STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	)	
	)	
HARVARD PILGRIM HEALTH CARE, INC. 2018 INDIVIDUAL HMO RATE FILING	)	**DECISION AND ORDER**
	)	
Docket No. INS-17-1001	)	

I. INTRODUCTION

I, Eric Cioppa, Superintendent of Insurance ("Superintendent"), issue this Decision and Order after consideration of Harvard Pilgrim Health Care, Inc.'s ("Harvard Pilgrim") 2018 rate filing and proposed modifications for its individual health insurance products.[1]

By its initial filing, in which it assumed that reimbursement for the cost-sharing reductions ("CSRs") would be funded in 2018, Harvard Pilgrim proposed an average increase of 39.7%, with a range of 22.3% to 45.9% depending on deductible level and type of contract (the "Base Filing"). On June 23, in accordance with Bulletin 422, Harvard Pilgrim filed alternative rates based on the assumption that CSR reimbursements would not be funded in 2018, proposing an average increase of 49.5%, with a range of 10.1% to 54.5% depending on deductible level and type of contract (the "Unreimbursed Filing"). Harvard Pilgrim proposes to rate all of its Individual Products on a combined basis as a single risk pool in both its Base Filing and Unreimbursed Filing. On July 14, as part of its pre-filed testimony in this proceeding, Harvard Pilgrim made changes to both its Base Filing and Unreimbursed Filing. The changes in the Base Filing resulted in an average increase of 29.2%, with a range of 17% to 37.8% depending on

[1] Harvard Pilgrim will offer the following individual products in 2018: Gold HMO 1500, Bronze HMO 6500, Maine's Choice[SM] HSA HMO 5000, Silver HMO, Maine's Choice[SM] Casco Silver HMO, Maine's Choice[SM] Sebago Silver, and Maine's Choice[SM] Pemaquid Silver HMO.

deductible level and type of contract. The changes to the Unreimbursed Filing resulted in an average increase of 39%. At the time of the initial filing, total in-force enrollment was approximately 20,775 individuals who will be affected by the proposed rate revisions. Harvard Pilgrim requests that its proposed rate revisions become effective on January 1, 2018.

As part of both the Base and Unreimbursed Filings, Harvard Pilgrim further proposes to discontinue the Maine's Choice Gold HMO and Best Buy HMO HSA 5400. Harvard Pilgrim proposes mapping the Maine's Choice Gold HMO into the Harvard Pilgrim Gold HMO 1500 and mapping the Best Buy HMO HSA 5400 into the Maine's Choice HSA HMO 5000.

For the reasons discussed below, with regard to the Base Filing, I am denying the revised average rate increase of 29.2% as requested, but would approve revised rates that result in an average increase of 27.1%. With regard to the Unreimbursed Filing, I am denying the revised average rate increase of 39.0%, but would approve revised rates that result in an average increase of 36.7%. Furthermore, for both filings, I am approving Harvard Pilgrim's proposed discontinuance of the Maine's Choice Gold HMO; approving Harvard Pilgrim's proposed discontinuance of the Best Buy Bronze HMO HSA 5400 within the Maine's Choice service area; and denying Harvard Pilgrim's proposed discontinuance of the Best Buy Bronze HMO HSA 5400 within the remainder of the State.

II. PROCEDURAL HISTORY

On June 2, 2017, Harvard Pilgrim filed a request to increase rates for its Individual Products assuming that the CSR reimbursements would be funded for 2018. The Bureau of Insurance designated the matter as Docket No. INS-17-1001.

On June 6, 2017, the Superintendent issued a Notice of Pending Proceeding and Public Hearing, which scheduled a public hearing for July 25, 2017. The Hearing Notice also

established an intervention deadline. The Maine Attorney General filed a timely request to intervene, and was granted intervenor status on June 15, 2017.

On June 7, 2017, the Superintendent issued a Procedural Order establishing procedures for the conduct of the proceeding. Included in the Procedural Order was the requirement that Harvard Pilgrim submit an alternative rate filing by June 23, 2017, in which it assumed CSRs would not be reimbursed in 2018.

On June 15, 2017, the Superintendent issued Bulletin 423 setting a uniform deadline of July 14, 2017 for all insurers to file revised rates requests.

