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DEPT. OF COMMERCE & INSURANCE

Emergency Rules
Of the
Department of Commerce and Insurance
Division of Insurance

Chapter 0780-1-88
Tennessee Health Insurance Portability, Availability and Renewability Regulations

Statement of Emergency Requiring Emergency Rules

Pursuant to T.C.A. § 4-5-208, I am promulgating emergency rules with respect to proper standards for health insurance issuers in paying insurance producers that sell contracts of health insurance coverage mandated pursuant to T.C.A. §§ 56-7-2801, *et seq*. The general rulemaking authority is given to me pursuant to T.C.A. § 56-7-2814 which authorizes me to promulgate rules as may be necessary to ensure compliance with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) as well as any rules necessary to carry out the proper administration of the Tennessee Health Insurance Portability, Availability and Renewability Act, T.C.A. §§ 56-7-2801, *et seq*.

I have become aware that some issuers are attempting to discourage the offering of policies to HIPAA-eligible individuals in the individual market or to small groups containing high risk individuals, by withholding commissions from producers for sales to such individuals or small groups. The federal Center for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Association (HCFA), has previously determined and published its conclusion that paying producers less through all forms of agent compensation (commissions, bonuses, or other rewards) for high risk individuals and groups than it pays for those with better risk profiles, constitutes a circumvention of the insurance reform provisions of HIPAA. CMS has declared such actions to be violative of 45 C.F.R. §146.150(a) and 45 C.F.R. §148.120. HCFA Bulletin 98-01 – Insurance Standards Bulletin – Agent Commissions and Application Processing Delays.

The State has recently decided to decrease the number of individuals which are eligible to receive health insurance coverage through TennCare, the state's Medicaid expansion program. The practice of paying producers less by health insurance issuers in this state could lead to individuals being disenrolled from TennCare not having the access to the health insurance coverage they are entitled to under HIPAA. The guaranteed issue provisions of HIPAA, as stated by CMS, generally require that issuers' normal conduits for receiving applications and offering coverage be open to HIPAA-eligible individuals or small employers. Issuers commonly use producers as an important part of their marketing and distribution system, and ordinarily compensate these producers by paying commissions on the coverage they sell. Commission payment is included among the costs used to calculate the premium rate for a given form of coverage. For an issuer to modify the normal operation of its marketing and distribution system so as to avoid its fair share of the high risk individuals and small groups protected by HIPAA, according to CMS, does not accord with the intent of the statute to protect these individuals and groups. Given the recent discovery that health insurance issuers may be engaging in such conduct in this state, and the disenrollment of Tennesseans from the state's Medicaid program, it is the finding of the Commissioner that an immediate danger to the public health, safety and welfare exists, and the nature of this danger is such that the use of any other form of rulemaking authorized by T.C.A. title 4, chapter 5 would not adequately protect the public. It is important to note that CMS published their opinion as to this practice's legality in 1998, and, therefore, these emergency rules only represent a formal promulgation of CMS' interpretation of HIPAA, and do not represent new standards being applied to health insurance issuers in this state.

CMS, in its bulletin, also noted that several states had taken action, under their Unfair Trade Practices Acts or their rating authority, to combat the practice of unfairly reducing or eliminating agent commissions. CMS strongly encouraged the states to continue to use their Unfair Trade Practice Act authority to take actions against these practices.

The Department of Commerce and Insurance has also filed a Notice of Rulemaking Hearing to adopt the provisions contained in these emergency rules as permanent rules.

For a copy of the entire text of this notice contact: John F. Morris, Staff Attorney, 500 James Robertson Parkway, Fifth Floor, Davy Crockett Tower, Nashville, Tennessee 37243, Department of Commerce and Insurance, telephone (615) 741-2199.

Paula A. Flowers

Paula A. Flowers
Commissioner
Department of Commerce and Insurance

Chapter 0780-1-88

Tennessee Health Insurance Portability, Availability and Renewability Regulations

New rules

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Rule 0780-1-88-.01 Purpose and Scope.

The purpose of this Chapter is to implement regulations necessary to ensure compliance with the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections in 42 U.S.C.), and to implement the minimum standards established by such Act, as well as to implement regulations necessary to carry out the proper administration of the Tennessee Health Insurance Portability, Availability and Renewability Act, T.C.A.§§ 56-7-2801, *et seq*.

