Centers for Medicare & Medicaid Services
Kansas City Regional Office

Market Conduct Examination Report

Fortis Insurance Company

Massachusetts: Women's Health Cancer Rights Act

Company History and Background

Fortis Insurance Company (FIC) which was known as Time Insurance Company until April 1998, was founded in 1892 as the LaCrosse Mutual Aid Association. The company became part of N. V. AMEV, a holding company based in the Netherlands, in 1978 (N. V. is now called Fortis AMEV). In 1990, N.V. AMEV joined forces with a Belgian company, A. G. Groupe (now called Fortis AG). The combined operations have now adopted the name Fortis. Fortis' listed companies are Fortis (B) of Belgium and Fortis (NL) of the Netherlands.

FIC is a subsidiary of Fortis Health, which is part of Fortis, Inc., a financial services company that, through its operating companies and affiliates, provides specialty insurance and investment products to businesses, organizations and individuals in the United States. Fortis Inc., is part of the international Fortis group, Fortis AG.

Fortis health products are issued and underwritten by Fortis Insurance Company and John Alden Life Insurance Company of Milwaukee, WI and Fortis Benefits Insurance Company of Kansas City, MO. These three companies make up the organization known as Fortis Health.

FIC offers health care products to individuals and small groups. This includes specialty products, such as, student insurance and a short-term medical plan. It offers its products in each of the states in the United States and also in America Samoa, Puerto Rico and the Virgin Islands. Not all products are offered in all states. The Company sells a variety of life, annuity and health products approved in each territorial market.

Fortis Health officers are as listed below:

Ben Cutler II	President and CEO
David McDonough	Chief Operating Officer
Margaret Crawford	Sr. V.P. Human Resources
Ann Mayberry-French	Sr. V.P. General Counsel
Roger Jones	Sr. V.P. Chief Information Officer

Fortis Insurance Company officers are as listed below:

Benjamin Cutler II	President
Donald Hamm Jr.	Treasurer – V.P.
Ann Mayberry-French	Secretary – V.P.
Steven DeRaleau	V.P.
Michael Kellen	V.P.
David McDonough	V.P.
James Oatman	V.P.
James Srite	V.P.
Peggy Ettestad	V.P.

Kimberly Harm	V.P.
Dean Kopperud	V.P.
Clark Merkley	V.P.
Robert Ogden	V.P.
Leopoldo Toralballa	V.P.
Jack Gochenaur	V.P.
Laura Hohing	V.P.
Jon Nicholson	V.P.
Ross Rosenberg	V.P.

The Company has two types of sales recruitment. It uses regional independent agents and contracts with Managing General Agents (MGA's). The MGA's are large independent agencies, which sometimes have sub-agents, that submit applications to company underwriters. The MGA's do not have binding authority, all issued policies are reviewed and either denied or accepted by Company personnel. There is only one MGA contract in Massachusetts. The Company does not use Third Party Administrators.

The individual market in Massachusetts is currently closed. The Company still writes small group business, however it is not actively pursuing the market.

Background

Generally, the requirements of the Women's Health and Cancer Rights Act of 1998 (WHCRA) became effective on October 21, 1998.

As of the commencement of the market conduct examination of Fortis Insurance Company (Fortis) the State of Massachusetts had not incorporated into Massachusetts State law provisions and/or requirements that would bring Massachusetts into compliance with the requirements of WHCRA. As a result, pursuant to the requirements found at sections 2722 and 2761 of the Public Health Service Act (42 USC sections 300gg-22, 300gg-61), the enforcement of all or part of WHCRA in Massachusetts is currently the responsibility of the Centers for Medicare and Medicaid Services (CMS).

Utilizing enforcement tools similar to those used by State insurance departments, the CMS KCRO undertook the responsibility of the enforcement of WHCRA through form review, complaint investigation, and market conduct examinations.

On June 5, 2001 a letter was sent to Fortis President Benjamin Cutler announcing the examination of Fortis.

HuffThomas, a regulatory consulting firm, was contracted by CMS to perform the on-site portion of the market conduct examinations of issuers identified by CMS.

On July 10, 2001 an entrance conference was held at Fortis headquarters in Milwaukee, Wisconsin and the examination begun.

Preliminary Examination Findings In Brief

With respect to Fortis Insurance Company's (FIC) compliance with the provisions of the Women's Health and Cancer Rights Act of 1998 (WHCRA), the examination noted four (4) issues with respect to compliance with the Act.

Two (2) exceptions involve limited interpretations by FIC of what constitutes mastectomy and/or reconstruction procedures. These narrow interpretations would lead to incorrect and non-compliant denials of the breast reconstruction benefit protections provided by WHCRA.

The remaining two (2) exceptions involve numerous instances of non-compliance with respect to the group and individual policy forms issued and/or renewed by FIC in Massachusetts.

Exception #1 - - Violation of Sections 2706 and 2752 of the PHS Act (reference Section 713 of ERISA)

General Subject Area(s) - - Limited Interpretation of a Mastectomy Impacting Coverage for Breast Reconstruction following a Mastectomy

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Background

WHCRA provides for breast reconstruction benefits following a mastectomy. Fortis Insurance Company (FIC) utilizes a limited interpretation of what constitutes a mastectomy. FIC's interpretation would lead to incorrect and non-compliant denials of the breast reconstruction benefit protections provided by WHCRA.

Specific Violation

- **FIC's limited interpretation of which procedures constitute a mastectomy is more limited than those procedures indicated by FIC's chosen reference for determining the nature of such medical procedures. This narrow interpretation would lead to incorrect and non-compliant denials of the benefit protections provided by WHCRA.**

Section 2706 of the PHS Act, which incorporates by reference Section 713 of the Employee Retirement Income Security Act of 1974 (ERISA 713) states in part:

> (a) In General.--A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for—
>
> (1) all stages of reconstruction of the breast on which the mastectomy has been performed;
>
> (2) surgery and reconstruction of the other breast to produce a symmetrical appearance; (emphasis added).

