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Subject: The Relationship of Certain Types of State Laws to the Application of the Guaranteed Availability Requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in the Small Group Market

Markets: Small Group

I. Purpose

The purpose of this Bulletin is to convey the position of the Health Care Financing Administration (HCFA) on the following specific issues relating to the application of the guaranteed availability requirements in section 2711 of the Public Health Service Act (the "PHS Act") (42 U.S.C. §300gg-11)¹

- (1) Whether issuers of health insurance coverage in the small group market may offer any product to fewer than all small employers if applicable State law authorizes those issuers to do so.
- (2) The extent to which the PHS Act preempts State laws that authorize issuers to offer any product to fewer than all small employers in the small group market.
- (3) Whether the guaranteed availability requirements apply to group health plans comprised of fewer than two employees.

II. Background

Section 2711(a)(1)(A) of the PHS Act generally requires every issuer that offers health insurance coverage in the small group market to accept every small employer that applies for coverage. (42 U.S.C. §300gg-11(a)(1)(A)). "Small group market" is defined in section 2791(e)(5) of the PHS Act as "the health insurance market under which individuals obtain health insurance coverage (directly or through an arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by a small employer." (42 U.S.C. §300gg-91(e)(5)). Section 2791(e)(4) of the PHS Act

¹ Title I, Section 102(a) of HIPAA added title XXVII to the PHS Act.

defines "small employer" as "in connection with a group health plan, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year." (42 U.S.C. §300gg-91(e)(4)).

Regulations at 45 CFR §146.150 clarify the requirements of section 2711 with respect to the marketing of products to small employers. One of those requirements, the guaranteed availability requirement (also known as the "all products" requirement), provides as follows:

Section 146.150. Guaranteed availability of coverage for employers in the small group market.

(a) *Issuance of coverage in the small group market.* Subject to paragraphs (c) through (f) of this section, each health insurance issuer that offers health insurance coverage in the small group market in a State must-

(1) Offer, to any small employer in the State, all products that are approved for sale in the small group market and that the issuer is actively marketing, and must accept any employer that applies for any of those products...

(45 CFR §146.150(a)(1)). Paragraphs (c) through (f) of §146.150, referred to above in paragraph (a), describe the circumstances in which an issuer is excused from complying with the all products requirement. Unless an exception applies, therefore, an issuer must offer to all small employers all the State-approved products the issuer is actively marketing in the small group market.

III. State Laws That Apply to the Offering of Products in the Small Group Market

It has come to HCFA's attention that several States have authorized issuers to offer products approved for sale in the small group market to some small employers, but not to all small employers in that market.

The Federal regulations referred to above, however (implementing the guaranteed availability requirements), make clear that an issuer of coverage in the small group market generally must offer to each small employer (as defined in the PHS Act) in the State each product that is approved for sale in the small group market and that is actively marketed by the issuer. Issuers are not relieved from the guaranteed availability requirements simply because a State law requires or permits issuers to offer products to some, but not all, small employers in the small group market. The following examples are provided for purposes of clarification:

Example 1. A State law requires issuers to offer coverage for biologically-based mental illness to employers with more than 25 employees. However, under the PHS Act's all products requirement, if an issuer actively markets a product providing coverage for biologically-based mental illness to small

employers with more than 25 employees, the issuer also must offer the product to all small employers with between 2 and 25 employees.

Example 2. A State permits issuers to offer certain products without exclusions for pre-existing conditions to employers with more than 35 employees. However, under the PHS Act's all products requirement, issuers that offer products without pre-existing condition exclusions to employers with more than 35 employees also must offer those same products to small employers with between 2 and 34 employees.

IV. Preemption

There seems to be some confusion about the preemption provision contained in section 2723(a) of the PHS Act. (42 U.S.C. Section 300gg-23(a)). "Preemption" is a term of art that refers to the situation in which Federal law supersedes State law. State laws do not "preempt" Federal laws.

The courts have established guidelines for determining whether, and to what extent, State laws are preempted. The clearest indication of preemption is through the inclusion by Congress of an express preemption provision in a statute, such as in sections 2723(a) and 2762(a) of the PHS Act. Those sections specify that State law will generally be preempted only if it "prevents the application of" a provision of title XXVII.¹ The conference report accompanying HIPAA indicates that this is intended to be the "narrowest" preemption of State laws.²

We believe that general case law on preemption provides additional guidance in determining what constitutes the scope of the preemption. One basis on which courts have found preemption is if compliance with both Federal and State law is in effect physically impossible. See Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355 (1986). In light of the statutory language that State law will not be preempted unless it "prevents" compliance with HIPAA; the legislative history that indicates that preemption will be limited to the "narrowest" of circumstances; and the general case law on preemption, HCFA takes the position that State law "prevents the application" of a HIPAA provision if the State law makes it impossible for a party to comply with HIPAA. If a State law simply permits but does not require an issuer to do something that is prohibited under HIPAA, the State law would not be applicable. The issuer simply could not take advantage of the more generous State law provision.

