PROGRAM MEMORANDUM
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Health Care Financing Administration

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Title: Insurance Standards Bulletin Series--INFORMATION

Subject: Imposing Nonconfinement Clauses on Eligible Individuals

Market: Group and Individual

I. Purpose

Title XXVII of the Public Health Service Act (PHS Act), as added by Title I of the Health Insurance Portability and Accountability Act (HIPAA), contains certain group and individual market provisions that affect group health plans and health insurance issuers. The purpose of this Bulletin is to convey the position of the Health Care Financing Administration concerning the rights of "eligible individuals" to guaranteed availability of health insurance coverage in the group and individual markets. These protections are provided under sections 2711, 2741 and 2744 of the PHS Act, as implemented in regulations at 45 CFR Parts 146 and 148. This Bulletin clarifies that it is a violation of the PHS Act for a group health plan and a health insurance issuer selling group or individual health insurance coverage to apply a Anonconfinement clause@ to an eligible individual. Although in practice nonconfinement clauses in the group market generally apply only to dependents, in some cases they apply also to employees. Nonconfinement clauses are also sometimes applied in the individual market, both to insured individuals and to any covered dependents.

It is not the purpose of this Bulletin to address the responsibility of a former issuer under State law. The rule discussed in this Bulletin applies only to an issuer that is providing new group or individual coverage to an eligible individual. Similarly, this Bulletin does not address actively-at-work clauses, as they apply to employees. Clarification of the responsibility of a former issuer under State law, as well as a discussion of the actively-at-work clause, will be provided in the near future. To the extent that the term nonconfinement is applied to employees, it will be dealt with in that future guidance.

II. Background

Guaranteed Availability

Section 2711 of the PHS Act, and the implementing regulations at 45 CFR 146.150, require group health plans and health insurance issuers selling group health insurance coverage to accept every

"eligible individual"[1] who applies for enrollment under the terms of the group health plan, even those individuals with serious medical problems. Certain limitations on preexisting condition exclusions apply.

Part B of Title XXVII of the PHS Act sets forth three alternative means of ensuring that health coverage in the individual market is available to eligible individuals on a guaranteed issue basis with no preexisting condition exclusions. States may enforce the Federal minimum standard, implement an acceptable alternative mechanism under State law, or do nothing and allow the Federal Government to enforce the Federal minimum standard. The Federal minimum standard gives health insurance issuers three options with respect to their individual market products: they can guarantee issue all their products, or they can elect to limit the coverage offered to either their two most popular products or two "representative" products.

III. Nonconfinement Clauses

Many health insurance contracts/policies contain language providing that if an applicant is an inpatient on the day that coverage is scheduled to take effect, that person shall not be entitled to any benefits under the contract/policy until the first day on which he or she is no longer an inpatient. Such a provision is sometimes referred to as a "nonconfinement clause" or "deferral rule." It is HCFA=s position that delaying the effective date of coverage until an individual is no longer confined to a hospital or other health care institution violates provisions of the PHS Act
that relate to both the group and individual markets.

Section 2702 of the PHS Act[2] generally provides that a group health plan, and a health insurance issuer selling group health insurance coverage, may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan based on any health factor. These health factors include: health status, medical condition (including physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability. Because confinement to a hospital, nursing home or extended care facility is due to one or more health factors, and because delaying the effective date of coverage constitutes a rule for eligibility, the plan provisions delaying the effective date of coverage based on confinement impermissibly deny eligibility based on a health factor and thus violate section 2702 of the PHS Act.

[1]The regulations at §146.150 define an eligible individual in the group market as one who meets the applicable requirements of the group health plan, the issuer, and State law for coverage under the plan. The regulations at §148.103 define an eligible individual in the individual market as one who meets specified conditions. In general, an eligible individual is an individual: 1) who has at least 18 months of "creditable coverage," 2) who most recently has been covered under a group health plan, a governmental plan, or a church plan (or health insurance coverage offered in connection with such a plan; 3) who is not eligible for coverage under another group health plan, Medicare, or Medicaid; 4) who does not have any other health insurance coverage; 5) whose most recent coverage was not terminated because of fraud or nonpayment of premiums; and 6) who either was not offered continuation coverage under COBRA or a similar State program, or who, if COBRA or similar State-mandated continuation coverage was offered, has elected and exhausted such continuation coverage.

[2]Parallel provisions of HIPAA's portability provisions under section 2701 and 2702 of the PHS Act are contained in section 701 and 702 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 9801 and 9802 of the Internal Revenue Code of 1986.

Section 2701 of the PHS Act generally provides that a group health plan, and a health insurance issuer selling group health insurance coverage may, with respect to a participant or beneficiary, impose a preexisting condition exclusion only if: 1) the exclusion relates to a condition (whether physical or mental), regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the 6-month period ending on the enrollment; 2) the exclusion extends for a period of not more than 12 months (or 18 months in the case of a late enrollee) after the enrollment date; and 3) the period of any such preexisting condition exclusion is reduced by the aggregate of the periods of creditable coverage (if any, as defined in section 2701(c)(1) of the PHS Act) applicable to the participant or beneficiary as of the enrollment date. Nonconfinement clauses are prohibited under section 2701 of the PHS Act because they operate in part as a preexisting condition exclusion, by precluding coverage of benefits related to a preexisting condition. Therefore, because nonconfinement clauses do not satisfy the requirements of section 2701 of the PHS Act, they operate as impermissible preexisting condition exclusion provisions and are prohibited by that section.

Finally, section 2741 of the PHS Act provides that a health insurance issuer that sells in the individual market, and that is subject to guaranteed availability requirements, must issue coverage to all eligible individuals who apply and may not impose any preexisting condition exclusion on such individuals. Contracts/policies that delay an eligible individual's effective date of coverage until that individual is discharged from the hospital invariably violate the individual market requirements of section 2741 and 2744 of the PHS Act because they operate in part as a preexisting condition exclusion by precluding coverage of benefits related to a preexisting condition. The statute prohibits the imposition of any preexisting condition exclusion on eligible individuals.

In conclusion, group health plans and health insurance issuers selling group and individual health insurance coverage should ensure that no coverage sold to eligible individuals contains a nonconfinement clause. If necessary, the language of the contracts/policies should be modified to clarify that nonconfinement clauses may not be applied to eligible individuals.

Where to get more information:

The regulations cited in this bulletin are found in Parts 146 through 148 of Title 45 of the Code of Federal Regulations (45 CFR '146-148). Information about HIPAA is also available on HCFA:s website at www.hcfa.gov.

If you have any questions regarding this Bulletin, call the HIPAA Insurance Reform Help Line at (410) 786-1565 or your local HCFA Regional Office.