



**Billing Code 6325-63-P**

**OFFICE OF PERSONNEL MANAGEMENT**

**48 CFR Parts 1602, 1615, and 1652**

**RIN: 3206-AN00**

**Federal Employees Health Benefits Program; Rate Setting for Community-Rated Plans**

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a final rule that makes changes to the Federal Employees Health Benefits Acquisition Regulation (FEHBAR). These changes: define which subscriber groups may be included for consideration as similarly sized subscriber groups (SSSGs); require the SSSG to be traditional community rated; establish that traditional community rated (TCR) Federal Employees Health Benefits (FEHB) plans must select only one rather than two SSSGs; and make conforming changes to FEHB contract language to account for the new medical loss ratio (MLR) standard for most community rated FEHB plans.

**DATES:** *Effective Date:* [INSERT DATE 30 DAYS AFTER PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** Wenqiong Fu, Policy Analyst, at [wenqiong.fu@opm.gov](mailto:wenqiong.fu@opm.gov) or (202) 606-0004.

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management is issuing a final rule to update the Federal Employees Health Benefits Acquisition Regulation to accommodate the new FEHB specific medical loss ratio (MLR) requirement for most community

rated plans as well as to update the similarly sized subscriber group (SSSG) requirement for traditional community rated plans.

### **Comments on FEHB premium impacts**

OPM received a comment regarding the impact the regulation will have on future premiums in the FEHB Program. Based on the analysis, OPM does not believe that there will be a significant impact in aggregate on the entire FEHBP, and as such, it is unlikely that there will be any major substantive impacts on future premium increases in the FEHBP as a whole.

### **Comment on Traditional Community Rating plans on FEHB Groups**

A commenter raised a concern that, by utilizing TCR plans, OPM may potentially cost the government more money. The commenter's justification was that insurers will adjust rates to the highest expected rate if they have to provide the same rates to all groups. Traditional Community Rating is guided by state law and all groups pay the average cost of coverage for the community. As such, it is not believed plans will adjust rates to the highest expected rate.

### **Comments on recommended language**

A commenter suggested that (1) OPM should exclude customers of carrier subsidiaries from SSSG consideration and (2) OPM should also exclude from SSSG analysis “[an] entity that maintains a contractual arrangement with the carrier to provide healthcare benefits.”

OPM declines to make this change. We require these entities to be considered for SSSG comparison because we do not want businesses to form distinct entities under a corporate umbrella for the sole purposes of getting a lower rate for non-FEHBP groups. Our goal is to identify one non-FEHBP subscriber group (employer groups covered by an issuer) that is closest in size to the FEHBP group and, if the group received a discounted rate, the carrier must provide the discount to the FEHBP. We feel that, if carriers have the ability to shift groups under a

corporate umbrella, the most appropriate SSSG will not be available for comparison to the FEHBP group and the FEHB program will be at greater risk. OPM also is not amending 48 CFR 1602.170–13(b)(1)(iv). Our intention is not to include SSSGs of entities with whom a Carrier contracts to provide health insurance coverage for its own employees. Additionally, we do not intend to set up a reinsurance arrangement. Our intent is to include entities where a Carrier has contracted provision of benefits to its customers to a third-party entity.

### **Regulatory Flexibility Act**

OPM certifies that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only affects health insurance carriers in the FEHB Program.

### **Executive Order 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866. OPM has examined the impact of this final rule as required by Executive Order 12866 and Executive Order 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. This rule is not considered a major rule because there will be no increased costs to Federal agencies, Federal Employees, or Federal retirees in their health insurance premiums.

### **Federalism**

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

**List of Subjects in 48 CFR Parts 1602, 1615, and 1652**

Government employees, Government procurement, Health insurance reporting and recordkeeping requirements.

U.S. Office of Personnel Management.

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Katherine Archuleta,  
Director.

For the reasons set forth in the preamble, OPM amends chapter 16 of title 48 CFR (FEHBAR) as follows:

## **PART 1602—DEFINITIONS OF WORDS AND TERMS**

1. The authority citation for part 1602 continues to read as follows:

**Authority:** 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

2. Revise §1602.170–13 to read as follows:

### **§1602.170–13 Similarly sized subscriber groups.**

(a) A *Similarly sized subscriber group* (SSSG) is a non-FEHB employer group that:

(1) As of the date specified by OPM in the rate instructions, has a subscriber enrollment closest to the FEHBP subscriber enrollment;

(2) Uses traditional community rating; and,

(3) Meets the criteria specified in the rate instructions issued by OPM.

(b) Any group with which an entity enters into an agreement to provide health care services is a potential SSSG (including groups that are traditional community rated and covered by separate lines of business, government entities, groups that have multi-year contracts, and groups having point-of-service products) except as specified in paragraph (c) of this section.

(1) An entity's subscriber groups may be included as an SSSG if the entity is any of the following:

(i) The carrier;

(ii) A division or subsidiary of the carrier;

(iii) A separate line of business or qualified separate line of business of the carrier; or

(iv) An entity that maintains a contractual arrangement with the carrier to provide healthcare benefits.