Both the Superintendent and the Attorney General issued several information requests, and made oral requests at hearing, to which Harvard Pilgrim filed responses.

On June 23, 2017, Harvard Pilgrim filed its Unreimbursed Filing in accordance with Bulletin 422.

On June 27, 2017, in responding to information requests by the Attorney General, Harvard Pilgrim requested confidential treatment of certain responsive information, filing a Request for Confidential Treatment.

On June 29, 2017, the Superintendent issued an Order denying Harvard Pilgrim's Request for Confidential Treatment.

On July 14, 2017, Harvard Pilgrim filed the pre-filed testimony and exhibits of Edward Kane, Vice President, Maine; Daniel Rachfalski, Chief Actuary; and Laura Pendergast, Manager of Pricing.

The public hearing was held as scheduled on July 25, 2017, and was conducted entirely in public session. Members of the public had an opportunity to make either sworn or unsworn statements for consideration by the Superintendent. Members of the public also submitted

written comments outside the public hearing which the Superintendent designated a part of the record of this proceeding. The Superintendent has read each of the written comments provided. To the extent that unsworn oral or written statements comment on facts that are in the record, they shall be considered for their persuasive value in the same manner as legal arguments and other comments submitted by the parties. However, such statements are not evidence and the Superintendent may not consider them in making factual findings. 5 M.R.S. § 9057.

At hearing, Harvard Pilgrim presented testimonial evidence from Edward Kane, Daniel Rachfalski, and Laura Pendergast. The Superintendent admitted into evidence Harvard Pilgrim's pre-filed testimony and exhibits as well as Harvard Pilgrim's responses to discovery filed throughout the proceeding. There were no objections to any of the evidence being admitted into the record of the proceeding.

After Harvard Pilgrim rested its case at hearing, the Superintendent adjourned the hearing for the submission of responses to certain hearing panel inquiries and for the filing of a written closing statement.

On August 1, 2017, Harvard Pilgrim filed its responses to the hearing questions.

On August 8, 2017, Harvard Pilgrim filed its written closing statement.

On August 8, 2017, the Attorney General filed its written closing statement, and the record in this proceeding is now closed.

Harvard Pilgrim has provided direct written notice by mail to every affected policyholder advising of the proposed rate increases.

III. LEGAL STANDARD

A. Rate Increase

Harvard Pilgrim is required by 24-A M.R.S. § 2736(1) to file proposed premium rates for its individual health insurance products with the Superintendent. Because Harvard Pilgrim's initial proposed rate increase of 39.7% exceeded the 10% threshold for review established under the federal Affordable Care Act (ACA), *see* 45 C.F.R. § 154.200, the rate filing is subject to the Superintendent's review and approval pursuant to 24-A M.R.S. § 2736(1). *See* 24-A M.R.S. § 2736-C(2-B). The Superintendent may approve the filed rates only if they are not excessive, inadequate, or unfairly discriminatory. 24-A M.R.S. § 2736(2). In addition, pursuant to 24-A M.R.S. § 2736-C(5), the Superintendent shall disapprove the rates unless it is anticipated that the rates will yield a loss ratio of at least 65% as determined in accordance with accepted actuarial principles and practices. That is, expected claims payments must be at least 65% of premium. Harvard Pilgrim, as the proponent of the filed rates, bears the burden of proving by a preponderance of the evidence that the proposed rates meet statutory requirements. 24-A M.R.S. § 2736-A.

B. Discontinuance and Replacement of Policy Forms

Under longstanding Maine law, individuals purchasing health insurance coverage in the individual market have a right to guaranteed renewal of their insurance policies. This right means that, except in certain narrowly defined circumstances, "coverage may not be cancelled, and renewal must be guaranteed." 24-A M.R.S. § 2850-B(3). Where a policy is subject to guaranteed renewal, it must not only be renewed, but it generally cannot even be modified except within narrow constraints set forth by statute. *See* § 2850-B(3)(I). Any modifications falling

outside these constraints are considered to be the discontinuance of the policyholder's current coverage,[2] and must qualify for a statutory exception to the guaranteed renewal requirement.