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, I. *Basis for Imposition of Civil Money Penalties* --

Actions in the Group Market (i) lists the following as a basis of imposition of a Civil Money Penalty:

> *Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2752 of the PHS Act, 42 U.S.C. 300gg-52).*

Section 2752 of the PHS Act states:

> "The provisions of section 2706 shall apply to health insurance coverage offered by a health insurance issuer in the individual market in the same manner as they apply to health insurance coverage offered by a health insurance issuer in connection with a group health plan in the small or large group market"

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, I. *Basis for Imposition of Civil Money Penalties – Actions in the Individual Market* (f) lists the following as a basis of imposition of a Civil Money Penalty:

> *Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2752 of the PHS Act, 42 U.S.C. 300gg-52) and any additional implementing regulations.*

The company provided the on-site examiner with a listing of all the Current Procedural Terminology (CPT) codes as published by the American Medical Association (AMA) they considered to meet the criteria of a mastectomy.

Generally, the medical community considers a mastectomy to be an excision of the breast. Of the **23** CPT codes listed under the category of "Breast Excision" (CPT 2001 Standard Edition. AMA press, pages 55 and 56) only **8** codes were recognized by FIC as being indicative of a mastectomy. These codes recognized by FIC, state the word "mastectomy" in their descriptive title. **Eleven** of the 23 procedure codes involve either procedures utilizing a needle, a biopsy, or removal of a lesion. As a result, it is at least arguable that these 11 procedures may not meet the medical community's definition of a mastectomy and therefore create a situation in which reconstruction would be warranted.

However, the remaining **four** codes, which would otherwise trigger the protections of WHCRA, have been excluded by FIC. The exclusion of these four codes by FIC for purposes of determining a mastectomy appear to be inconsistent with the medical community's definition of a mastectomy. Furthermore, it appears to be inconsistent with the CPT Code Book (CPT 2001 Standard Edition) which is FIC's chosen source of reference.

These codes are as follows:

1) 19120 – Excision of cyst, fibroadenoma, or other benign or malignant tumor, aberrant breast tissue, duct lesion, nipple or areolar lesion (except 1940), open, male or female, one or more lesions;

2) 19260 – Excision of chest wall tumor including ribs;

3) 19271 - Excision of chest wall tumor involving ribs, with plastic reconstruction; without mediastinal lyphadenectomy;

4) 19272 - with mediastinal lyphadenectomy.

While CMS realizes the 4 aforementioned codes do not explicitly state the word "mastectomy" in their descriptive title, clearly they represent very invasive procedures that involve excision of the breast and are listed in the CPT code book under that general heading.

Adverse Impact to Consumers

- Consumers who undergo certain procedures not included in FIC's interpretation of procedures constituting a mastectomy would be denied benefits they are otherwise entitled to under WHCRA.

Recommendation(s)

FIC should:

1) Confirm that FIC's interpretation of the procedures constituting a mastectomy does in fact include the 4 CPT codes outlined earlier in this report and the protections of WHCRA are provided to those individuals; or

2) Expand its interpretation of a mastectomy by including the 4 CPT codes outlined earlier in this report; or

3) Explain in detail the reasoning behind the omission of the 4 CPT codes in question.

Exception #2 - - Violation of Sections 2706 and 2752 of the PHS Act (reference Section 713 of ERISA)

General Subject Area(s) - - Limited Interpretation of Breast Reconstruction

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Background

WHCRA provides for breast reconstruction benefits following a mastectomy. Fortis Insurance Company (FIC) utilizes a narrow interpretation of what constitutes breast reconstruction. FIC's interpretation would lead to incorrect and non-compliant denials of the breast reconstruction benefit protections provided by WHCRA.

Specific Violation

- **FIC's coverage of breast reconstruction procedures is more limited than those procedures indicated by FIC's chosen reference for determining the nature of such medical procedures. These limitations would lead to incorrect and non-compliant denials of the breast reconstruction benefit protections provided by WHCRA.**

Section 2706 of the PHS Act, which incorporates by reference Section 713 of the Employee Retirement Income Security Act of 1974 (ERISA 713) states in part*:*

(a) In General.--A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for—

(1) all stages of reconstruction of the breast on which the mastectomy has been performed;

(2) surgery and reconstruction of the other breast to produce a symmetrical appearance;

(3) prostheses and physical complications all stages of mastectomy, including lymphedemas; in a manner determined in consultation with the attending physician and the patient. Such coverage may be subject to annual deductibles and coinsurance provisions as may be

deemed appropriate and as are consistent with those established for other benefits under the plan or coverage. Written notice of the availability of such coverage shall be delivered to the participant upon enrollment and annually thereafter.

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, I. *Basis for Imposition of Civil Money Penalties – Actions in the Group Market* (i) lists the following as a basis of imposition of a Civil Money Penalty:

> *Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2752 of the PHS Act, 42 U.S.C. 300gg-52).*

Section 2752 of the PHS Act states:

> "The provisions of section 2706 shall apply to health insurance coverage offered by a health insurance issuer in the individual market in the same manner as they apply to health insurance coverage offered by a health insurance issuer in connection with a group health plan in the small or large group market"

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, I. *Basis for Imposition of Civil Money Penalties – Actions in the Individual Market* (f) lists the following as a basis of imposition of a Civil Money Penalty:

> *Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2752 of the PHS Act, 42 U.S.C. 300gg-52) and any additional implementing regulations.*

The company provided the on-site examiner with a listing of all the Current Procedural Terminology (CPT) codes as published by the American Medical Association (AMA) they considered to meet the criteria of breast reconstruction.

Of the **22** CPT codes listed under the category of "Breast Repair and/or Reconstruction" (CPT 2001 Standard Edition. AMA press, page 56) only **17** of these codes were recognized by FIC as being indicative of breast reconstruction procedures, and therefore covered pursuant to the requirements of WHCRA.

The exclusion of the remaining **5** codes by FIC for purposes of determining breast reconstruction are inconsistent with FIC's chosen reference for determining the nature of such medical procedures.

These codes are as follows:

1) 19316 – Mastopexy;

2) 19328 – Removal of intact mammary implant;

3) 19330 - Removal of mammary implant material;

4) 19330 - Delayed insertion of breast prosthesis following mastopexy, mastectomy or in reconstruction;

5) 19355 - Correction of inverted nipples;

It is unclear why FIC considers only certain codes appearing under the heading "Breast Repair and/or Reconstruction" to be reliable while excluding others. Code 19330 (delayed insertion of breast prosthesis following mastopexy, masectomy or in reconstruction) clearly falls within the language of what is considered to be a covered procedure under the requirements of WHCRA. The statutory language and legislative history does not suggest the protections of WHCRA are time sensitive or expire after a given point in time. The remaining 4 excluded codes would be relevant in certain cases when surgery and reconstruction are performed on the other breast to produce a symmetrical appearance.