(2) A subscriber group covered by an entity meeting any of the criteria under paragraph (b)(1) of this section may be included for comparison as a SSSG if the entity meets any of the following criteria:

(i) It reports financial statements on a consolidated basis with the carrier; or

(ii) Shares, delegates, or otherwise contracts with the carrier, any portion of its workforce that involves the management, design, pricing, or marketing of the healthcare product.

(c) The following groups must be excluded from SSSG consideration:

(1) Groups the carrier rates by the method of retrospective experience rating;

(2) Groups consisting of the carrier's own employees;

(3) Medicaid groups, Medicare-only groups, and groups that receive only excepted benefits as defined at 26 U.S.C. 9832(c);

(4) A purchasing alliance whose rate-setting is mandated by the State or local government;

(5) Administrative Service Organizations (ASOs);

(6) Any other group excluded from consideration as specified in the rate instructions issued by OPM.

(d) OPM shall determine the FEHBP rate by selecting the lowest rate derived by using rating methods consistent with those used to derive the SSSG rate.

(e) In the event that a State-mandated TCR carrier has no SSSG, then it will be subject to the FEHB specific MLR requirement.

3. In §1602.170-14, revise paragraph (a) to read as follows:

**§1602.170-14 FEHB-specific medical loss ratio threshold calculation.**

(a) *Medical Loss Ratio* (MLR) means the ratio of plan incurred claims, including the carrier's expenditures for activities that improve health care quality, to total premium revenue determined by OPM, as defined by the Department of Health and Human Services in 45 CFR part 158.

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## **PART 1615—CONTRACTING BY NEGOTIATION**

4. The authority citation for part 1615 is revised to read as follows:

**Authority:** 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301; 5 U.S.C. 8902.

5. In §1615.402, revise paragraphs (c)(2), (c)(3)(i)(A) and (B), and (c)(4) to read as follows:

### **§1615.402 Pricing policy.**

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(c) \*\*\*

(2) For contracts with fewer than 1,500 enrollee contracts for which the FEHB Program premiums for the contract term will be at or above the threshold at FAR 15.403–4(a)(1), OPM will require the carrier to submit its rate proposal, utilization data, and a certificate of accurate cost or pricing data required in 1615.406–2. In addition, OPM will require the carrier to complete the proposed rates form containing cost and pricing data, and the Community-Rate Questionnaire, but will not require the carrier to send these documents to OPM. The carrier will keep the documents on file for periodic auditor and actuarial review in accordance with 1652.204–70. OPM will perform a basic reasonableness test on the data submitted. Rates that do not pass this test will be subject to further OPM review.

(3) \*\*\*

(i) \*\*\*

(A) For contracts with 1,500 or more enrollee contracts for which the FEHB Program premiums for the contract term will be at or above the threshold at FAR 15.403– 4(a)(1), OPM will require the carrier to provide the data and methodology used to determine the FEHB Program rates. OPM will also require the data and methodology used to determine the rates for the carrier’s SSSG. The carrier will provide cost or pricing data required by OPM in its rate instructions for the applicable contract period. OPM will evaluate the data to ensure that the rate is reasonable and consistent with the requirements in this chapter. If necessary, OPM may require the carrier to provide additional documentation.

(B) Contracts will be subject to a downward price adjustment if OPM determines that the Federal group was charged more than it would have been charged using a methodology consistent with that used for the SSSG. Such adjustments will be based on the rate determined by using the methodology (including discounts) the carrier used for the SSSG.

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(4) Contracts will be subject to a downward price adjustment if OPM determines that the Federal group was charged more than it would have been charged using a methodology consistent with that used for the similarly-sized subscriber group (SSSG). Such adjustments will be based on the rate determined by using the methodology (including discounts) the carrier used for the SSSG.

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6. In §1615.406-2, revise the first certificate following paragraph (b) to read as follows:

**§1615.406–2 Certificates of accurate cost or pricing data for community rated carriers.**

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(Beginning of first certificate)

Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers (SSSG methodology)

This is to certify that, to the best of my knowledge and belief: (1) The cost or pricing data submitted (or, if not submitted, maintained and identified by the carrier as supporting documentation) to the Contracting officer or the Contracting officer's representative or designee, in support of the \_\_\_\_\* FEHB Program rates were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHB Program contract and are accurate, complete, and current as of the date this certificate is executed; and (2) the methodology used to determine the FEHB Program rates is consistent with the methodology used to determine the rates for the carrier's Similarly Sized Subscriber Group.

\*Insert the year for which the rates apply.

