MASSACHUSETTS HEALTH CONNECTOR
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Federal Policy and Regulatory Update

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Board of Directors Meeting
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Overview of Policy and Regulatory Landscape in 2018

While the federal policy landscape in 2017 was marked by the failed "repeal and replace" efforts in Congress and the sudden cessation of Cost Sharing Reduction payments, 2018 is characterized to date by substantial regulatory efforts to undermine the goals of the Affordable Care Act.

- Overview of 2018 federal policy landscape
- Standard rulemaking
- Executive Order-driven rulemaking
- Elimination of federal individual mandate penalty
- New rules/regulations expected in coming months
- Considerations and next steps

2019 Notice of Benefit and Payment Parameters

2019 Notice of Benefit and Payment Parameters

CMS issues regulations each year to outline their approach to risk adjustment, but they also review other market-wide and Exchange-specific rules at the same time.

- The annual "Notice of Benefit and Payment Parameters" covers topics such as
  - Risk adjustment procedures
  - Guaranteed issue and renewability
  - All aspects of Exchange operations
  - Issuer requirements under the ACA
- This year's rule advanced several hallmark policies of the current administration, including
  - An increased emphasis on state oversight of markets
  - A growing role for agents, issuers, and web brokers in the federal Marketplace application process
- HHS indicated that subsequent rule making and guidance will focus on program integrity initiatives for Exchanges

2019 Notice of Benefit and Payment Parameters, cont'd

Flexibility for states was a pervasive theme in the rule, though it also preserved a state's ability to maintain current approaches.

- For example, CMS considered whether a national Essential Health Benefit (EHB) standard should be implemented; while they did not adopt this approach in the final rule, they indicated they may in future
- At present, no action is needed for Massachusetts to be able to continue its current approach to the Exchange or insurance market

New flexibilities for states to…

- Reduce risk adjustment transfers by up to 50% beginning in 2020 under new federal rules or under their own authority, if available
- Choose from a broader range of plans in choosing an EHB Benchmark plan
- Raise the threshold for rate increases requiring justification to higher than 10%
- Request a Medical Loss Ratio (MLR) lower than 80%
- Engage only one Navigator entity, without restriction on the type or location of the organization
- Modify plan certification requirements around network adequacy, essential community provider coverage, and meaningfully different plan designs

Proposed Regulations Stemming from 2017 Executive Order

Overview of Proposed Regulations

Recent federal guidance proposes to expand access to Association Health Plans (AHP) and Short-Term Limited Duration Health Plans (STLDP). Without state vigilance, these plans could destabilize the merged market by attracting "better" risk leading to higher premiums for remaining merged market enrollees.

- In October 2017, President Trump issued an Executive Order directing the Depts. of HHS, Treasury, and Labor to facilitate insurance across state lines and competition by changing insurance market rules related to AHPs, STLDPs, and HRAs. The proposed rule on AHPs was released on Jan. 4, and the proposed rule on STLD plans was released on Feb. 20
- Together, these proposals appear designed to develop a "shadow market" of health plans that might not be subject to ACA or state merged market rules. While some argue this could reduce costs for "healthy" individuals and small groups that exit to AHPs and STLDPs from merged market plans, consumers could be left without protections Massachusetts has long valued, and premiums for those remaining in the merged market are estimated to increase by as much as 10% in the first year alone
- While thematically similar, the two proposed rules present different levels of risk to Massachusetts consumers and the overall stability of the merged market. As proposed, states could continue to regulate STLDPs but states might be restricted in their ability to regulate AHPs due to federal preemption
- In response to these federal proposals, CCA and DOI recommended policy focus on continued flexibility to regulate insurance at the state level so that the Commonwealth may adapt to local market needs and preferences

Association Health Plans

On Jan. 4, DOL issued a proposed regulation on AHPs, which could permit out-of-state entities to offer coverage not meeting Massachusetts standards to Massachusetts small employers, leaving consumers exposed and segmenting risk.