¹ Section 2723(a) of the PHS Act provides, in part, that the standards contained in Part A of title XXVII shall supersede State law relating solely to issuers of coverage in the group markets, to the extent that State law "prevents the application of" a requirement of that Part. Section 2762(a) provides, generally, that the requirements of Part B of title XXVII (the "individual market rules" of HIPAA) are not to be construed to prevent a State from establishing, implementing or enforcing State laws concerning coverage in the individual market, except if State laws "prevent the application of" a requirement of Part B. (42 U.S.C. §300gg-62(a).

² See House Conf. Rep. No. 104-736, at 205 (1996), reprinted in 1996 U.S. Code Cong. & Admin. News. 2018.

For example, HIPAA provides that employers with between 2 and 50 employees ("small employers") are entitled to guaranteed issue of any group health insurance product offered in the small group market (unless one or more of the exceptions listed in PHS Act sections 2711(c) - (f) apply). If a State law provides that a particular product cannot be offered to employers with fewer than 25 employees, but must be offered to employers with 25 or more employees, the issuer is unable to comply with the guaranteed issue requirement and the State law. The State law, therefore, is preempted to the extent that it prohibits the issuer from offering the product to employers with fewer than 25 employees.

The result is different, however, if State law mandates or prohibits offering a product to part of the small group market, but is silent or permissive regarding the other part of that market. For example, if a State law requires issuers to market a particular product to employers with 25 or more employees, but is silent regarding the issuers' obligations with respect to employers with fewer than 25 employees, the State law does not prevent an issuer from offering the product to the smaller employers. In that case, the issuer can comply with the State law requirement and also with HIPAA by marketing the same product to all small employers.

Similarly, if the State law prohibits marketing a product to groups of 25 or more employees, but is silent with respect to the smaller employers, then even though the State law would not prevent offering the product to groups of under 25 employees, as a practical matter, HIPAA as it intersects with State law prevents the issuer from marketing the product to anyone in the small group market. The issuer can comply with both the HIPAA all-products guarantee and the State's prohibition on sales to groups of 25 or more, but the way it has to comply is by not offering the product in the small group market.

We believe this result is also consistent with Executive Order 13132 of August 4, 1999 (See 64 Fed. Reg. 43, 255 (August 10, 1999)), which states that "Agencies shall construe... a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute."

V. Guaranteed Availability with Respect to Group Health Plans with Fewer Than 2 Employee Participants

The general rules discussed above (concerning application of the guaranteed availability requirements) do not necessarily apply to health insurance coverage offered in connection with group health plans that have fewer than two participants that are current employees. Section 2721(a) of the PHS Act (42 U.S.C. §300gg-21(a)) provides, in part, that the guaranteed availability requirements contained in section 2711 do not apply to group health plans (and the coverage offered in connection with those plans) that have fewer than two participants as current employees on the first day of the plan year. (For ease of reference, such group health plans with fewer than two participants are referred to as "groups of one").

Generally, coverage issued in connection with groups of one is considered individual market coverage under section 2791(e)(1) of the PHS Act. (42 U.S.C. 300gg-91(e)(1)(B)(i)). Section 2791(e)(1)(B)(ii) of the PHS Act and implementing regulations, however, permit States to define health care coverage offered in connection with groups of one as group market, and not individual market, coverage. (42 U.S.C. §300gg-91(e)(1)(B)(ii); see also 45 CFR §144.103 [definition of individual market]). If a State defines such coverage as group market coverage, the State may also require issuers of coverage in connection with groups of one to comply with the guaranteed availability requirements. Unless a State regulates coverage issued in connection with groups of one as group market coverage and requires guaranteed availability of coverage with respect to that coverage, however, the group market guaranteed availability requirements do not apply to coverage issued in connection with groups of one.

Where to get more information:

The regulations cited in this bulletin are found in Parts 144 through 148 of Title 45 of the Code of Federal Regulations (45 CFR sections 144-148). Information about HIPAA is also available on HCFA's website at <http://hipaa.hcfa.gov>.

If you have any questions regarding this Bulletin, call the HIPAA Insurance Reform Help Line at (410) 786-1565 or your local HCFA regional office (see attached list of contact numbers and the geographic areas served by each region).

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