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BULLETIN

Docket No: INS. NO. 13-039-AB

TO: ALL NEW HAMPSHIRE LICENSED HEALTH INSURANCE ISSUERS

FROM: Roger Sevigny

DATE: December 20, 2013

RE: Auto-Enrollment for Pediatric Dental Benefits

This bulletin is intended to clarify the interplay between the prohibition in RSA 417:4 (b) against forming an insurance contract with a consumer that the consumer has not initiated or agreed to and the provision in the Affordable Care Act (ACA) stating that carriers offering plans outside of the Exchange may exclude pediatric dental coverage and still be in compliance with the EHB requirements only if the carrier is reasonably assured that the consumer has obtained pediatric dental benefits.

With certain exceptions, each insurance plan sold in the individual or small group market starting in 2014 must include all ten Essential Health Benefits (EHBs) listed in the ACA. Specifically, section 2707(a) of the federal Public Health Service Act, as amended by section 1201 of the ACA, requires that a "health insurance issuer that offers health insurance coverage in the individual or small employer group market shall ensure that such coverage includes the essential health benefits package required under section 1302(a) of the Patient Protection and Affordable Care Act." The EHB requirement applies to Qualified Health Plans (QHPs) sold on a Health Benefit Exchange (Exchange) created under Section 1311 of the ACA. ACA Section 1301(a)(1).

The EHBs include "pediatric services, including oral and vision care." ACA Section 1302(b)(1)(J). However, for coverage sold through an Exchange, the ACA contains an exception for pediatric dental benefits. Specifically, section 1302(b)(4)(F) of the ACA states that health insurance plans offered on an Exchange may be certified as qualified health plans even if the plan does not cover pediatric dental services, if a certified stand-alone dental plan covering these services is available in the Exchange.

Through rulemaking, the U.S. Department of Health and Human Services (US DHHS) has drawn a distinction between policies offered inside and outside of the Exchange with respect to pediatric dental benefits. In the preamble to its final rule "Patient Protection and Affordable Care Act, Standards Related to Essential Health Benefits, Actuarial Value and Accreditation, " US DHHS stated that, if there is a stand-alone dental plan offered on the state's Exchange, a carrier is not required to include pediatric dental benefits in each QHP it offers on the Exchange. 78 Fed. Reg. at 12853 (February 25, 2013). However, for policies offered outside of the Exchange, "an individual or family must be offered coverage of all ten categories of EHB, either through one policy, or through a combination of a medical policy and an Exchange-certified stand-alone dental plan." Id.

A policy offered outside of the Exchange may exclude pediatric coverage only if the carrier is "reasonably assured" that the consumer has purchased a stand-alone dental plan that has been certified by the Exchange. Specifically, US DHHS has stated that

> . . . in cases in which an individual has purchased stand-alone pediatric dental coverage offered by an Exchange-certified stand-alone dental plan off the Exchange, that individual would already be covered by the same pediatric dental benefit that is part of EHB. **When an issuer is reasonably assured that an individual has obtained such coverage through an Exchange-certified stand-alone dental plan offered outside an Exchange, the issuer would not be found non-compliant with EHB requirements if the issuer offers that individual a policy that when combined with the Exchange certified stand-alone dental plan ensures full coverage of EHB.** This alternate method of compliance is at the option of the medical plan issuer and would only apply with respect to individuals for whom the medical plan issuer is reasonably assured have obtained pediatric dental benefits.

78 Fed. Reg. at 12853 (February 25, 2013)(emphasis added).

Consistent with the US DHHS guidance, the Department will consider a carrier selling an individual or small group plan off the Exchange that does not have embedded pediatric dental benefits to have received "reasonable assurance" that an individual purchasing such a plan has obtained coverage meeting the pediatric dental EHB requirement if the following requirements have been met:

1. At the time of solicitation, the carrier has disclosed to all applicants and consumers shopping for coverage that pediatric dental coverage is one of the Essential Health Benefits that carriers are generally required to offer to all purchasers and that such coverage is not included in the health plan being offered by that insurer; and
2. At the time of purchase, the consumer has indicated to the carrier that he or she understands:
    a. That the coverage being purchased, without purchase of an additional exchange-certified stand-alone dental plan, does not include all of the Essential Health Benefits;
    b. That failure to purchase coverage that includes all Essential Health Benefits may have tax consequences for the consumer; and
    c. That exchange-certified, stand-alone dental plans are available for sale either on or off the Exchange.

Automatic enrollment by a carrier into a pediatric dental plan is not required in order to obtain "reasonable assurance" and may constitute a violation of RSA 417:4, Unfair Insurance Trade Practices. Specifically, that law provides that

> (b) Except as contained in the policy no insurer, corporation, partnership, or individual shall make any contract or agreement with any person insured or to be insured except as initiated by or agreed to by the person insured or to be insured that the whole or any part of the insurance which is subject to the provisions of this title....Any contracts made in contravention of this section shall be null and void.

RSA 417:4, V(b). Auto-enrollment by carriers, without affirmative consumer selection of pediatric dental benefits, is unlawfully binding consumers to a contract for services, and would likely be interpreted as a violation of law.

This Bulletin applies to all insurers offering comprehensive individual and small group health insurance plans that are effective beginning January 1, 2014. Because of the novelty of this circumstance, the Department will not take enforcement action against any carrier that has used auto-enrollment so long as that carrier ceases the practice and notifies auto-enrolled individuals of their option to decline this stand-alone dental coverage. For questions about this bulletin please contact Michael Wilkey, Director Compliance and Consumer Services, (603) 271-2261 or by email michael.wilkey@ins.nh.gov.