Firm: \_\_\_\_\_

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date of Execution: \_\_\_\_\_

(End of first certificate)

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**PART 1652—CONTRACT CLAUSES**

7. The authority citation for part 1652 continues to read as follows:

**Authority:** 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

8. In §1652.215–70, revise paragraphs (a) and (c) to read as follows:

**§1652.215-70 Rate Reduction for Defective Pricing or Defective Cost or Pricing Data.**

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(a) If any rate established in connection with this contract was increased because:

(1) The Carrier submitted, or kept in its files in support of the FEHBP rate, cost or pricing data that were not complete, accurate, or current as certified in one of the Certificates of Accurate Cost or Pricing Data (FEHBAR 1615.406–2);

(2) The Carrier submitted, or kept in its files in support of the FEHBP rate, cost or pricing data that were not accurate as represented in the rate reconciliation documents or MLR Calculation;

(3) The Carrier developed FEHBP rates for traditional community rated plans with a rating methodology and structure inconsistent with that used to develop rates for a similarly sized subscriber group (see FEHBAR 1602.170–13) as certified in the Certificate of Accurate Cost or Pricing Data for Community Rated Carriers;

(4) The Carrier, who is not mandated by the State to use traditional community rating, developed FEHBP rates with a rating methodology and structure inconsistent with its State-filed rating methodology (or if not required to file with the State, their standard written and established rating methodology) or inconsistent with the FEHB specific medical loss ratio (MLR) requirements (see FEHBAR 1602.170-13); or

(5) The Carrier submitted or, kept in its files in support of the FEHBP rate, data or information of any description that were not complete, accurate, and current—then, the rate shall be reduced in the amount by which the price was increased because of the defective data or information.

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(c) When the Contracting Officer determines that the rates shall be reduced and the Government is thereby entitled to a refund or that the Government is entitled to a MLR penalty, the Carrier shall be liable to and shall pay the FEHB Fund at the time the overpayment is repaid or at the time the MLR penalty is paid—

(1) Simple interest on the amount of the overpayment from the date the overpayment was paid from the FEHB Fund to the Carrier until the date the overcharge is liquidated. In calculating the amount of interest due, the quarterly rate determinations by the Secretary of the Treasury under the authority of 26 U.S.C. 6621(a)(2) applicable to the periods the overcharge was retained by the Carrier shall be used;

(2) A penalty equal to the amount of overpayment, if the Carrier knowingly submitted cost or pricing data which was incomplete, inaccurate, or noncurrent; and,

(3) Simple interest on the MLR penalty from the date on which the penalty should have been paid to the FEHB Fund to the date on which the penalty was or will be actually paid to the FEHB fund. The interest rate shall be calculated as specified in paragraph (c)(1) of this section.

9. In §1652.216–70, revise paragraphs (b)(2), (3), (7), and (8) to read as follows:

**§1652.216-70 Accounting and price adjustment.**

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(b) \*\*\*

(2). Effective January 1, 2013 all community rated plans must develop the FEHBP's rates using their State-filed rating methodology or, if not required to file with the State, their standard written and established rating methodology. A carrier who mandated by the State to use traditional community rating will be subject to paragraph (b)(2)(ii) of this clause. All other carriers will be subject to paragraph (b)(2)(i) of this clause.

(i) The subscription rates agreed to in this contract shall meet the FEHB-specific MLR threshold as defined in FEHBAR 1602.170-14. The ratio of a plan's incurred claims, including the carrier's expenditures for activities that improve health care quality, to total premium revenue shall not be lower than the FEHB-specific MLR threshold published annually by OPM in its rate instructions.

(ii) The subscription rates agreed to in this contract shall be equivalent to the subscription rates given to the carrier's similarly sized subscriber group (SSSG) as defined in FEHBAR 1602.170-13. The subscription rates shall be determined according to the carrier's established policy, which must be applied consistently to the FEHBP and to the carrier's SSSG. If the SSSG receives a rate lower than that determined according to the carrier's established policy, it is considered a discount. The FEHBP must receive a discount equal to or greater than the carrier's SSSG discount.

(3) If subject to paragraph (b)(2)(ii) of this clause, then:

(i) If, at the time of the rate reconciliation, the subscription rates are found to be lower than the equivalent rates for the SSSG, the carrier may include an adjustment to the Federal group's rates for the next contract period, except as noted in paragraph (b)(3)(iii) of this clause.

(ii) If, at the time of the rate reconciliation, the subscription rates are found to be

higher than the equivalent rates for the SSSG, the carrier shall reimburse the Fund, for example, by reducing the FEHB rates for the next contract term to reflect the difference between the estimated rates and the rates which are derived using the methodology of the SSSG, except as noted in paragraph (b)(3)(iii) of this clause.

(iii) Carriers may provide additional guaranteed discounts to the FEHBP that are not given to the SSSG. Any such guaranteed discounts must be clearly identified as guaranteed discounts. After the beginning of the contract year for which the rates are set, these guaranteed FEHBP discounts may not be adjusted.

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(7) Carriers may provide additional guaranteed discounts to the FEHBP. Any such guaranteed discounts must be clearly identified as guaranteed discounts. After the beginning of the contract year for which the rates are set, these guaranteed FEHBP discounts may not be adjusted.

(8) Carriers may not impose surcharges (loadings not defined based on an established rating method) on the FEHBP subscription rates or use surcharges in the rate reconciliation process. If the carrier is subject to the SSSG rules and imposes a surcharge on the SSSG, the carrier cannot impose the surcharge on FEHB.

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