



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor
Theodore K. Nickel, Commissioner

Wisconsin.gov

125 South Webster Street • P.O. Box 7873
Madison, Wisconsin 53707-7873
Phone: (608) 266-3585 • Fax: (608) 266-9935
E-Mail: ociinformation@wisconsin.gov
Web Address: oci.wi.gov

June 24, 2016

Kevin Counihan
Chief Executive Officer, Health Insurance Marketplaces
Director, Center for Consumer Information & Insurance Oversight
Centers for Medicare & Medicaid Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Mr. Counihan,

Thank you for your email entitled "Notice to States Regarding Marketplace Auto Re-enrollment"

The Wisconsin Office of the Commissioner of Insurance (OCI) has a number of concerns regarding the auto enrollment of enrollees, as outlined in your email.

You state "Beginning with the 2017 PY, 45 CFR 155.335(j)(3) authorizes Marketplaces to determine the auto re-enrollment of enrollees in QHPs where the issuer will have no Marketplace enrollment option for the upcoming plan year, unless otherwise directed by the state regulatory authority." Your email continues:

This notice outlines the steps CMS expects state regulatory authorities in all states with an FFM (including State Partnership Marketplaces) or SBM-FP to take if they wish to direct this auto re-enrollment activity for PY2017, to ensure that the Marketplace will automatically re-enroll enrollees according to state direction. If CMS does not receive notice from a state regarding its intent to direct the auto re-enrollment of its QHPs no longer available in the Marketplace by 5:00 p.m. ET on June 24, 2016, CMS will proceed to direct auto re-enrollment for applicable QHPs.

However, the language in 45 CFR 155.335(j)(3) does not align with your interpretation. Specifically, the language states the following:

(j) (3) No QHPs from the same issuer are available through the Exchange, the enrollee may be enrolled through the Exchange in a QHP issued by a different issuer, *to the extent permitted by applicable State law*, unless he or she terminates coverage, including termination of coverage in connection with voluntarily selecting a different QHP, in accordance with

§ 155.430. The Exchange will ensure that re-enrollment in coverage under this paragraph (j)(3) occurs as follows:

- (i) As directed by the applicable State regulatory authority; or
- (ii) If the applicable State regulatory authority declines to provide direction, in a similar QHP from a different issuer, as determined by the Exchange. (Emphasis added)

This language speaks to ensuring re-enrollment but does not speak to auto enrollment. CMS has chosen a broad interpretation of the law to create a process that forces consumers to purchase a health insurance plan chosen by the federal government. The language also references, “to the extent permitted by applicable state law.” The process outlined in your email does not take into account state law.

It is OCI’s position that the auto enrollment options offered violate long standing State and Federal contract law principles. Wisconsin’s Insurance laws and regulations rest upon the principle that insurance is an area of free contractual activity. The Wisconsin Insurance laws and regulations provide consumer protections, stability in the diverse marketplace and fair competition. In Wisconsin, consumers have the right to enter into contracts of insurance free from external pressure and without pressure. Neither the state of Wisconsin nor the federal government has the right to assign a consumer into a contract with an insurer without the consumer’s prior approval and knowledge, regardless of any laudable goal. In the same vein, neither Wisconsin nor the federal government has the right to drive business to one insurer over another.

Furthermore, Wisconsin law requires anyone participating in the solicitation of insurance to hold an agent license. Federal employees determining which plan to auto enroll an individual into and facilitating that enrollment is doing the business of insurance without compliance with state agent licensing laws and may be subject to regulatory action.

Wisconsin insurers operate in a vibrant competitive environment that benefits both insurers and consumers as a result of a respected freedom to contract. The proposal to have States or CMS assign individuals to random insurers’ products and plans without the individual affirmatively choosing such products and plans is contrary to Wisconsin’s insurance law founding principle, and, we believe, will harm Wisconsin consumers and insurers.

Further, in order to achieve the seamless movement of individuals from plans that are ceasing participation in the Federal Exchange to participating insurers offering a variety of products and plans within the Federal Exchange, CMS will have to release nonpublic personally identifiable information pertaining to each enrollee without their prior authorization. This transfer of information, including the mere knowledge that a consumer was insured by a specific insurer, violates the Gramm-Leach-Bliley Act P.L. 106-102 (GLBA). Specifically, the GLBA prohibits insurers and agents from releasing nonpublic personally identifiable information. See 16 CFR § 313.10. The State of Wisconsin incorporated the requirements of the GLBA into regulations that also preclude Wisconsin licensees from releasing nonpublic personal financial information. See, s. Ins 25.04 (20) and (22), Wis. Adm. Code.

Consumers will experience further problems as their personal bank account information may be transferred from one insurer to another without their authorization. Consumers bank accounts may be debited in an amount the consumer never authorized for health insurance coverage that the consumer never chose. Alternatively, if CMS envisions insurers sending paper or electronic billing statements to enrollees, there will be significant consumer confusion over receiving a statement indicating they owe premium to a new insurance company. It is likely that most consumers will not have read notices sent to them explaining that the government enrolled them in a health insurance plan without their consent, prior to receiving a statement indicating they owe money for a product they did not choose to purchase. Unopened and unpaid premium due to consumer confusion will not achieve CMS's goals of enrollment. Those same individuals will be without coverage due in part to confusion.

In summary, Wisconsin does not support the auto enrollment process as outlined in your email. The current proposal violates both Federal and State law regardless of whether the State or the Federal government automatically places consumers into an insurance product or plan and therefore the current proposal should not be followed and a compliant process be developed.

In short, the proposed method violates Wisconsin law, violates consumer privacy rights, interferes with market competition, disturbs contract law principles, and will result in significant consumer harm.

Sincerely,



Theodore K. Mueker
Commissioner