- The proposed rule would allow more AHPs to be treated as large group plans, which could allow AHP members to access different and less expensive coverage than available in the Massachusetts merged market, but this would also be coverage without Massachusetts merged market protections
  - Under the new federal rules, every business in the state or every business within the same trade across the country could conceivably be considered one large "employer" for the purposes of insurance rules
  - Although Massachusetts merged market rules would continue to apply to plans offered directly to individuals and small groups (including Massachusetts's small group cooperatives), AHPs may be considered large group plans by DOL and are expected to look to bypass state benefit, rating, and other consumer protections
  - This differs from Massachusetts' state-specific association coverage, "group purchasing cooperatives," which generally meet merged market rules
- According to the American Academy of Actuaries, this could "*…fragment the market as lower-cost groups and individuals would move to establish an AHP, and higher-cost groups and individuals would remain in traditional insurance plans. Such adverse selection would result in higher premiums in the non-AHP plans. Ultimately, higher-cost individuals and small groups would find it more difficult to obtain coverage*."

Short-Term Limited Duration Plans

On Feb. 20, DOL, Treasury, and HHS jointly issued a proposed regulation on STLDPs, which could permit plans not meet Massachusetts standards to enter the nongroup market, leaving consumers exposed and segmenting risk.

- Under current federal law, STLDPs are not required to meet ACA consumer protection standards, but these plans are limited to a 3-month duration to ensure they are only used to fill brief coverage gaps
- The proposed federal rules would allow STLD plans to offer coverage for up to 364 days, thereby expanding the number of individuals likely to take up insufficient STLD coverage rather than comprehensive coverage. As with AHPs, this could attract healthier/younger risk from Massachusetts' merged market, resulting in higher premiums for the remaining members of the merged market risk pool
  - The rule acknowledges this *"may further reduce choices for individuals remaining in the individual market risk pool"* by weakening states' individual markets, and that *"consumers who purchase short-term, limited-duration insurance policies and then develop chronic conditions could face financial hardship"* as a result
- Importantly, the STLDP rule appears to permit continued flexibility for Massachusetts to apply its own market standards, including requiring guaranteed issue and rating restrictions, rather than deferring to the new federal approach, The STLDP rule is not expected to impact Massachusetts because STLDPs have traditionally not been in our market due to the guaranteed issue and rating requirements
- The Massachusetts individual mandate (specifically its Minimum Creditable Coverage standards) may help protect against uptake of STLD plans, given that adult residents could be penalized for carrying coverage that fails to include key consumer protections like prohibitions on annual caps on coverage

Public Comments from Massachusetts

In response to proposed AHP and STLDP rules, the Health Connector and the Division of Insurance, along with a diverse coalition of market stakeholders, submitted comments voicing concern with the proposals and expressing ongoing commitment to Massachusetts' approach to market stability.

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March 6, 2018

The Honorable Preston Rutledge, Assistant Secretary
Employee Benefits Security Administration, U.S. Department of Labor
Room N-5655, 200 Constitution Avenue NW
Washington, D.C. 20210

RE: Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85) – Commonwealth of Massachusetts Comments

Dear Assistant Secretary Rutledge:

We are writing on behalf of the Massachusetts Division of Insurance (DOI) and Massachusetts's State-Based Marketplace (the Commonwealth Health Insurance Connector Authority or "Health Connector") to offer comments in response to the Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM) titled "Definition of 'Employer' Under Section 3(5) of ERISA-Association Health Plans" (83 FR 614). Together, our agencies serve as stewards of health insurance for 765,000 Massachusetts residents covered in Massachusetts's "merged" nongroup and small group market, which includes over 245,000 Massachusetts residents covered through the Health Connector. We appreciate the DOL accepting comments on this proposed regulation and inviting dialogue with states on this topic.

