DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

July 12, 2018

Subject: Implications of the Decision by United States District Court for the District of New Mexico on the Risk Adjustment and Related Programs

The Centers for Medicare & Medicaid Services (CMS), on behalf of the Department of Health and Human Services (HHS), operates a risk adjustment program pursuant to section 1343 of the Patient Protection and Affordable Care Act (PPACA) and implementing regulations set forth in 45 C.F.R. Part 153 on behalf of any State which does not elect to operate their own risk adjustment program. Currently, HHS operates risk adjustment on behalf of all States, as no States operate their own risk adjustment program.[1]

On February 28, 2018, the United States District Court for the District of New Mexico issued a decision vacating use of the statewide average premium by CMS in the risk adjustment transfer formula established under section 1343 of the PPACA for the 2014 – 2018 benefit years, pending further administrative proceedings.[2] The ruling prevents CMS from making further collections or payments under the risk adjustment program, including amounts for the 2017 benefit year, at this time. CMS noted this ruling and immediate impacts in its July 9, 2018 release of *Summary Report on Permanent Risk Adjustment Transfers for the 2017 Benefit Year*,[3] and a REGTAP announcement to issuers regarding their issuer-specific risk adjustment results.

On March 28, 2018, the federal government moved the United States District Court for the District of New Mexico to reconsider its decision. A hearing on the matter was held on June 21, 2018. CMS is currently awaiting the court's ruling. CMS is seeking a quick resolution to the legal issues raised in a manner that restores the program to the manner in which it has been administered for benefit years 2014-2018. CMS will continue to update stakeholders on this issue as developments materialize.

See also the *United States District Court Ruling Puts Risk Adjustment On Hold* Press Release available at: https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-07-07.html.

[1] HHS operated the risk adjustment program in all States and the District of Columbia, except Massachusetts, in the 2014, 2015 and 2016 benefit years. HHS began operating risk adjustment in all States and the District of Columbia in the 2017 benefit year.
[2] *New Mexico Health Connections v. United States Department of Health and Human Services et al*, No. CIV 16-0878 JB/JHR (D.NM 2018).
[3] Available at: https://downloads.cms.gov/cciio/Summary-Report-Risk-Adjustment-2017.pdf.

This document provides further guidance as to the implications of this litigation on the HHS-operated risk adjustment and related programs, as described below:

- **Collection of 2017 Benefit Year Risk Adjustment Charges[4] and Distribution of Risk Adjustment Payments**: Although CMS announced the risk adjustment transfer amounts for the 2017 benefit year as calculated under the HHS-operated risk adjustment methodology which utilizes the statewide average premium, in light of the current status of the litigation, CMS will not collect or pay the specified amounts at this time. CMS will inform stakeholders of any update to the status of collections or payments at an appropriate future date.
- **Collection of 2014, 2015, and 2016 Benefit Year Risk Adjustment Charges (including overpayments) and Distribution of Risk Adjustment Payments**: Similar to the 2017 benefit year, as risk adjustment payments and charges for the 2014, 2015, and 2016 benefit years were calculated under the HHS-operated risk adjustment methodology which utilizes the statewide average premium, they are affected by the court's decision. CMS will not collect or pay any specified amounts remaining for the 2014-2016 benefit years at this time. CMS will inform stakeholders of any update to the status of collections or payments at an appropriate future date.
- **Collection of 2017 Benefit Year Risk Adjustment User Fees**: CMS will collect 2017 benefit year risk adjustment user fees in the August 2018 payment cycle to support program operations as the per member per month basis of the user fee calculation does not use or otherwise rely upon the statewide average premium.
- **2014, 2015, 2016 and 2017 Benefit Year EDGE Data Submissions**: Issuers must continue archiving and maintaining 2014, 2015, 2016, and 2017 EDGE data consistent with normal operations. Additionally, issuers are reminded of the maintenance of records requirement at 45 C.F.R § 153.620(b).
- **2018 Benefit Year EDGE Data Submission:** CMS will continue current operations of the 2018 benefit year EDGE server data submission as normal.
- **2017 Benefit Year EDGE/Risk Adjustment Discrepancies**: While some discrepancy resolutions for the 2017 benefit year have been issued, CMS will cease issuing any further discrepancy resolution decisions at this time. CMS will share further information regarding 2017 benefit year unresolved discrepancies at an appropriate future date.
- **2017 Benefit Year Risk Adjustment Administrative Appeals**: At this time, CMS is delaying the administrative appeals process set forth in 45 C.F.R. § 156.1220 for matters related to the calculation of 2017 benefit year transfer amounts (including calculation of risk adjustment default charges) as these amounts were calculated under the HHS-operated risk adjustment methodology which utilizes the statewide average premium. CMS will provide guidance on appeals of 2017 benefit year transfer amounts at an appropriate future date. However, CMS is not delaying the administrative appeals process under 45 C.F.R § 156.1220 for matters related to the 2017 benefit year risk adjustment user fees. Therefore, issuers will have until August 10, 2018, to request reconsideration of the 2017 benefit year user fee amounts. If you would like to request reconsideration of

[4] References to risk adjustment charges in this document include risk adjustment default charges. Therefore, CMS will also not collect or distribute risk adjustment default charges for the 2014, 2015, 2016, or 2017 benefit years at this time.

the 2017 benefit year user fee amounts, email CMS at ACAfinancialappeals@cms.hhs.gov.

- **2019 Benefit Year Risk Adjustment and Beyond**: The court's decision is specific to the HHS-operated risk adjustment methodology for the 2014 through 2018 benefit years. It does not impact program operations related to the 2019 benefit year and beyond.
- **State-operated Risk Adjustment Programs**: Pursuant to 45 C.F.R. § 153.310, a state that operates an Exchange is eligible to operate its own risk adjustment program. The court decision does not impact a state's ability to operate the program for future benefit years.
- **State Flexibility Requests:** As noted above, the court decision is specific to the 2014 through 2018 benefit years. Therefore, pursuant to 45 C.F.R. § 153.320(d), beginning with the 2020 benefit year, States can request a reduction in calculated risk adjustment transfers in the State's individual, small group or merged markets by up to 50 percent in States where HHS operates the risk adjustment program. These requests for the 2020 benefit year continue to be due by August 1, 2018.
- **HHS-operated Risk Adjustment Data Validation (HHS-RADV)**: CMS will continue to close out 2016 benefit year HHS-RADV and continue the current operations related to the validation of risk scores for 2017 benefit year HHS-RADV as planned.
- **Medical Loss Ratio (MLR) Reporting**: CMS will provide further guidance, as may be necessary, regarding the treatment of risk adjustment transfer amounts for MLR reporting purposes in the near future.
- **2019 Rate Filings**: We encourage you to speak with your State Department of Insurance.

CMS is actively litigating this case and appreciates issuers' patience while this case is in litigation. CMS will communicate any updates as soon as they are available. For questions, please contact CMS at RARIPAYMENTOPERATIONS@cms.hhs.gov.