Specifically, under Maine law, a carrier may not discontinue a guaranteed-renewable individual plan unless it provides its subscribers with a replacement product meeting certain requirements, including, crucially, that "the superintendent finds that the replacement is in the best interests of the policyholders." 24-A M.R.S. § 2850-B(3)(G)(3). Accordingly, in this matter, because there is no claim that Harvard Pilgrim's proposed discontinuances and replacements of the identified Individual Products are only "minor modifications," it is for the Superintendent to determine whether they meet the best-interests standard and to ensure that they are otherwise in compliance with applicable law.

As set forth in the statute, the "best interests of the policyholders" standard applies to the proposed "replacement" products, except to the extent that changes to the policyholder's coverage are required by law. The statute directs the Superintendent to protect the interests of Harvard Pilgrim's existing subscribers, not the interests of potential future policyholders. Moreover, the standard is not whether the replacement is in the "best interests of a majority of the policyholders." It is simply whether the replacement is in the best interests of "the policyholders." While this standard does not mean that the proposed replacement policy must be a good deal for every single current policyholder, it does require a more nuanced analysis than merely considering whether replacement will be marginally preferable to renewal for a bare majority of subscribers. A replacement policy that imparts small benefits to a majority by

[2] The Maine statute refers to the discontinuance of a "product," but does not use the term in the same sense in which it is now used in the ACA. For example, discontinuing a plan with a $500 deductible and replacing it with an otherwise identical plan with a $5,000 deductible would be a "product discontinuance" under the standards of 24-A M.R.S. § 2850-B(3)(I), but the two plans would be closely enough related, despite the significant difference in the level of coverage, to belong to the same "product" as that term is used in the ACA.

imposing significant hardships on a minority is not necessarily in the best interests of the policyholders as a whole. *See* INS-13-803 Decision and Order at 8–10.

IV. RULINGS

I hereby admit Harvard Pilgrim's post-hearing responses to the hearing panel's inquires, including incorporated materials (filed on August 1, 2017), with no objection by any party.

V. DISCUSSION

With regard to the Base Filing, I find that the rates filed by Harvard Pilgrim in this proceeding are neither inadequate nor unfairly discriminatory. However, I do find that the proposed rates as submitted by Harvard Pilgrim are excessive, in contravention of 24-A M.R.S. § 2736, for the reasons discussed more particularly below.

With regard to the Unreimbursed Filing, I find that the rates filed by Harvard Pilgrim in this proceeding are neither inadequate nor unfairly discriminatory. However, I do find that the proposed rates as submitted by Harvard Pilgrim are excessive, in contravention of 24-A M.R.S. § 2736, for the reasons discussed more particularly below.

A. Base Filing

1. Overview and Recent Market-wide Changes

I have heard extensively from consumers, both in the hearing process and in carrying out my general responsibilities as a public official, about the hardships posed by the high costs of health insurance. Unfortunately, the high cost of insurance is primarily the result of the high and steadily increasing cost of health care. It has been exacerbated by the additional risks created by the climate of uncertainty that has enveloped federal health insurance law at this time. Another factor that increases costs for insurers is referred to in technical terms as "adverse selection." If healthy consumers leave the insurance pool while less healthy consumers stay, the insurer's

average cost per member would go up even if the underlying cost of health care did not change at all. This has been a major factor in rate increases this year both in Maine and in other states, and is the basis for the "morbidity adjustment" discussed below.

One of my highest priorities as Superintendent of Insurance is to do everything in my power to look for solutions that will ease the burdens on consumers. This includes continuing the Bureau's dedication to strict enforcement of the statutory prohibition of excessive health insurance rates. Nevertheless, premiums must be adequate to pay claims and expenses, so I cannot approve premiums that fail to keep pace with the rising cost of health care and the impact of adverse selection on the risk pool. Therefore, although I am rejecting the rates that Harvard Pilgrim has filed, I must nevertheless reluctantly approve another double-digit increase next year for Maine consumers.