Adverse Impact to Consumers

- Consumers who undergo certain procedures not included in FIC's interpretation of procedures constituting a breast reconstruction would be denied benefits they are otherwise entitled to under WHCRA.

Recommendation(s)

FIC should:

1) Confirm that FIC's interpretation of the procedures constituting breast reconstruction do in fact include the 5 CPT codes outlined earlier in this report; or

2) Expand its interpretation of breast reconstruction to include the 5 CPT codes outlined earlier in this report; or

3) Explain in detail the reasoning behind the omission of the 5 CPT codes in question.

Exception #3 - - Violation of Section 2706 of the PHS Act (reference Section 713 of ERISA)

General Subject Area(s) - - Contract Language – Form Violations – Group Market

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Background

Section 2706 of the Public Health Service Act outlines the requirements of WHCRA for health insurance issuers providing health insurance coverage in connection with group health plans. The Centers for Medicare & Medicaid Services (CMS) enforcement authority with respect to WHCRA are found at Sections 2722 and 2761 of the PHS Act, CMS's rulemaking authority under Section 2792, and Federal Enforcement regulations found at 45 CFR Part 150. These statutes and regulations require an issuer's policy forms to accurately reflect the benefits of WHCRA.

The forms provided the on-site examiner by FIC representing the forms that are issued and/or renewed by FIC in the Massachusetts group health insurance market are outlined in the table below.

Title of Form **(as it appears on the cover page of the policy provided the onsite examiners)**	Form Number
Sigmet Group Insurance for Small Businesses 2-50 lives	18817
Sigmet II Group Insurance for Small Businesses	18509
Sigmet PPO III Group Insurance For Small Businesses	18510
PORT – Group Insurance Certificate	20735
Companion Classic Plan – Group Insurance for Small Businesses	19620

Specific Violations

- **FIC issues and renews group health insurance forms which do not accurately reflect the benefits provided by WHCRA.**

Section 2706 of the PHS Act, which incorporates by reference Section 713 of the

Employee Retirement Income Security Act of 1974 (ERISA 713) states in part:

> (b) In General.--A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for—
>
> (1) all stages of reconstruction of the breast on which the mastectomy has been performed;
>
> (2) surgery and reconstruction of the other breast to produce a symmetrical appearance;
>
> (3) prostheses and physical complications all stages of mastectomy, including lymphedemas; in a manner determined in consultation with the attending physician and the patient. Such coverage may be subject to annual deductibles and coinsurance provisions as may be deemed appropriate and as are consistent with those established for other benefits under the plan or coverage. Written notice of the availability of such coverage shall be delivered to the participant upon enrollment and annually thereafter.

Federal Enforcement regulations found at 45 CFR 150.103 defines "HIPAA requirements" to mean "…*the requirements of title XXVII of the PHS Act and its implementing regulations in parts 146 and 148 of this subchapter*."

Federal Enforcement regulations found at 45 CFR 150.103 defines "Group health insurance policy or group policy" to mean:

> "…*the legal document or contract issued by an issuer to a plan sponsor with respect to a group health plan (including a plan that is a non-Federal governmental plan)* ***that contains the conditions and terms of the insurance that covers the group***." (emphasis added).

Federal regulations found at 45 CFR 150.305 "Determination of entity liable for civil money penalty" state the following:

> "If a failure to comply is established under this Part, the responsible entity, as determined under this section, is liable for any civil money penalty imposed.
>
> (a) *Health insurance issuer is responsible entity*—(1) *Group health insurance policy.* To the extent a group health insurance policy issued, sold, renewed, or offered to a private plan sponsor or a non-Federal

> governmental plan sponsor is subject to applicable HIPAA requirements, a health insurance issuer is subject to a civil money penalty, irrespective of whether a civil money penalty is imposed under paragraphs (b) or (c) of this section, **if the policy itself** or the manner in which the policy is marketed or administered fails to comply with an applicable HIPAA requirement." (emphasis added).

CMS further emphasized this requirement in the preamble to 45 CFR 150.305. Specifically, the preamble states in part as follows:

> "*Section 150.305 Determination of Entity Liable for Civil Money Penalty*
>
> Health insurance issuers that issue, sell, renew, or offer coverage to either private employers that sponsor group health plans or to non-Federal governmental plan sponsors are responsible for compliance with HIPAA and applicable implementing regulations at 45 CFR part 146.
>
> Under § 150.305, we consider a health insurance issuer to be subject to a civil money penalty if a **group health insurance** policy it sells **is written**, serviced, or administered in a manner that fails to comply with, or conflicts with, an applicable requirement of HIPAA…"

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, I. *Basis for Imposition of Civil Money Penalties – Actions in the Group Market* (i) lists the following as a basis of imposition of a Civil Money Penalty:

> *Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2706 of the PHS Act, 42 U.S.C. 300gg-06).*

Specific Violations by Form Title and Number

NOTE: Those forms with the same policy language and violations have been grouped together, where possible, for ease of review.

Sigmet Group Insurance for Small Businesses 2-50 lives – Form #18817

and;

Companion Classic Plan – Group Insurance for Small Businesses – Form #19620

(1) The "Covered Charges" Section, Subsection 7. c. states in relevant part the following:

> "The **(1)** initial breast prosthesis needed because of the surgical removal of all or part of the breast **(2)** because of cancerous tissue, **(3)** provided the surgical removal was done while the Covered Person was insured under this plan.")
>
> "**(4)** Charges for repairs to or replacement of any of the above are not covered charges" (emphasis and references added).

The **first** and **fourth underlined portions** of the aforementioned provision violates the requirements of WHCRA found at Section (a)(3) in that they do not provide coverage for replacement prosthetics. The language of WHCRA clearly uses the word "prostheses" which is plural and further states such benefits are to be available when provided "…*in a manner determined in consultation with the attending physician and the patient*."

The **second underlined portion** of the aforementioned provision violates the requirements of WHCRA as found at Section (a)(3) by suggesting that benefits are only available when a mastectomy is performed due to cancer.

WHCRA states in relevant part "*A...health insurance issuer providing health insurance coverage…that provides medical and surgical benefits with respect to a mastectomy shall provide*…" The law does not state "with respect to a mastectomy performed due to cancer." In addition, no other language appears elsewhere in WHCRA which would indicate that benefits are only provided to those individuals who have undergone a mastectomy due to cancer.

