



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor
Theodore K. Nickel, Commissioner

Wisconsin.gov

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Dear Mr. Counihan:

I am writing in response to CMS's July 20, 2016 letter addressing concerns the Wisconsin Office of the Commissioner of Insurance (OCI) raised in my June 24, 2016 letter. As you know, CMS's rule allowing for the auto re-enrollment of consumers into QHPs of a different issuer is only allowed "to the extent permitted by State law" 45 CFR 155.335(j)(3). For the sake of clarity, this letter and my June 24, 2016 letter shall serve as notice from OCI that the auto re-enrollment scheme set forth in 45 CFR 155.335(j)(3) is not permitted under Wisconsin law and the Exchange may not automatically enroll consumers with a new issuer in Wisconsin.

Section 631.07, Wis. Stat., requires a person to consent to the issuance of any disability insurance¹ policy on that person's health. This law precludes the issuance of a disability policy to anyone "other than the one whose ... health is at risk unless the latter has given written consent to the issuance of the policy." Under CMS's rule, a person will be automatically enrolled by the Exchange into a disability policy without their approval and consent. As such, the Exchange will be obtaining an insurance policy on the health of a person without written consent from that person in violation of s. 631.07, Wis. Stat. To be clear, OCI does not view enrollment in a health plan through the Exchange in a previous year as consent under s. 631.07, Wis. Stat.

Section 601.01, Wis. Stat., outlines the legislative purposes for the insurance code and provides guidance to OCI on its regulation of the insurance market in Wisconsin. Those purposes include "[t]o maintain freedom of contract and freedom of enterprise so far as consistent with the other purposes of the law." The Wisconsin Supreme Court has stated, "contract law is based upon the principles of free will and consent." *Mackezie v. Miller Brewing Co.*, 623 N.W.2d 739. Wisconsin courts have also made clear that no insurance contract can exist without the assent of the insured. *Weed v. Lepinaka*, 30 Wis. 2d 198.

Under CMS's auto re-enrollment rule, no valid contract will exist. A consumer will be placed with an insurance carrier who is not of their choosing and therefore cannot be mutual assent given the consumer is not choosing the insurer. Additionally, your

¹ Section Ins 6.75 (1)(c) and 2(c), Wis. Adm. Code, define "disability insurance" as "insurance covering injury or death of persons caused by accident, or *insurance covering health of persons.*" (emphasis added).

letter states, "Enrollees who are re-enrolled into a QHP that a different issuer offers are not enrolled into a contract without their prior approval or knowledge. Rather...the auto re-enrollment will not be effectuated unless the enrollee submits a binder payment, so an enrollee must take affirmative action to enter into a contract with another issuer." OCI does not accept a consumer receiving an invoice from an issuer they did not choose and deciding whether to pay the bill as affirmative action or mutual assent to enter a contract. Auto re-enrollment deprives a consumer of the right to select coverage that meets their individual needs and enter into a contract where there is a mutual understanding between the parties involved. Auto re-enrollment would not result in a valid contract under Wisconsin law and violates the insurance code's purpose of "maintain[ing] freedom of contract."

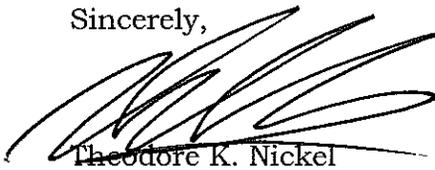
Furthermore, the Gramm-Leach-Bliley Act and similar provisions adopted by OCI in ch. Ins 25, Wis. Adm. Code, preclude the disclosure of private financial and health information to third parties without providing the consumer notice and the opportunity to opt out. Under the CMS rule, the Exchange would be sending personal financial and health information to a third-party insurer without authorization and without the requisite notices and option to opt out in violation of these requirements.

In addition to these state law violations, OCI does not believe CMS has the authority under the Affordable Care Act (ACA) to enroll consumers with an insurer not of their choosing. Several provisions of the ACA make clear that the law was intended to facilitate a consumer's choice of health plans; in fact, the Exchanges were created for this purpose. The choice of a health plan is specific to the needs of each individual consumer. CMS's plan to program an algorithm into the Exchange to choose a consumer's health plan for them without their consent is not authorized by the ACA and not consistent with the law's purpose and intent.

It is our intent to issue a bulletin informing Wisconsin insurers that the proposed auto re-enrollment scheme violates Wisconsin law. Any insurers who accept an individual for enrollment under the auto re-enrollment scheme will be subject to a sanction for each violation of Wisconsin law. In addition, Wisconsin will seek restitution for consumers harmed by your proposed auto re-enrollment scheme.

For these reasons, CMS's plan to auto re-enroll individuals into health plans offered by a different issuer is a violation of Wisconsin statutes. OCI will enforce any violations of Wisconsin law if CMS's plan is implemented in this state including taking administrative action against any participating insurer. Please confirm CMS will not implement the auto re-enrollment rule in Wisconsin.

Sincerely,



Theodore K. Nickel
Commissioner