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September 20, 2010

The Honorable Kathleen Sebelius
Secretary, United States Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Secretary Sebelius:

I am writing to respond to your inquiry whether Massachusetts has the ability, beginning on September 23, 2010, to substantially enforce the consumer protection provisions of the Affordable Care Act, or the ACA, that go into effect for plan or policy years beginning on or after September 23, 2010.

The Commonwealth's Division of Insurance (DOI) and, for more narrow purposes, the Department of Public Health (DPH), have the current authority to enforce certain *state* law provisions that are similar to many of the ACA provisions referenced in your letters. The following is a list of the ACA provisions you referenced and a brief notation describing the parallel state law and specific differences, if any.

- A prohibition on imposing lifetime limits on benefits.
 - State law does not prohibit health plans from imposing lifetime limits on benefits.
- A prohibition on rescissions except in cases of fraud or intentional misrepresentation of material fact.
 - State law permits *cancellation* of coverage in cases of fraud or misrepresentation and further permits *cancellation* of coverage for additional, specified reasons. See M.G.L. c. 176O, § 6(a)(7).

- Continued coverage of most adult children up to age 26.
 - State law requires health plans to allow continued coverage of adult children until the child reaches age 26 or two years after the child loses dependent status, whichever comes first. *E.g.*, M.G.L. c. 175, § 110(P). The state law provision is somewhat narrower than the ACA provision, however, which allows for such coverage without regard to dependent status.
- Coverage of out-of-network emergency room services.
 - State law requires health plans to cover emergency services provided to members for emergency medical conditions. *E.g.*, M.G.L. c. 175, § 47U.
- Establishment of internal and external appeals processes.
 - State law establishes internal and external appeals processes. See M.G.L. c. 176O.
- Coverage of recommended prevention services with no cost sharing.
 - State law mandates coverage of certain preventive care services, including specified visits, immunizations and laboratory services for children to age six; routine mammograms; and routine cytologic screening. State law does not prohibit an insurer from including cost-sharing for the covered preventive care services. See M.G.L. c. 175, §§ 47C and 47G; M.G.L. c. 176A, § 8J and M.G.L. c. 176G, § 4.
- Elimination of pre-existing condition exclusions for children.
 - State law prohibits insurers from denying coverage to anyone because of a pre-existing condition but allows insurers to limit the coverage of a pre-existing condition for a new enrollee for up to six months from the effective date of coverage, if the enrollee had received treatment for that specific condition in the previous six months. This pre-existing condition period must be reduced by the amount of time that the insured had prior creditable coverage, as long as the new coverage would take effect within 63 days of the termination of the prior coverage. See M.G.L. c. 176J, § 5 and M.G.L. c. 176N, § 2.

DOI has the authority to enforce each of the above state laws, and DPH has the authority to enforce certain provisions of M.G.L. c. 176O relating to internal and external reviews. While DOI and DPH do not have explicit authority to enforce federal law, they may and will continue to enforce all provisions of state law that are not preempted by the ACA under their authority to regulate fully-insured, licensed health plans (i.e. they cannot regulate ERISA-exempt plans).¹

The Massachusetts external review process currently differs from the federal requirements. DPH will continue to administer its external review process until either state legislative changes bring it in line with the new federal requirements, or the United States Department of Health and Human Services (HHS) exempts the Massachusetts process from or deems it compliant with the ACA. If HHS finds the Massachusetts external appeals process to be non-compliant with the ACA, such process would cease to operate beyond July of 2011.

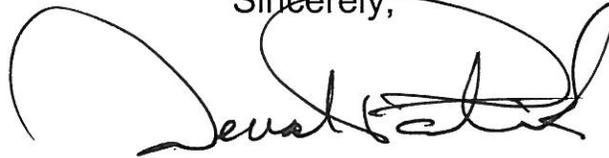
The Massachusetts Attorney General has broad authority to enforce laws to protect health care consumers. First, the Attorney General has general authority to enforce violations of law under M.G.L. c. 12, §10, which authorizes the Attorney General to enforce “all violations of law” by investigating “all matters in which [she] has reason to believe there have been such violations” and bringing criminal or civil proceedings “before the appropriate state and federal courts, tribunals and commissions as [she] may deem to be for the public interest.” Second, Massachusetts’ consumer protection law, M.G.L. c. 93A, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce, grants expansive authority to the Attorney General to enforce the law and to promulgate rules and regulations interpreting the statute, requiring only that such rules and regulations be consistent with the rules and regulations of the Federal Trade Commission and related federal court decisions as well as state law and regulations. See M.G.L. c. 93A §§ 2(a), 2(c).

¹ *E.g.*, M.G.L. c. 175, §108 which, among other things, authorizes the DOI Commissioner to disapprove any health insurance policy that does not comply with state law.

The Attorney General has promulgated certain regulations governing the activities of group health care insurers and routinely enforces c. 93A in the context of the health care marketplace. The Attorney General also may bring enforcement actions under c. 93A that rely in part on a violation of a federal statutory or regulatory standard meant for the protection of the public health or safety as the basis for an allegation of unfair or deceptive business conduct. See 940 CMR 3.16(4). However, any enforcement decisions made under the state's consumer protection law or her general statutory authority are made within the discretion of the Attorney General on a case-by-case basis.

Please let me know if you would like to discuss this matter further, or otherwise require additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Sebelius", written over the word "Sincerely,".

cc: Joseph G. Murphy, Commissioner
Massachusetts Division of Insurance