2. Trend

Trend is the rate at which Harvard Pilgrim's overall healthcare costs, including unit costs and utilization, are projected to increase during the rating period. In both the Base Filing and the Unreimbursed Filing, Harvard Pilgrim's proposed 2018 rates incorporate an annual pricing trend of 10.4%. This trend represents an increase over the company's 2017 assumed trend of 9.5%. Harvard Pilgrim stated that the increased trend reflects increases in utilization and pharmacy costs. More specifically, the company stated that the main driver of the higher trend in this rate filing is an increase in the mix of services under both inpatient and outpatient surgery. In addition, pharmacy trend continues to increase reflecting the take up rate of several new specialty drugs in the market. Harvard provided a detail of its trend calculation and its allowed claims experience in response to discovery requests. Based on the evidence presented, I find the proposed 10.4% trend will not cause the rates to be excessive or inadequate.

3. Morbidity Adjustment

Harvard Pilgrim's June 2 filing provided for a morbidity adjustment of 15.9% to adjust its experience to the anticipated population in the projected period. The June 23 Unreimbursed Filing used the same adjustment. The July 14 revised filings did not change this assumption. Harvard Pilgrim's response to the Superintendent's first discovery request stated that this adjustment assumption is based solely on the estimated deterioration of the individual market risk pool due to the effect of the federal non-enforcement of the individual mandate. Edward Kane's pre-filed testimony cited CMS' 2017 Effectuated Enrollment Snapshot, published on June 12, 2017, as showing an 8.4% decrease in effectuated enrollment from March 2016 to February 2017. Harvard Pilgrim confirmed during the hearing their understanding that the CMS report only includes on-Exchange enrollment and not off-Exchange enrollment.

I estimate the contraction of the combined on- and off-Exchange market in Maine to be in the range of 5.1%, determined as follows. I take official notice of the Maine Rule 940 reporting posted on the Bureau website,[3] which shows a total of 88,472 insured lives as of March 31, 2016 for the three carriers proposing rates for 2018. The enrollment reported in recent rate filings totals of 82,584 insured lives in 2017. Based on these numbers the Maine individual market experienced a 5.1% reduction as opposed to the 8.4% figure used by Harvard Pilgrim. Mr. Kane's pre-filed testimony stated that Harvard Pilgrim's own enrollment decreased by 7.8%, which is higher than 5.1% but still less than the 8.4% in the CMS report. Furthermore, Harvard Pilgrim based its 15.9% factor on a range of scenarios that assume declines even greater than 8.4%.

For these reasons, I find that while there is justification for a morbidity adjustment, the magnitude proposed by Harvard Pilgrim is excessive and would lead to additional declines in

[3] http://www.maine.gov/pfr/insurance/publications_reports/yearly_reports/rule940/rule940_reports.html.

membership due to higher rates. Instead, a morbidity adjustment of 14% would result in rates that are not excessive or inadequate.

4. Contribution to Surplus (Profit Margin)

Harvard Pilgrim has requested that its 2018 individual rates include a 1% contribution to surplus, which is a nonprofit insurer's equivalent of a for-profit insurer's margin for profit and risk. Harvard Pilgrim's surplus contribution is unchanged from 2017, and is well within a range that the Superintendent has considered reasonable for this line of business. I find that Harvard Pilgrim's 1% surplus contribution will not cause the rates to be excessive or inadequate.

5. Administrative Costs

Both Harvard Pilgrim's Base Filing and Unreimbursed Filing provided for administrative costs of $58.73 per member per month (PMPM) for rates effective January 1, 2018. For the Base Filing, this represents 9.51% of premium. However, based on the different expected distribution of membership, this dollar amount represents 8.9% of premium in the Unreimbursed Filing. I find that this level of administrative costs will not cause the rates to be excessive or inadequate.

B. Unreimbursed Filing

1. Overview of the CSR Program and Adjustments to Base Filing

The ACA provides two major subsidy programs to help low-income consumers with the costs associated with individual health insurance. The premium tax credit program provides assistance with the premium, and the CSR program provides assistance with out-of-pocket costs such as deductibles and coinsurance. The way CSR operates is that when a policyholder with household income between 100% and 250% of the federal poverty level (FPL) buys a Silver plan on the Exchange, the plan is upgraded to a "Variant Plan" with less cost sharing, at no additional cost to the policyholder.