Authority: T.C.A. §§ 56-7-2801, *et seq.*, and 56-7-2814, and Pub.L. 104-191, 110 Stat. 1936 (1996).

Rule 0780-1-88-.02 Definitions

(1) "Compensation" means any consideration given or promised by a health insurance issuer to its producers for the sale of contracts providing health insurance coverage, including but not limited to commissions, bonuses, or other such rewards;

(2) "Group health plan" means an employee welfare benefit plan, as defined in Section 3(1) of the Employee Retirement Income Security Act of 1974, to the extent that the plan provides medical care and including items and services paid for as medical care to employees or their dependents, as defined under the terms of the plan, directly or through insurance, reimbursement, or otherwise. A program under which creditable coverage is provided shall be treated as a group health plan for the purposes of applying this Chapter;

(3) "Health insurance coverage" means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any policy, certificate, or agreement offered by a health insurance issuer;

(4) "Health insurance issuer" means an entity subject to the insurance laws of this state, or subject to the jurisdiction of the commissioner, that contracts or offers to contract to provide health insurance coverage, including but not limited to, an insurance company, a health maintenance organization and a nonprofit hospital and medical service corporation. "Health insurance issuer" does not mean a group health plan;

(5) "HIPAA" means the federal Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936 (1996), and the Tennessee Health Insurance Portability, Availability and Renewability Act, T.C.A.§§ 56-7-2801, *et seq.*;

(6) "Individual market" means the market for health insurance coverage offered to individuals other than in connection with a group health plan. This includes coverage offered in connection with a group health plan that has fewer than two (2) participants as current employees on the first day of the plan year;

(7) "Producer" means a person required to be licensed pursuant to T.C.A. title 56, chapter 6, part 1 to sell, solicit or negotiate insurance on behalf of a health insurance issuer in this state.

Authority: T.C.A. §§ 56-7-2802 and 56-7-2814.

Rule 0780-1-88-.03 Producer Compensation.

The compensation paid by a health insurance issuer to its producers for a policy of insurance required to be offered by health insurance issuers under HIPAA shall not be less than the compensation paid to its producers for the health insurance issuer's standard health insurance products.

Authority: T.C.A. §§ 56-7-2814, 56-8-104(6) and 56-8-113, Pub.L. 104-191, 110 Stat. 1936 (1996), 45 C.F.R. §146.150(a), and 45 C.F.R. §148.120.

Rule 0780-1-88-.04 Penalties.

In addition to any other law or penalty that may apply, violations of Rule 0780-1-88-.03 shall be treated as unfair discrimination and an unfair act or practice under T.C.A. § 56-8-104(6)(B), and shall subject the health insurance issuer to the penalties set forth in T.C.A. § 56-8-109.

Authority: T.C.A. §§ 56-7-2814, 56-8-104(6) and 56-8-113.

Rule 0780-1-88-.05 Severability.

If any provision of this Chapter or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the Chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

Authority: T.C.A. §§ 56-7-2814 and 56-8-113.

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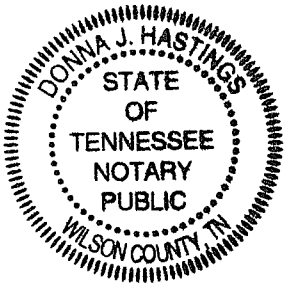
I certify that this is an accurate and complete copy of emergency rules lawfully promulgated and adopted by the Department of Commerce and Insurance on the 22nd day of July, 2005.



Paula A. Flowers
Paula A. Flowers
Commissioner
Department of Commerce and Insurance

Subscribed and sworn to before me this the 22nd day of July, 2005.

Donna J. Hastings
Notary Public

My commission expires on the 31st day of March, 2009.

All emergency rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Paul G. Summers
Paul G. Summers
Attorney General and Reporter

The emergency rules set out herein were properly filed in the Department of State on the 26 day of July, 2005, and will be effective from the date of filing for a period of 165 days. These emergency rules will remain in effect through the day of the 7 day of Jan., 2006.

Riley C. Darnell
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Secretary of State

By: MMB

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