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DEPARTMENT OF INSURANCE

FRANKFORT, KENTUCKY

ADVISORY OPINION

2021-0003

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance (the "Department") on the specified issue. The Advisory Opinion is not legally binding on either the Department or the reader.

TO: ALL HEALTH INSURERS AUTHORIZED TO OFFER HEALTH BENEFIT PLANS IN THE COMMONWEALTH OF KENTUCKY

FROM: SHARON P. CLARK, COMMISSIONER
KENTUCKY DEPARTMENT OF INSURANCE

RE: IMPLEMENTATION OF 21 SB 44

DATE: August 25, 2021

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This Advisory Opinion is intended to provide guidance on the implementation of 21 RS SB 44, An Act relating to access to health care. This Act requires insurers to accept premium and cost-sharing payments made on behalf of an insured from:

- A state or federal government program, including payments made by programs operating in accordance with title XXVI of the federal Public Health Service Act, 42 U.S.C. sec. 300ff et seq., as amended

- An Indian tribe, tribal organization, or urban Indian organization; and
- A program conducted by an organization that certifies that the organization is:
 - Exempt from taxation under 26 U.S.C. sec 502(a), as amended;
 - Described in 26 U.S.C. sec 170(b)(1)(A)(i) or (vi); and
 - Operating in compliance with applicable federal laws, including the False Claims Act, 31 U.S.C. secs. 3720 to 3722.

Under section 1(4)(b) of the Act, the Act does not require insurers to accept payments made by, or on behalf of, any organization that receives funding in any form from a health care provider, as defined in KRS 304.17A-005, which includes the following:

- Advanced practice registered nurse licensed under KRS Chapter 314;
- Chiropractor licensed under KRS Chapter 312;
- Dentist licensed under KRS Chapter 313;
- Facility or service required to be licensed under KRS Chapter 216B;
- Home medical equipment and services provider licensed under KRS Chapter 309;
- Optometrist licensed under KRS Chapter 320;
- Pharmacist licensed under KRS Chapter 315;
- Physician, osteopath, or podiatrist licensed under KRS Chapter 311;
- Physician assistant regulated under KRS Chapter 311; and
- Other health care practitioners as determined by the department by administrative regulations promulgated under KRS Chapter 13A.¹

Based on legislative testimony, the language in Section 1(4)(b) is intended to be a narrow exemption that would prohibit a non-profit organization that is affiliated with a health care provider from providing premium or cost-sharing assistance to an insured that it also serves as a patient. Further, based on discussions with the proponents of the amendment, this language was intended to prevent health care providers who can submit claims under a health benefit plan from paying the premiums for the health plan.

In considering the implementation of the exemption in Section 1(4)(b) of SB 44, the Department has reviewed guidance from the U.S. Department of Health and Human Services, Office of Inspector General regarding the operation of independent charity patient assistance programs. On May 30, 2014, the U.S. Department of Health and Human Services, Office of Inspector General's Supplemental Special Advisory Bulletin: Independent Charity Patient Assistance Programs was published in the Federal Register at 79 FR 31120. While this advisory relates to patient assistance programs for Medicare and Medicaid beneficiaries, it sets forth guiding principles for patient assistance programs operated by independent charities that provide cost sharing assistance for prescription drugs to assist patient assistance programs in avoiding activities that could be considered a violation of the federal anti-kickback law. The federal law makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any

¹ The Department has filed 806 KAR 17:580 which proposed to add pharmacies to the list of providers

remuneration to induce or reward the referral or generation of business reimbursable by any federal health care program. [1128A(a)(5) of the Social Security Act, 42 CFR 1003.101]

Under the federal anti-kickback law, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. Based on the 2014 Special Advisory Bulletin, the federal anti-kickback law is interpreted to cover any arrangement where one purpose of the remuneration is to give or obtain money for the referral of services or to induce further referrals. Civil penalties can be imposed against any person that offers or transfers remuneration to a beneficiary that the benefactor knows or should know is likely to influence the beneficiary to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program. A violation determination requires an individualized evaluation of all of the relevant facts and circumstances, including the parties’ intent. Relevant factors for the analysis are the nature, structure, sponsorship, and funding of the particular patient assistance program.

Based on the Department’s understanding of the legislative intent of SB 44 Section 1(4)(b), a similar prohibition against inappropriate remuneration to entities identified in Section 1(2)(c) was envisioned. Accordingly, the Department expects organizations identified in Section 1(2)(c) of SB 44 to act independently from any donors in their nature, structure, sponsorship, and funding, ensuring that the determination of an insured’s eligibility for assistance does not depend directly or indirectly on the insured’s use of any particular provider or service.

In construing the Act, the Department will review funding from health care providers to an organization to ensure that:

- The organization does not function as a conduit for payments or other benefits from the insurer to the provider;
- The health care provider does not impermissibly influence the insured’s choice of services through the organization;
- The health care provider does not exert any direct or indirect influence or control over the assistance provided to insureds; and
- The organization is not providing assistance to insureds in a manner that facilitates undue increases in costs to the health plan.

Please contact the Department at (502) 564-6026 with any questions about this Advisory Opinion.