I. Massachusetts Insurance Market Background

The Commonwealth of Massachusetts has a history spanning several decades of bipartisan, innovative health insurance expansion efforts and tailored approaches to regulating its health insurance market to meet local market needs and priorities. In the 1990s, Massachusetts implemented reforms requiring guaranteed issue coverage to small employers and also to individuals (nongroup). In 2006, Massachusetts enacted landmark health reform legislation that resulted in the highest rate of health

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April 23, 2018

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9924-P
P.O. Box 8010
Baltimore, MD 21244-8010

Submitted via the Federal Regulations Web Portal at www.regulations.gov

RE: Short-Term, Limited-Duration Insurance (CMS-9924-P) – Commonwealth of Massachusetts Comments

Dear Administrator Verma:

We write on behalf of the Massachusetts Division of Insurance (DOI) and Massachusetts's State-Based Marketplace (the Commonwealth Health Insurance Connector Authority or "Health Connector") to offer comments in response to proposed regulations entitled "Short-Term, Limited Duration Health Insurance," published on February 21, 2018. Together, our agencies serve as stewards of health insurance for 765,000 Massachusetts residents covered in Massachusetts's "merged" nongroup and small group market, which includes 245,000 Massachusetts residents covered through the Health Connector.

The proposed federal rules would allow short-term limited duration (STLD) plans to offer coverage for up to 364 days, thereby expanding the number of individuals nationally who may take up less comprehensive STLD coverage rather than more robust coverage that meets Affordable Care Act (ACA) and state requirements, such as essential benefits, cost protections, and guaranteed availability without medical underwriting. The proposed rule clearly allows for continued state regulatory oversight of these plans, which Massachusetts favors for a multitude of policy and historical reasons.

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MassAHU
Massachusetts Association of Health Underwriters

March 6, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted electronically via regulations.gov

RE: Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85)

Dear Assistant Secretary Rutledge:

On behalf of broad group of organizations representing consumers, providers, hospitals, and health plans based in Massachusetts, we are writing to offer comments in response to the Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM) titled, Definition of "Employer" Under Section 3(5) of ERISA - Association Health Plans (83 FR 614).

We have serious concerns that the proposed regulations could impact the stability of the Massachusetts marketplace by allowing individual employers to circumvent many of the protections and requirements of the Massachusetts merged market and the Affordable Care Act (ACA) by joining together as association health plans (AHPs) for the purpose of purchasing health coverage for their employees.

The proposed rule would broaden the definition of an employer under ERISA to allow more employers to form AHPs and bypass ACA rules. Specifically, the rule expands the criteria for determining when an association of employers may constitute a single multiple-employer group. First, the proposed rule would amend the existing requirement that associations sponsoring AHPs must exist for a reason other than offering health insurance, by expressly allowing a group or association to exist for the purpose of offering or providing health coverage to its members.

Federal Mandate Penalties Eliminated for 2019

Developments Resulting from Federal Individual Mandate Changes

President Trump signed a tax bill into law on December 22, 2017, which reduced the penalty for the federal individual mandate to zero, effective 1/1/2019.

- Implications for Massachusetts
  - MA is the most insulated of any state with respect to impacts of the federal mandate being essentially repealed, given that we maintained our own independent state mandate, which has been in effect since 2007
  - However, consumer confusion and/or erroneous perceptions that carrying coverage is no longer required is a possibility that Massachusetts should actively guard against
  - Long term effects via federal public policy are still possible for Massachusetts
- Implications for the rest of the United States
  - CBO has estimated that repeal would cause 13 million to lose coverage by 2025. Urban Institute estimates premium increases could be up to 20% (or more in some states) as a result of individual mandate penalty change + proposed changes to Short-Term Limited Duration Plans, though Massachusetts would not experience these impacts
  - States are becoming the frontlines of policy efforts to stem the tide of premium increases and erosions to the ACA and coverage expansion, with many states now actively considering individual mandates and other state-level policy tools

Technical Assistance and Dialogue with Other States

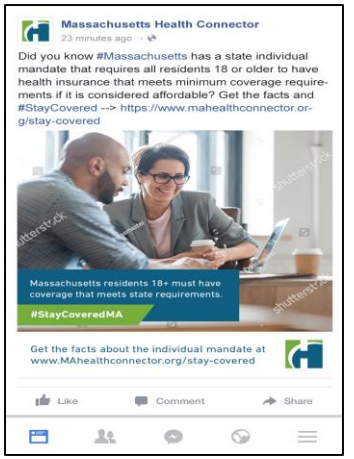
Since the federal individual mandate has been altered, many states have begun to explore whether to establish state-level individual mandates of their own.