The **third underlined portion** of the aforementioned provision violates the requirements of WHCRA found at Section (a)(3) by suggesting that benefits are limited to only those individuals who were covered under the plan at the time of the mastectomy. No language appears in WHCRA which would indicate that WHCRA benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

Specifically, the law states in part "...*a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide*...." (emphasis added). The law does not state "with respect to an individual's mastectomy," or "with respect to a mastectomy for which the issuer has paid benefits." A plain reading of the statutory language and legislative history does not indicate a desire by Congress that WHCRA benefits not be portable. In fact, such an interpretation of the law would create situations where often the requirements of WHCRA would actually conflict with the portability requirements

of the Health Insurance Portability and Accountability Act of 1996 making it difficult, if not impossible, for an issuer to be in compliance with both laws.

For example, Federal Regulations found at 45 CFR 144.103 define a preexisting condition exclusion in relevant part as:

> "…a limitation or exclusion of benefits relating to a condition *based on the fact that the condition was present before the first day of coverage*…" (emphasis added).

Federal Regulations found at 45 CFR 146.111(a)(1)(C)(ii) state in relevant part:

> "…A preexisting condition exclusion is not permitted to extend for more that 12 months (18 months in the case of a late enrollee) after the enrollment date.

Federal Regulations found at 45 CFR 146.111(a)(1)(C)(iii) state in relevant part:

> "…The period of any preexisting condition exclusion that would otherwise apply to an individual under a group health plan is reduced by the number of days of creditable coverage the individual has as of the enrollment date…"

The term "*creditable coverage*" as defined in Federal Regulations found at 45 CFR 146.113 includes a wide range of specified sources through which an individual may have had prior creditable coverage such as group health plans, health insurance, Medicare and Medicaid.

Under the aforementioned requirements of HIPAA, an individual who changes group health plans or group health insurers must have any applicable preexisting condition exclusion periods credited by prior creditable coverage. If WHCRA allowed an issuer to deny WHCRA benefits to certain individuals based on the fact that the condition was present before the first day of coverage, the result for the issuer would be complete compliance with the requirements of WHCRA, while at the same time subjecting itself to possible penalties for non-compliance with HIPAA.

(2) The "General Exclusions" Section, Subsection 7 states in relevant part the following:

> "No benefits will be paid for any of the following…Reconstructive or plastic surgery…This does not included charges for reconstructive surgery…that follows surgical removal of all or part of the affected breast **(1)** <u>because of cancerous tissue</u>, provided the **(2)** <u>surgical removal was done while the Covered Person was insured under this plan</u>" (emphasis added).

The **first underlined portion** of the aforementioned provision violates the requirements of WHCRA as found at Section (a)(1) by suggesting that benefits are only available when a mastectomy is performed due to cancer.

The **second underlined portion** of the aforementioned provision violates the requirements of WHCRA as found at Section (a)(1) by suggesting that benefits are limited to only those individuals who were covered under the plan at the time of the mastectomy. No language appears in WHCRA which would indicate that benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

(3) Forms #18817 and #19620 violate the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(4) Forms #18817 and #19620 generally violate the requirements of WHCRA found at Section (a)(3) by failing to include a benefits provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Sigmet II Group Insurance for Small Businesses – Form #18509

and;

Sigmet PPO III Group Insurance For Small Businesses – Form #18510

(1) The "Covered Charges" Section, Subsection h. states in relevant part "…*the initial external breast prosthesis*" is a covered benefit. The Subsection goes on to state "*Repairs to or replacements of prosthetic devices are not Covered Charges*."

The aforementioned provision violates the requirements of WHCRA found at Section (a)(3) in that it does not reflect coverage for replacement prosthetics. The language of WHCRA clearly uses the word "prostheses" which is plural and further states such benefits are to be available when provided "…*in a manner determined in consultation with the attending physician and the patient*."

(2) Forms #18509 and #18510 generally violate the requirements of WHCRA found at Section (a)(1) as the reconstructive benefits provided are severely limited and do not appear to be worded in a manner intended to comply with the requirements of WHCRA. Specifically, the forms provide benefits for "*Reconstructive surgery to restore function for conditions resulting from accidental injury provided the injury occurred while the Covered Person is insured*." (emphasis added).

However, the forms also exclude "*Reconstructive or plastic surgery that is primarily a cosmetic or beautifying procedure*. Given most breast reconstructions do not actually restore the "function" of the breast, it would appear unlikely that FIC would pay for any breast reconstructions under the terms of these contracts.

In addition, under the terms of these contracts, breast reconstructions performed as a result of illness would not appear to be covered.

NOTE: While it is unclear at this time if FIC processes any breast reconstruction claims under the aforementioned provision, the provision would also violate the requirements of WHCRA found at Section (a)(1) by requiring the injury to have occurred while the covered person was insured under the plan.

(3) Forms #18509 and #18510 violate the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(4) Forms #18509 and #18510 violate the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

PORT – Group Insurance Certificate – Form #20735

(1) The "Covered Charges" Section, Subsection 9 (b). states in relevant part "…*the initial external breast prosthesis*" is a covered benefit. The Subsection goes on to state "*Repairs to or replacements of prosthetic devices are not Covered Charges*."

The aforementioned provision violates the requirements of WHCRA found at Section (a)(3) in that it does not provide coverage for replacement prosthetics. The language of WHCRA clearly uses the word "prostheses" which is plural and further states such benefits are to be available when provided "…*in a manner determined in consultation with the attending physician and the patient*."

(2) The "Covered Charges" Section, Subsection 10 states in relevant part "*Covered Charges Incurred for reconstructive surgery (a) when such surgery is incidental to or follows surgery resulting from illness or injury of the involved part*..."

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(3) The "General Exclusions" Section, Subsection 8 states in relevant part the following:

> "The following are not covered under this plan:
>
> Charges for Cosmetic Treatment or Surgery and any complications arising from such surgery… This does not include charges for Cosmetic Treatment or Surgery that follows Medically Necessary surgical removal of all or part of a diseased breast, provided the surgical removal was done while the Covered Person was covered under this plan." (emphasis added).