The actuarial value of a CSR Variant Plan ranges from 73% to 94%, depending on income level. For consumers with income between 100% and 200% of FPL, if they pay the applicable premium for a Silver plan, they receive a plan that is either within (87%) or slightly above (94%) the Platinum range. The insurance contract commits the carrier to pay the enhanced "CSR Variant" benefits, and the ACA provides that the federal Department of Health and Human Services (HHS) will reimburse the carrier for all additional claims paid by the carrier; *i.e.*, the difference between the claims actually paid by the carrier and the claims the carrier would have paid if the policy had been a standard Silver plan rather than a CSR Variant plan.

However, in contrast to the premium tax credits paid to consumers, the ACA did not include any specific appropriation for the CSR reimbursements, and Congress did not include such an appropriation in any subsequent spending bill. Instead, HHS has paid the CSR reimbursements from the same general Treasury funds that are used to pay the premium tax credits. The House of Representatives sued the Secretary of HHS, claiming that the reimbursement payments are unlawful because there is no valid appropriation of funds to pay them. A federal District Court agreed, concluding that "the consequence at issue here is that a permanently authorized benefit program was made dependent on non-permanent appropriations," and that necessary appropriation was not made. *House of Representatives v. Burwell*, 185 F.Supp.3d 165, 185 (D.D.C. 2016).

The court therefore issued an injunction prohibiting future CSR reimbursements "until a valid appropriation is in place," but stayed the injunction pending appeal. *Id*. at 189. The court recognized that the CSRs themselves must continue regardless of whether they are reimbursed. It explained that insurers on the Exchange "cannot escape cost-sharing reductions, which are a

mandatory feature of participation in the Exchanges. If the insurers are not reimbursed, they will charge higher premiums to cover their expenses." *Id*. at 183.

Although the stay permits CSR reimbursements to continue, it does not require them to continue. To date, the reimbursements have been paid in full when due, but this is being done on an interim, *ad hoc* basis. All three branches of the federal government have the power to bring more certainty, but the courts have not resolved the pending appeal, Congress has considered a variety of legislative options but has not enacted any of them, and HHS has continued to make interim reimbursements but has not committed to pay them even through the remainder of 2017, let alone into 2018.

Accordingly, I issued Bulletin 422, advising that on or before June 23, 2017, "unless definitive Congressional or judicial action is taken that is sufficient to ensure that CSR reimbursements will be fully funded through December 31, 2018, carriers shall, if applicable, submit amended or alternative filings that include the rates they intend to use in 2018 in the event that CSR reimbursements terminate." No such action was taken, and all three carriers with pending individual rate filings submitted their alternative Unreimbursed Filings.

Harvard Pilgrim's Unreimbursed Filing is based on the premise that if insurers are required to provide the CSRs out of their own pockets, with no reimbursement for the additional cost, this is a fundamental change in the plan design of Silver Qualified Health Plans (QHPs). It would not be a general cost of doing business to be spread across all policyholders, but rather, it would be a specific benefit provided to Silver policyholders, and thus should be paid for by Silver plan premiums. Accordingly, Harvard Pilgrim calculated its Unreimbursed rates by changing the "pricing actuarial value" of its Silver QHPs to reflect the actual expected cost,

averaging the expected cost of each CSR variant in proportion to the expected mix of enrollees in the various CSR bands.

The result was that the Unreimbursed rates for Harvard Pilgrim's Silver plans are 17.3% higher than the Base rates, with no change to the Bronze and Gold rates. This was based on an assumption that the proportion of members enrolled in the different CSR Variant plans in 2018 would be substantially similar to the 2017 enrollment. This assumption seems optimistic, because the impact of a substantial increase in both premiums and tax credits is likely to have a significantly different impact on the various CSR income bands. However, in light of the substantial increase I have approved in Harvard Pilgrim's Base rates, and the Company's ability to absorb pricing uncertainties that affect only its relatively limited individual enrollment base, I find that Harvard Pilgrim's questionable enrollment assumptions do not make the resulting rates in the various plans either excessive or inadequate.

Specifically, I find Harvard Pilgrim's proposed relativities between its Base rates and its Unreimbursed rates to fall within a range of reasonableness. Applying those rate relativities to the Base Filing, as modified to comply with this Decision and Order, would result in rates that are not excessive, inadequate, or unfairly discriminatory.

2. Trend

No changes from Base Filing analysis.

