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Comments on Department of Labor Notice of Proposed Rulemaking

Docket # EBSA-2016-0010; RIN 1210-AB63

Submitted by the New Hampshire Insurance Department

As Commissioner of the New Hampshire Insurance Department (NHID), I offer the following comments in response to the Department of Labor (DOL) and coordinating agencies' Notices of Proposed Rulemaking[1] and Proposed Revision of Annual Information Return/ Reports[2] proposing changes to the Form 5500 annual report for employee benefit plans. Specifically, DOL's request for public comments sought input regarding the impact of the "amendments and the proposed annual reporting requirements for plans that provide group health benefits, including the new Schedule J, in light of the Supreme Court's recent decision in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016)."[3]

The NHID supports the comments submitted by the National Academy for State Health Policy (NASHP) and the All-Payer Claims Database Council (APCD Council). The NHID participated in NASHP's work group and is involved in the group working to develop a uniform data set, and we support the approach described in the NASHP/APCD Council comments. We believe that collaboration with DOL in the partnership expressed in those comments would be beneficial to DOL and the states, and address the needs identified by DOL for oversight to the quality and cost of health care provided by ERISA plans, which are among the stated objectives of DOL's creation of Schedule J.

In addition, I write to provide additional information to DOL about New Hampshire's unique approach to claims data reporting, one which houses the claims data reporting law in the state Insurance Code, in the event this information is helpful to DOL in its oversight of employee benefit plans. New Hampshire is a national leader in health cost transparency, and due to our concern about the continued viability of claims data reporting at the state level, New Hampshire filed its own amicus brief to the Supreme Court in the *Gobeille* case.[4] We would be glad to confer with DOL about our approach if that would be helpful.

Almost ten years ago, the New Hampshire Insurance Department developed the NH HealthCost website[5] using data from the state's all-payer claims database. The acclaimed website, which was re-

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[1] 81 Fed. Reg. 47496 (July 21, 2016).

[2] 81 Fed. Reg. 47534 (July 21, 2016).

[3] 81 Fed. Reg. 47534, 47559 (July 21, 2016).

[4] http://www.nh.gov/insurance/legal/documents/14-181tsacnh.pdf

[5] http://nhhealthcost.nh.gov/ As noted on the site's home page, NH HealthCost was developed by the NHID to improve the price transparency of health care services in New Hampshire. Through NH HealthCost, New Hampshire residents can compare prices from health care providers throughout the state on more than two dozen medical procedures, including MRIs, CT scans, ultrasounds, and X-rays. The information on the site is derived from claims data collected from New Hampshire's health insurers and stored as a part of the Comprehensive Health Care Information System (NHCHIS). Data on the NH HealthCost website is updated quarterly.

launched earlier this year, allows employers and consumers to compare the cost of medical procedures performed by different providers in the state, based on the prices insurance companies have paid for these procedures in the past. Site users can see how costs vary between insurance companies, and calculate their likely out-of-pocket costs. New Hampshire's cost transparency initiative has prompted insurance companies to design new health plans that pass on savings to members who get care from lower-cost providers. This helps not only consumers but also employers seeking ways to hold down the cost of employee coverage. It also increases healthy competition between insurance companies because the cost of care – one of the largest components of premiums – is no longer a secret hidden from shoppers.

New Hampshire's claims data reporting law is unique in being part of its system of insurance regulation. In the NHID's view, the state law is not preempted as to the fully-insured data, even after *Gobeille*, because it is "saved" by ERISA's savings clause for insurance laws, 29 U.S.C. § 1144(b)(2)(A). The savings clause issue was not addressed by the Court in *Gobeille*, and the NHID is confident in its legal authority to continue collecting the fully-insured data on a mandatory basis as it has in the past, given that New Hampshire's claims data reporting requirement is an integral part of the state's system of insurance regulation.

New Hampshire's claims data submission statute is also unusual in that it expressly prohibits the inclusion of personally identifiable information (PII) in carriers' data submissions.[6] All data elements that could be directly tied to a covered individual are encrypted during the submission process in such a way as to preclude the NHID, the New Hampshire Department of Health and Human Services (DHHS), and their contractors from having access to PII, or being able to reconstruct such elements.[7]

This year, after the *Gobeille* case was issued, the New Hampshire legislature passed a law addressing the claims data submission process in light of the Court's decision. 2016 N.H. Laws ch. 250 (SB 431).[8] This law requires carriers and TPAs to obtain an indication of intent from self-funded private employers as to whether they choose to have their data included in the claims data submission of their carrier or TPA. If the employer indicates an intent to participate, the carrier or TPA is obligated to include the data in its submission. The NHID recently finalized its opt-in form through administrative rulemaking,[9] and resumed its collection of claims data.[10]

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[6] NH RSA 420-G:11-a, I provides that "notwithstanding HIPAA or any other provision of law, the comprehensive health care information system shall not include or disclose any data that contains direct personal identifiers. For the purposes of this section, 'direct personal identifiers' include information relating to an individual that contains primary or obvious identifiers, such as the individual's name, street address, e-mail address, telephone number, and social security number."

[7] See NH RSA 420-G:11, II(a)(1)(data are to be encrypted); N.H. Code of Admin. R. Ins 4002.01(*l*)(defining encryption as "a method by which the true value of data has been disguised in order to prevent the identification of persons or groups, and which does not provide the means for recovering the true value of the data.")

[8] http://www.gencourt.state.nh.us/bill_status/billText.aspx?sy=2016&id=1034&txtFormat=pdf&v=current

[9] As required under the 2016 law, the NHID adopted N.H. Code of Admin. R. Ins 4005.03, which includes the Self-Funded Private Employer Opt-in Form: http://www.nh.gov/insurance/legal/documents/ins4005ad.pdf

[10] On November 22, 2016, the NHID issued a bulletin explaining requirements under the new rule, and noting that claims data collection would resume: http://www.nh.gov/insurance/media/bulletins/2016/documents/INS16-034_ab.pdf

In view of the importance of claims data collection to New Hampshire cost transparency efforts, we respectfully request that DOL review the approach brought forward in the NASHP/APCD Council comments and consider the state partnership in the development of the final rules for the Form 5500 and Schedule J.

Thank you for your consideration of these comments.

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