The aforementioned provision violates the requirements of WHCRA as found at Section (a)(1). No language appears in WHCRA which would indicate that benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

(4) Form #20735 violates the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Adverse Impact to Consumers

- Claims processed pursuant to the non-compliant contractual language of FIC's group policy forms would be incorrectly denied in violation of the requirements of WHCRA thus denying certain WHCRA benefits to FIC insureds; and/or

- FIC insureds are unaware of their right to submit claims for certain benefits guaranteed them under the requirements of WHCRA. The non-compliant contractual language may result in otherwise payable claims not being submitted by the uninformed policyholders.

NOTE: As part of FIC's examination, FIC provided the on-site examiner with a copy of the required WHCRA notice mailed to FIC insureds. In anticipation of FIC's potential argument that FIC administratively complies with the requirements of WHCRA through its processing of claims, we note the following phrase contained in this FIC WHCRA Notice:

> "Covered benefits **are subject to all provisions described in your plan**, including **but not limited to**, deductible, copayment, rate of pay, exclusions and limitations." (Emphasis added.)

Recommendation(s)

FIC should:

1) Revise its' group policy forms so that newly issued forms comply with the requirements of WHCRA; and

2) Develop forms to amend existing FIC policy forms already issued in Massachusetts; and

3) Submit to CMS a plan for amending the FIC policy forms already issued in Massachusetts.

Exception #4 - - Violation of Section 2752 of the PHS Act (reference Section 2706 of the PHS Act and 713 of ERISA)

General Subject Area(s) - - Contract Language – Form Violations – Individual Market

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Background

Section 2752 of the Public Health Service Act outlines the requirements of WHCRA for health insurance issuers conducting business in the individual market. The Centers for Medicare & Medicaid Services (CMS) enforcement authority with respect to WHCRA are found at Sections 2722 and 2761 of the PHS Act, CMS's rulemaking authority under Section 2792, and Federal Enforcement regulations found at 45 CFR Part 150. These statutes and regulations require an issuer's policy forms to accurately reflect the benefits of WHCRA.

FIC no longer issues individual policies in Massachusetts. The forms provided to the on-site examiner by FIC representing the forms renewed by FIC in the Massachusetts individual health insurance market are outlined below.

Individual Policy Form Numbers
192-MA, 504, 507, 544, 556, 557, 619, 645, *658, 670, 671, 673, 789

* Form number 658 is a hospital indemnity policy that is not required to comply with the requirements of WHCRA

Specific Violations

- **FIC renews individual health insurance forms which do not accurately reflect the benefits provided by WHCRA.**

Section 2752 of the PHS Act which incorporates by reference Section 2706 of the PHS Act, (which further incorporates by reference Section 713 of the Employee Retirement Income Security Act of 1974) states in part:

> (c) In General.--A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, that

provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for—

(1) all stages of reconstruction of the breast on which the mastectomy has been performed;

(2) surgery and reconstruction of the other breast to produce a symmetrical appearance; and

(3) prostheses and physical complications all stages of mastectomy, including lymphedemas; in a manner determined in consultation with the attending physician and the patient. Such coverage may be subject to annual deductibles and coinsurance provisions as may be deemed appropriate and as are consistent with those established for other benefits under the plan or coverage. Written notice of the availability of such coverage shall be delivered to the participant upon enrollment and annually thereafter.

Federal Enforcement regulations found at 45 CFR 150.103 defines "HIPAA requirements" to mean "…*the requirements of title XXVII of the PHS Act and its implementing regulations in parts 146 and 148 of this subchapter*."

Federal Enforcement regulations found at 45 CFR 150.103 defines "Individual health insurance policy or individual policy" to mean:

> "…*the legal document or contract issued by the issuer to an individual* ***that contains the conditions and terms of the insurance****…*." (Emphasis added.)

Federal regulations found at 45 CFR 150.305 "Determination of entity liable for civil money penalty" state the following:

> "If a failure to comply is established under this Part, the responsible entity, as determined under this section, is liable for any civil money penalty imposed…
>
> (2) *Individual health insurance policy.* To the extent an individual health insurance policy is subject to an applicable HIPAA requirement, a health insurance issuer is subject to a civil money penalty **if the policy itself**, or the manner in which the policy is marketed or administered, violates any applicable HIPAA requirement." (Emphasis added.)

CMS further discusses the intent and purpose of this requirement in the preamble to 45 CFR 150.305. Specifically, the preamble states in part as follows:

"*Section 150.305 Determination of Entity Liable for Civil Money Penalty*…

> **With regard to health insurance sold in the individual market**, the issuer is the responsible entity and therefore liable for any assessed civil money penalty. To the extent that policies sold in the individual market are subject to the requirements of HIPAA, **issuers are responsible for ensuring that their policies comply** and are marketed and administered in accordance with those requirements and applicable implementing regulations at 45 CFR Part 148. In addition, **when a policy does not comply with applicable HIPAA requirements**, the issuer may be subject to a civil money penalty irrespective of whether the issuer sold the policy directly, or a broker or agent sold the policy on the issuer's behalf… " (Emphasis added.)

Federal Regulations found at 45 CFR Part 150, Appendix A to Subpart C of Part 150 – Examples of Violations, II. *Basis for Imposition of Civil Money Penalties – Actions in the Individual Market*, example (f) lists the following as a basis of imposition of a Civil Money Penalty:

> "*Failure to comply with the Women's Health and Cancer Rights Act of 1998 (section 2752 of the PHS Act, 42 U.S.C. 300gg-52) and any additional implementing regulations*."

Specific Violations by Form Title and Number

NOTE: Those forms with the same relevant policy language have been grouped together, where possible, for ease of review.

Form # 192-MA

(1) The "Covered Charges" Section D, Item 9.b. states in relevant part the following:

> "The **(1)** initial breast prosthesis needed because of the Medically Necessary surgical removal of all or part of the breast **(2)** provided the surgical removal was done while the Covered Person was insured under this plan."
>
> "**(3)** Charges for repairs to or replacement of any of the above are not covered charges." (Emphasis and references added.)

The **first** and **third underlined portions** of the aforementioned provision

violates the requirements of WHCRA found at Section (a)(3) in that they do not provide coverage for replacement prosthetics. The language of the WHCRA clearly uses the word “prostheses” which is plural and further states such benefits are to be available when provided “…*in a manner determined in consultation with the attending physician and the patient*.”

