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HLA



HEALTH CARE FOR ALL

August 14, 2015

Robert A. Whitney
Deputy Commissioner and General Counsel
Massachusetts Division of Insurance
1000 Washington Street, Suite 810
Boston, Massachusetts 02118

Dear Deputy Commissioner and General Counsel Whitney:

Health Law Advocates (HLA) and Health Care For All (HCFA) respectfully submit the following comments to the Division of Insurance (DOI) regarding the regulatory review process pursuant to Executive Order 562. HCFA seeks to create a patient-centered health care system that provides comprehensive, affordable, accessible, culturally competent, high quality care and consumer education for all Massachusetts residents, especially the most vulnerable among us. HLA is a non-profit public interest law firm that serves some of the Commonwealth's most vulnerable populations. HLA provides pro bono legal representation to low-income Massachusetts residents who have been unjustly denied health care access and to those who are burdened with unaffordable medical debt.

We understand the need to review regulations. However, wholesale changes to rules should go through a deliberative and inclusive process that informs the public, considers the impact of amendments and engages stakeholders. Massachusetts consumers are fortunate to have the DOI's regulatory authority to secure our rights. Regulations such as those related to health plan appeals, network adequacy, rate review, price transparency, coverage requirements, medical loss ratios, consumer disclosures, and mental health parity, just to name a few, are vital consumer protections. Throughout this regulatory review process, we urge the DOI to continue its tradition of effectively implementing insurance laws that are vital to protecting Massachusetts consumers.

Procedural Concerns with Executive Order 562

Sunset provisions (Section 2)

We are concerned that certain criteria in Executive Order 562 are not consistent with state administrative law M.G.L. c. 30A. First, we oppose the mandatory sunset of all regulations, as proposed under section 2 of the Executive Order. Most regulations are required to be promulgated under state law and they cannot lawfully be eliminated without due process. We understand that the DOI intends to allow further public comment through written and oral testimony, pursuant to M.G.L. c. 30A, §§2-3, for any proposed amendments to regulations. We urge the DOI to make that process as transparent and inclusive as possible, especially given the short timeframe remaining for review between now and March 2016. We additionally urge the DOI to allow for similar public notice and input if proposing any amendments to Bulletins or other sub-regulatory guidance.

Eliminating state consumer protections in favor of weaker federal standards (Section 3)

In addition, we are concerned with the criteria in section 3(c) of the Executive Order that the state regulation “not exceed federal requirements or duplicate local requirements.” This provision violates a key principle of our federal system, in which states are encouraged and expected to go beyond federal minimums. In many cases, regulations may exceed federal requirements because state law is more protective than federal law. This reflects the will of the people of Massachusetts as expressed by our Legislature. There should not be a broad and unilateral limit imposed on state regulations that go beyond federal regulations, especially not in the area of health care and health insurance policy, which have traditionally been regulated by the states.

The fact that Massachusetts has stronger, more protective health care laws and consumer rights in the area of health insurance is something the Commonwealth should be and is proud of. Many federal reforms under the Affordable Care Act were modelled on our 2006 health reform law, as enacted by the Massachusetts Legislature and implemented by the DOI and related state agencies. Rolling back protections that helped the nation chart its course in health reform would be a significant step backward. We urge the DOI to retain regulations developed pursuant to State health reform, and to continue to move forward to help the Commonwealth find new, innovative ways to improve the health care delivery system and manage growing health care costs.

As a specific example, network adequacy regulations should absolutely set standards that exceed federal requirements. While the ACA provides a framework for addressing the adequacy of Qualified Health Plan networks, under the law the states remain responsible for assuring that network adequacy is achieved for the benefit of consumers. The DOI standards for network

adequacy currently under review should therefore be retained and strengthened in accordance with State law.

Data collection under existing regulations and bulletins

During the DOI public listening session held on August 7, 2015, the Massachusetts Association of Health Plans (MAHP) and Blue Cross Blue Shield of MA (BCBSMA) offered suggestions on amending certain regulations in order to reduce carrier data filings with the DOI. MAHP and BCBSMA recommended that information should instead be obtained from other state agencies and databases when available. While we understand the health plans' desire to avoid duplicative data filing, we urge the DOI to carefully review these requests to ensure that the substance and frequency of data reported to the DOI remains unchanged.

Of note, it was suggested that the DOI might eliminate certain reporting requirements for mental health parity compliance. Massachusetts has one of the most comprehensive parity enforcement schemes in the country, due in large part to the DOI's careful efforts to promulgate thoughtful regulations and guidance.¹ These efforts are mandated by clear legislative authority.² The DOI developed its parity enforcement regulations following a robust regulatory process that included a huge public showing of support for increased parity enforcement.³ The resulting regulation and guidance clearly set forth the reporting requirements for insured health plans in Massachusetts to demonstrate compliance with state and federal parity laws. They do not duplicate other DOI requirements as the information needed to determine compliance with parity is unique due to the nature of the parity analysis. The regulation and guidance offer vital protections for consumers against potential health plan practices or policies that are discriminatory. We do support regulatory changes requiring health plans to more concretely demonstrate parity compliance. However, we strongly oppose any reduction in the frequency of data reporting, or any change in the substance and scope of data required of plans for parity compliance unless it can be satisfactorily demonstrated that the proposed change will not adversely impact the Division's and the public's ability to ascertain whether health plans are complying with parity requirements.

Need for inclusion and transparency

As the DOI moves forward with this review, we request a transparent and inclusive process to ensure that public input is fully encouraged, as required under section 8 of Executive Order 562. Toward that end, we respectfully request the DOI's schedule to review specific regulations as such openness will enhance the public engagement process. As discussed previously, we expect that all proposed amendments to regulations will go through the formal public comment process

¹ See, e.g., 211 CMR 154; DOI Bulletin 2013-06.

² See Public Law 110-343, section 511 (codified at M.G.L. c. 26, §8K).

³ See WBUR's CommonHealth, "Kennedy Calling for Equal Coverage of Mental Health – Yes, Still," (Mar. 29, 2013), available at <http://commonhealth.wbur.org/2013/03/mental-health-parity-states>.

with adequate notice to the public and opportunity to testify orally and in writing. Given that the DOI produces much of its guidance in Bulletins and other sub-regulatory forms, we strongly request that the same open, thorough and inclusive process apply to any proposed changes to Bulletins and other guidance. We appreciate that DOI has offered to make all comments submitted pursuant to this and subsequent listening sessions easily accessible on the DOI's website, and that the DOI has offered to allow stakeholders to respond to comments as they arise. In addition, we would like to learn more about the standards that the agency is applying in this review as we have substantive concerns about the appropriateness of some of the criteria in Executive Order 562, as discussed previously.

Thank you for the opportunity to submit testimony regarding the DOI's regulatory review process. We appreciate that the DOI has a history of soliciting stakeholder input and look forward to offering additional input and recommendations as this process evolves, and especially as the DOI considers specific changes to regulations. If you have any questions or need additional information, please contact Alyssa Vangeli at avangeli@hcfama.org or Clare McGorrian at cmcgorrian@hla-inc.org or 617-275-2983.

Sincerely,



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