policy, and does not apply to the State high risk programs in which these beneficiaries are currently enrolled. Some states have requested that issuers be permitted to sell individual market plans to the Medicare beneficiaries under 65 who lose state high risk pool coverage, in order to provide these beneficiaries with coverage similar to that currently provided by the state high risk pools. For these beneficiaries, the individual market plans would be allowed to coordinate benefits with the Medicare program, as the state high risk pools were allowed to do, thus effectively providing secondary coverage to supplement the beneficiary's Medicare coverage. In some states, this would be the only means by which these beneficiaries would be able to replace their high risk pool coverage and secure supplementary coverage for their cost-sharing.

The anti-duplication provisions of section 1882(d)(3)(A) are intended to protect Medicare beneficiaries from fraudulent or abusive practices leading beneficiaries to purchase excessive or unnecessary coverage. We have concluded that, in states that are closing their high risk pools and that do not have a state right for these individuals to purchase Medicare supplement insurance when the pools close, enforcement of the anti-duplication provision against issuers for the sale of individual market policies to Medicare beneficiaries under age 65 with ESRD or a disability who lose their high risk pool coverage, is not warranted for a limited period, from January 10, 2014 to December 31, 2015. This non-enforcement period would give states adequate time to examine permanent solutions for ensuring the availability of affordable and adequate coverage options for this population and to work through their legislative processes to achieve such solutions. Of course, this non-enforcement posture would not apply to any potentially fraudulent or abusive practice that is connected in any way with these narrowly defined sales.

In circumstances in which Medicare supplement insurance is sold, the Social Security Act requires that certain measures be undertaken to protect beneficiaries against fraud or abuse. Because the sale of individual market plans to replace the terminating high risk pool coverage for Medicare beneficiaries under 65 presents some of the same risks for fraud and abuse attendant to the sale of Medicare supplement policies, we believe that similar measures are appropriate here. In conjunction with this non-enforcement posture, HHS will ensure that notice is provided to the high risk pool participants losing coverage in a state (1) that individuals should verify if they are eligible for benefits under any Medicare supplement policy sold in their state or a state Medicaid program under title XIX, or are eligible to enroll in a Medicare Advantage plan, and that individuals who have any of those options may find that they provide better alternatives; (2) that if individuals have any of those forms of coverage, they do not need to purchase an individual market policy; (3) that individual market policies provide some overlapping coverage of a beneficiary's Medicare benefits; (4) that individuals may want to consider the protections afforded by purchasing qualified health plans; and (5) that the State Health Insurance Assistance Program in their state may provide advice concerning these options.

Enforcement of the anti-duplication provision is under the jurisdiction of the Department of Health and Human Services for civil monetary penalties and the Department of Justice for criminal sanctions.

III. Additional information

If you have any questions regarding this bulletin, you may contact the CMS Health Insurance Hotline at 877-267-2323 x6-1565 or phig@cms.hhs.gov. We note that the document "Medicare and the Marketplace Frequently Asked Questions, Frequently Asked Questions (FAQ) #9", released by the Centers for Medicare & Medicaid Services on October 4, 2013, remains in effect for all purposes other than the narrow situation outlined in this document.