Additionally, the **second underlined portion** of the aforementioned provision violates the requirements of WHCRA found at Section (a)(3) by suggesting that benefits are limited to only those individuals who were covered under the plan at the time of the mastectomy. No language appears in WHCRA which would indicate that prosthetic benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

Specifically, the law states in part "...a health insurance issuer providing health insurance coverage in connection with a group health plan, that provides medical and surgical benefits with respect to a mastectomy shall provide...." (Emphasis added.) The law does not state "with respect to an individual's mastectomy," or "with respect to a mastectomy for which the issuer has paid benefits." A plain reading of the statutory language and legislative history does not indicate a desire by Congress that WHCRA benefits not be portable. In fact, such an interpretation of the law would create situations where often the requirements of WHCRA would actually conflict with the portability requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) making it difficult, if not impossible, for an issuer to be in compliance with both laws in those States subject to the Federal Fallback provisions of HIPAA.

For example, the practice of not providing WHCRA benefits when an individual received a mastectomy under a previous plan, would result in an actual violation of the provisions of HIPAA in those cases where a “HIPAA eligible individual” purchases guaranteed issued health insurance coverage in the individual market.

In this regard, Federal Regulations found at 45 CFR 144.103 define a preexisting condition exclusion in part as “…a limitation or exclusion of benefits relating to a condition *based on the fact that the condition was present before the first day of coverage…*” (emphasis added).

Federal Regulations found at 45 CFR 148.120(a)(2) require that coverage sold to “eligible individuals” as defined at 45 CFR 148.103 “May not impose any preexisting condition exclusion on the individual” if the individual has selected such a policy. We would note there are also no indications in the requirements of HIPAA that the aforementioned prohibition on preexisting condition exclusions only applies to individuals who do not change carriers.

An “eligible individual” purchasing a guaranteed available individual policy

pursuant to the requirements of 45 CFR 148.120(a)(2) could not have any preexisting condition exclusion imposed on them. If WHCRA allowed an issuer to deny WHCRA benefits to certain individuals based on the fact that the condition was present before the first day of coverage, the result for the issuer would be complete compliance with the requirements of WHCRA while at the same time subjecting itself to possible penalties for non-compliance with HIPAA.

(2) The "General Exclusions" Section F, Subsection 8 states in relevant part the following:

> "The following are not covered under this plan:
>
> Charges for Cosmetic Treatment or Surgery and any complications arising from such surgery… This does not include charges for Cosmetic Treatment or Surgery that follows Medically Necessary surgical removal of all or part of a diseased breast, provided the surgical removal was done while the Covered Person was covered under this plan." (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA as found at Section (a)(1) by suggesting that benefits are limited to only those individuals who were covered under the plan at the time of the mastectomy. No language appears in WHCRA which would indicate that benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

(3) Form 192-MA violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(4) Form 192-MA violates the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Form 504

(1) The "Part II – Coverage Description" section, Item 4 of Form 504 states in part the following:

> "…Reconstructive surgery that is incidental to or follows covered surgery preformed as the result of trauma, infection or other diseases of the involved part." (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(2) Form #504 violates the requirements of WHCRA found at Section (a)(3) in that it does not provide coverage for prostheses.

(3) Form #504 violates the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Form 507

(1) The "Part II – Coverage Description" section, Item 4 of Form 507 states in part the following:

> "…Reconstructive surgery that is incidental to or follows covered surgery preformed as the result of trauma, infection or <u>other diseases of the involved part</u>." (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(2) The "Part II – Coverage Description" section, Item 8(c) of Form 507 states in part the following:

> "The **(1)** <u>initial external breast prosthesis</u> needed because of surgical removal of all or part of the breast **(2)** <u>because of cancerous tissue</u>, **(3)** <u>provided the surgical removal was done while the Covered Person was insured under the plan</u>."
>
> "…**(4)** <u>replacement of prosthetic devices are not Covered Expenses</u>." (emphasis and references added).

The **first** and **fourth underlined portions** of the aforementioned provision violates the requirements of WHCRA found at Section (a)(3) by failing to provide benefits for replacement prosthetics. The language of the WHCRA clearly uses the word "prostheses" which is plural and further states such benefits are to be available when provided "…*in a manner determined in consultation with the attending physician and the patient*."

Additionally, **second underlined portion** of the aforementioned provision violates the requirements of WHCRA as found at Section (a)(3), by indicating

that prosthetic benefits are only provided when a mastectomy is performed due to cancer.

WHCRA states in relevant part "*A...health insurance issuer providing health insurance coverage…that provides medical and surgical benefits with respect to a mastectomy shall provide*…" The law does not state "with respect to a mastectomy performed due to cancer." In addition, no other language appears elsewhere in WHCRA which would indicate that benefits are only provided to those individuals who have undergone a mastectomy due to cancer.

The **third underlined portion** of the aforementioned provision also violates the requirements of WHCRA found at Section (a)(3) by suggesting that benefits are limited to only those individuals who were covered under the plan at the time of the mastectomy. No language appears in WHCRA which would indicate that prosthetic benefits are only provided to those individuals who have had a mastectomy while covered under the same plan.

(3) Form #507 violates the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys that benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Form 544

(1) The "Exclusions and Limitations" section, Item (m) of Form #544 states in part:

> "EXPENSES NOT COVERED BY THIS POLICY: This policy does not provide benefits for the following:
>
> m) cosmetic surgery, except: a) reconstructive surgery that is incidental to or follows surgery performed while this policy is in force resulting from trauma, infection or <u>other diseases of the involved part</u>…" (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for "…*surgery and reconstruction of the other breast to produce a symmetrical appearance*."

(2) Form #544 violates the requirements of WHCRA found at Section (a)(3) in that it does not provide for coverage for replacement prosthetics. Specifically, the "Coverage Description" section, Item 7 states, in relevant part, coverage is provided for "*<u>Permanent</u> artificial members*…" (Emphasis added.)

(2) Form #544 violates the requirements of WHCRA found at Section (a)(3) by

failing to include a benefits provision that clearly conveys that benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Forms 556 & 557

(1) The "Exclusions and Limitations" section, Item (m) of Forms #556 and 557 state in part:

> "EXPENSES NOT COVERED BY THIS POLICY: This policy does not provide benefits for the following:
>
> m) cosmetic surgery, except: a) reconstructive surgery that is incidental to or follows surgery performed while this policy is in force resulting from trauma, infection or other diseases of the involved part…" (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for *"…surgery and reconstruction of the other breast to produce a symmetrical appearance"*.