3. Morbidity Adjustment

No changes from Base Filing analysis.

4. Contribution to Surplus (Profit Margin)

No changes from Base Filing analysis.

5. Administrative Costs

No changes from Base Filing analysis.

C. Proposed Product Discontinuances

Harvard Pilgrim proposes to discontinue the Maine's Choice Gold HMO and Best Buy Bronze HMO HSA 5400 plans.

Maine's Choice Gold HMO enrollees will be mapped on renewal into the Harvard Pilgrim Gold HMO 1500 plan. This plan replacement will move enrollees from a two-tier plan to a single-tier plan with access to Harvard Pilgrim's full HMO network. The cost sharing will be comparable to the average cost sharing under the current plan, falling between the current tiers, and will be in line with typical market standards for the Gold tier. I find that the replacement is suitable and is sufficiently similar to the current coverage that the discontinuance is in the best interests of policyholders. Members enrolled in either of the discontinued plans also have the right to switch to any other plan offered by Harvard Pilgrim or by a competitor.

Harvard Pilgrim proposed mapping the Best Buy Bronze HMO HSA 5400 enrollees into the new Maine's Choice Bronze HSA HMO 5000 plan, which offers improved cost sharing for Tier One providers. I find that the replacement is suitable and is sufficiently similar to the current coverage that the discontinuance is in the best interests of policyholders. However, Harvard Pilgrim acknowledged in discovery that the designated replacement plan is not available statewide. They noted that nearly two-thirds of the current enrollees do live in the Maine's Choice service area, and suggested that "In the alternative, members could choose the Bronze HMO 6500 plan that offers the same full network as the 5400 Plan with a lower premium in exchange for higher-cost sharing." However, that plan is not an HSA-qualified plan. Replacing qualified coverage with non-qualified coverage is not in the best interests of policyholders. Therefore, the discontinuance of the Best Buy Bronze HMO HSA 5400 is approved within the Maine's Choice service area but not within the remainder of the State.

VI. FINDINGS AND CONCLUSIONS

On the basis of a preponderance of the credible evidence in the record, and for reasons set forth in Section V above, I find and conclude that Harvard Pilgrim's proposed Base and Unreimbursed rates are excessive. If the changes to the rates proposed by Harvard Pilgrim are applied consistent with this Decision and Order, as discussed in Section V, I could lawfully approve the resulting rates. The necessary revisions to the proposed rates can be achieved by making the following changes:

- In both the Base and Unreimbursed Filings, decrease the morbidity adjustment from 15.9% to 14.0%.
- In both the Base and Unreimbursed Filings, continue to offer the Best Buy Bronze HMO HSA 5400 in areas outside the Maine's Choice service area.

VII. ORDER

Pursuant to the provisions of 24-A M.R.S. §§ 2736, 2736-A, 2736-B and authority otherwise conferred by law, I hereby ORDER:

1. The Base Filing rates filed June 2, 2017, as revised, by Harvard Pilgrim for its Individual Products are DISAPPROVED. Accordingly, the proposed rates shall not enter into effect.

2. The Unreimbursed Filing rates filed June 23, 2017, as revised, by Harvard Pilgrim for its Individual Products are DISAPPROVED. Accordingly, the proposed rates shall not enter into effect.

3. Harvard Pilgrim is authorized to submit revised Base and Unreimbursed rates for review and they shall be APPROVED if the Superintendent finds them to be consistent with the terms of this Decision and Order and that the effective date of those rates will assure a minimum of 30 days' prior notice to policyholders.

VIII. NOTICE OF APPEAL RIGHTS

This Decision and Order is final agency action of the Superintendent of Insurance, within the meaning of the Maine Administrative Procedure Act, 5 M.R.S. § 8002(4). It may be appealed to the Superior Court in the manner provided for by 24-A M.R.S. § 236, 5 M.R.S. §§ 11001 through 11008, and M.R. Civ. P. 80C. Any party to the proceeding may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal within forty days after the issuance of this Decision and Order. There is no automatic stay pending appeal. Application for stay may be made in the manner provided in 5 M.R.S. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

August 10, 2017

Eric A. Cioppa

ERIC A. CIOPPA
Superintendent of Insurance