- Throughout January and February, CCA staff have been invited to present via webinar to a number of national audiences organized by the National Academy of State Health Policy (NASHP) and Families USA, which have been geared toward state officials in other states as well consumer advocacy groups
- CCA has also been invited to provide individualized technical assistance to Maryland and DC, which are the states furthest along in consideration of a state-based mandate, though proposals for a mandate have cropped up in eight additional states
- The latest developments from others pursuing a mandate:
  - District of Columbia: On February 21, the Executive Board of the D.C. Exchange approved a resolution recommending the adoption of a District-level mandate as well as a number of other policy proposals. The resolution will have to be approved by the D.C. Council before going into effect
  - New Jersey: Bill passed by both House and Senate would establish an individual mandate, use revenue to fund a reinsurance program, and would require individuals who work for small businesses to obtain coverage conforming to small group rules or be subject to a mandate penalty
  - Maryland: Maryland's market stabilization proposal originally included an individual mandate (but departed from MA and ACA penalty concept by instead soliciting a "down payment" from someone who is not carrying coverage, and facilitating enrollment that could apply the payment, rather than assessing a "penalty")

Planned Efforts to Revive Awareness of State-Level Mandate

The Health Connector is planning a number of efforts, including developing materials and resources, to help remind/refresh the Massachusetts market about the state level mandate. This push will be branded as a 'Stay Covered' campaign.

- **Tailored guides and advisories**: CCA has worked with DOI to develop detailed guides and advisories for consumers, employers, and brokers about the individual mandate and MCC specifically
- **Ongoing work with sister agencies and stakeholders**: Will work with DOR and DOI and other agencies to find opportunities to further clarify ongoing effectiveness of the individual mandate, and identify whether there are ways we wish to further strengthen or refine our mandate policies
- **Work with Navigators**: CCA has incorporated into its Notice of Grant Opportunity for the Navigator program a request for Navigator applicants to indicate how they could use their communication and assistance roles to further bolster population awareness of individual mandate
- **General messaging**: CCA plans to incorporate reminder messaging in its general marketing, public messaging, and outreach messages
- **Social media**: CCA developing "sharables" for social media distribution (which can be amplified via carriers, consumer groups, elected officials, and others) using hashtag #staycovered
- **Special 'Stay Covered' URL**: CCA will establish a special 'Stay Covered' URL/webpage where it will house all materials on individual mandate and awareness-raising resources so stakeholders can readily access, share, and leverage
- **Other ideas?** We are seeking other awareness raising ideas from Board members.



Other Potential Rulemaking on the Horizon

Additional Potential Rulemaking in 2018

In addition to the possibility of final AHP and STLD plan regulations, staff are also watching for a number of possible proposed regulations that may be issued in the coming months which could present new impacts.

- Public Charge Determinations:
  - Leaked Department of Homeland Security draft regulations (the latest of which is reported to be at OMB) which would substantially expand the kinds of public benefits that can be considered part of a "public charge" determination, which could in turn impact an immigrant's ability to obtain citizenship
  - The expanded definition of public benefits that could trigger a public charge determination would newly include health programs, including premium tax credits via Exchanges like the Health Connector

- Changes to Non-Discrimination Requirements:
  - Section 1557 is the nondiscrimination provision of the ACA. The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing Federal civil rights laws (*e.g.,* Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, etc.) and extends nondiscrimination protections to individuals participating in HHS programs and activities that receive federal funding, including Exchanges
  - 2016 regulation clarified that these protections included protection from sex discrimination, which was defined to include anti-transgender discrimination. The Trump Administration has indicated that they plan to roll back this guidance

Looking Forward

Considerations and Next Steps

CCA will continue to monitor proposed and final regulations for implications to CCA enrollees and the Massachusetts health care landscape more broadly.

Working with our Board and agency partners, we seek to identify and act on opportunities to ensure our market remains stable and that our approach to coverage expansion in Massachusetts is maintained.