(2) Forms #556 and #557 violate the requirements of WHCRA found at Section (a)(3) in that they do not provide coverage for replacement prosthetics. Specifically, The Coverage Description section, item 7 states, in relevant part, coverage is provided for "*Permanent prosthesis*…"

(3) Form #556 and #557 violate the requirements of WHCRA found at Section (a)(3) by failing to include benefit provisions that clearly convey benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Form 645

(1) The "Exclusions" section, Item (h) of Form #645 states in part:

> "EXPENSES NOT COVERED BY THIS POLICY: This policy does not cover expenses due to:
>
> h) cosmetic surgery, except:
>
> (1) reconstructive surgery that is incidental to or follows surgery

performed while this policy is in force resulting from trauma, infection or other diseases of the involved part…" (Emphasis added.)

The aforementioned provision violates the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for *"…surgery and reconstruction of the other breast to produce a symmetrical appearance".*

(2) Form #645 violates the requirements of WHCRA found at Section (a)(3) by failing to include a benefit provision that clearly conveys benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Forms 670, 671 & 673

(1) The "Exclusions" section, Item (h) of Forms #670 and 671 states in part:

> "EXPENSES NOT COVERED BY THIS POLICY: This policy does not cover expenses due to:
>
> h) cosmetic surgery, except:
>
> (1) reconstructive surgery that is incidental to or follows surgery performed while this policy is in force resulting from trauma, infection or other diseases of the involved part…"

[**NOTE:** The same language appears in the "Exclusions" section of Form #673 except it is referenced as Item (i).]

The aforementioned provisions violate the requirements of WHCRA found at Section (a)(2) by failing to provide benefits for *"…surgery and reconstruction of the other breast to produce a symmetrical appearance".*

(2) Forms #670, #671 and #673 violate the requirements of WHCRA found at Section (a)(3) in that they do not provide coverage for replacement prosthetics. Specifically, The Coverage Charges section, item (h)(i) and state, in relevant part, coverage is provided for "*Permanent artificial members*…" (Emphasis added.)

(3) Forms #670, #671 and #673 violate the requirements of WHCRA found at Section (a)(3) by failing to include benefit provisions that clearly convey benefits are available for "…*physical complications all stages of mastectomy including lymphedemas*…"

Forms 619 & 789

The benefits provided through Forms #619 and #789 are very limited, and the description of benefits payable not very specific. However, it would appear the coverage does provide for "…*medical and surgical benefits with respect to a mastectomy*…" and as a result, the forms are subject to the requirements of WHCRA.

While the non-specific wording of these policies make them difficult to review for compliance, it would not appear that Forms #619 and #789 comply with any of the requirements of WHCRA with one possible exception. Specifically, one provision that appears in the "Expenses Not Covered by This Policy" section, Item (f) lists as excluded "*Plastic surgery except when made necessary by injury*." (Emphasis added.) Presumably, FIC would provide reconstructive surgery benefits to an individual insured under one of these policies provided the mastectomy performed was the result of an injury.

Adverse Impact to Consumers

- Claims processed pursuant to the non-compliant contractual language of FIC's individual policy forms would be incorrectly denied in violation of the requirements of WHCRA thus denying certain WHCRA benefits to FIC insureds; and/or

- FIC insureds are unaware of their right to submit claims for certain benefits guaranteed them under the requirements of WHCRA. The non-compliant contractual language may result in otherwise payable claims not being submitted by the uninformed policyholders.

NOTE: As part of FIC's examination, FIC provided the on-site examiner with a copy of the required WHCRA notice mailed to FIC insureds. In anticipation of FIC's potential argument that FIC administratively complies with the requirements of WHCRA through its processing of claims, we note the following phrase contained in this FIC WHCRA Notice:

> "Covered benefits **are subject to all provisions described in your plan**, including **but not limited to**, deductible, copayment, rate of pay, exclusions and limitations." (Emphasis added.)

Recommendation(s)

FIC should:

1) Develop forms to amend existing FIC policy forms already issued in Massachusetts; and

2) Submit to CMS an action plan for amending the aforementioned forms.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Region VII
Federal Office Building
601 East 12th Street, Room 235
Kansas City, Missouri 64106

Refer to:
ORA: WHCRA

October 24, 2002

Mr. Steven E. Johnson
Market Conduct Analyst
Fortis Insurance Company
P.O. Box 3050
Milwaukee, WI 53201-3050

RE: Riders 27428 & B105

Dear Mr. Johnson:

This letter conveys the results of our review of the above captioned forms.

> *At this time, the State of Massachusetts, has not incorporated into law provisions and/or requirements that would bring its laws into compliance with the requirements of the Women's Health and Cancer Rights Act of 1998 (WHCRA). As a result, the enforcement of WHCRA in Massachusetts is presently the responsibility of this office.*

The captioned forms have been accepted as of the date of this letter with respect to those issues which evidence your attempt to comply with the requirements of WHCRA. Please note, when Federal WHCRA regulations are issued, these forms may be subject to further review and may be found unacceptable at that time. We have not enclosed stamped copies of the accepted forms, as this letter will serve as your record of our acceptance. Please be advised that this review does not replace any form review and/or approval procedures required by the State of Massachusetts.

Please note that in accordance with Federal Regulations found at 45 CFR 150.319, this agency is allowed to take into account the insurer's previous record of compliance with respect to situations which arise where the imposition of a Civil Monetary Penalty is warranted. This notification of acceptance of the captioned form filing and your company's cooperation in this process will become a part of the record that will be maintained as evidence of your effort to comply with the WHCRA.

If there are any questions or if discussion is desired, please contact Evan Doran of this office at (816) 426-5472, ext. 3119. Once again, thank you for your cooperation.

Sincerely yours,

/s/

Richard P. Brummel
Acting Regional Administrator

CC: Benjamin Cutler
Christine F. Meyer

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Region VII
Federal Office Building
601 East 12th Street, Room 235
Kansas City, Missouri 64106

October 24, 2002

Benjamin Cutler, President
Fortis Insurance Company
P.O. Box 3050
Milwaukee, WI 53201

RE: Women's Health and Cancer Rights Act of 1998 (WHCRA) Market Conduct Examination – **Massachusetts**

Dear Mr. Cutler:

Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) market conduct examination requirements found at 45 CFR 150.313(e)(3), this letter will convey the results of the Centers for Medicare & Medicaid Services' (CMS') review of Fortis Insurance Company's (FIC) May 28, 2002 response to the WHCRA market conduct examination report of FIC dated March 27, 2002.

Specifically, the requirements of 45 CFR 150.313(e)(3) provide CMS with the following four (4) response options to each issue identified in a market conduct examination report:

1) Concurrence with the issuer's position.

2) Approval of the issuer's proposed plan of correction.

3) Conditional approval of the issuer's proposed plan of correction, which will include any modifications CMS requires.

4) Notice to the issuer that there exists a potential violation of HIPAA requirements.

With respect to any issues CMS chooses to "Approve" or "Conditionally Approve" in this letter, should FIC not fulfill the requirements and/or take the appropriate corrective actions within the appropriate time frames, CMS may pursue a Civil Monetary Penalty (CMP) with respect to those issues. In addition, CMS will consider such a failure by FIC to be an aggravating factor as provided for at 45 CFR 150.312 and calculate any CMPs to the maximum amount allowed under the law.

Exception #1 – Sections 2706 and 2752 of the PHS Act (reference Section 713 of ERISA) – Limited Interpretation of a Mastectomy Impacting Coverage for Breast Reconstruction following a Mastectomy

Background – Information collected by the on-site examiner indicated that FIC's interpretation of which procedures constitute a mastectomy was more limited than those procedures indicated by FIC's chosen source of reference for determining the nature of such medical procedures. This narrow interpretation would lead to incorrect and non-compliant denials of the benefit protections provided by WHCRA.

In total, four (4) codes that would otherwise trigger the protections of WHCRA were excluded by FIC.

In FIC's response, the company indicated they provided the on-site examiner those procedure codes reflecting their understanding of procedures that would constitute a mastectomy. They further indicated the procedure codes cited in the Market Conduct Examination Report would in fact be covered under FIC's contracts subject to the terms and limitations of those contracts. The company went on to state that claims for services for these procedures would be referred to FIC's Health Management department for review.

FIC indicated that the company's Health Management Services and Claims staff would be notified that the procedures in question constitute a "mastectomy" for the purposes of compliance with WHCRA in the State of Massachusetts and that subsequent services for reconstruction, including reconstruction of the other breast to achieve a symmetrical appearance, would be a covered benefit pursuant to WHCRA.

CMS Response – Approval of FIC's proposed plan of correction.

Exception #2 – Sections 2706 and 2752 of the PHS Act (reference Section 713 of ERISA) – Limited Interpretation of Breast Reconstruction

Background – Information collected by the on-site examiner indicated that FIC's coverage of breast reconstruction procedures is more limited than those procedures indicated by FIC's chosen source of reference for determining the nature of such medical procedures. These limitations would lead to incorrect and non-compliant denials of the breast reconstruction benefit protections provided by WHCRA.

In total, five (5) codes that would otherwise be covered procedures pursuant to the requirements of WHCRA were excluded by FIC.

In FIC's response, the company indicated they provided the on-site examiner those procedure codes reflecting their best estimation of procedures that would constitute breast reconstruction under the terms of WHCRA. They further indicated the procedure codes

cited in the Market Conduct Examination Report would have been reviewed for medical necessity and appropriateness before a determination of coverage would be made.

FIC indicated that the company's Health Management Services and Claims staff would be notified that the procedures in question, when preformed subsequent to a mastectomy on covered persons in Massachusetts, would constitute breast reconstruction as contemplated by the requirements of WHCRA. The procedures in question would be a covered benefit in compliance with WHCRA, subject to the terms and limitations of the contract.

CMS Response – Approval of FIC's proposed plan of correction.

Exception #3 – Sections 2706 of the PHS Act (reference Section 713 of ERISA) – Contract Language – Form Violations – Group Market

Background – Policy forms collected by the on-site examiner indicated that FIC issued and renewed group health insurance forms that did not accurately reflect the requirements of WHCRA. (NOTE: See report pages 11 – 19 for a complete description of the specific areas of non-compliance).

In FIC's response, they indicated that their forms did not comply with the requirements of WHCRA primarily due to the age of the contracts examined. They further indicated that they provided the on-site examiner with evidence that the company was in full administrative compliance with the requirements of WHCRA and that the identified areas of non-compliance were related to the forms only and were not reflected in benefit claims determinations under WHCRA.

FIC submitted a WHCRA complaint policy form rider (form #27428) and indicated that the new form would be issued to all coverage in force in the group market in Massachusetts upon issuance or renewal of coverage. (A separate letter indicating this agency's acceptance of this form is enclosed).

CMS Response – Conditional approval provided FIC has begun the process of using the aforementioned form with respect to newly issued group business, and has begun amending existing contracts upon renewal. If this activity is not yet underway, FIC should immediately contact this office with an explanation.

Exception #4 – Sections 2752 of the PHS Act (reference Section 713 of ERISA) – Contract Language – Form Violations – Individual Market

Background – Policy forms collected by the on-site examiner indicated that FIC renewed individual health insurance forms that did not accurately reflect the requirements of WHCRA. (NOTE: See report pages 20 – 30 for a complete description of the specific areas of non-compliance).

In FIC's response, they indicated that their forms did not comply with the requirements of WHCRA primarily due to the age of the contracts examined. They further indicated that they provided the on-site examiner with evidence that the company was in full administrative compliance with the requirements of WHCRA and that the identified areas of non-compliance were related to the forms only and were not reflected in benefit claims determinations under WHCRA.

FIC submitted a WHCRA complaint policy form rider (form #B105) and indicated that the new form would be issued to all coverage in force in the individual market in Massachusetts upon renewal. (A separate letter indicating this agency's acceptance of this form is enclosed). FIC further indicated that the company does not currently issue new business in the individual market in Massachusetts.

CMS Response – Conditional approval provided FIC has begun the process of amending existing contracts upon renewal. If this activity is not yet underway, FIC should immediately contact this office with an explanation

If you have questions or want to discuss these matters, please contact Jorge Lozano of my Insurance Reform staff at (816) 426-5472, ext. 3120. Thank you for your cooperation.

Sincerely,

/s/

Richard P. Brummel
Acting Regional Administrator

Enclosure

CC: Gale Arden, CMS, Central Office
Ruth Bradford, CMS, Central Office
Evan Doran, CMS, Kansas City Regional Office
Steven Johnson, FIC
Christine F. Meyer, FIC