



June 8, 2013

OAL Reference Attorney
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Jessica Ryan
California Department of Insurance
300 Capitol Mall, Suite 1700
Sacramento, CA 95814

Re: California Department of Insurance, Proposed Emergency Regulations
Essential Health Benefits
OAL # 2013 -0603-04E

Dear Ms. Ryan:

We appreciate the opportunity to comment on the Essential Health Benefits Emergency Regulations Package that the California Department of Insurance (CDI) submitted to the Office of Administrative Law on June 3, 2013. We write to request that you modify this regulations package because, as written, it would not permit CDI to certify plans that do not offer the pediatric dental essential health benefit. These regulations would force Covered California to violate federal law and expose CDI and Covered California to a significant litigation risk. Moreover, they would require Covered California to re-procure and renegotiate all of its health plan contracts at a crucial step of implementation.

Section 2594.1(a) of the proposed emergency regulations stipulates that the entire article applies to all individual or small group health insurance policies “regardless of whether the health insurance policy is sold on the Exchange or outside of the

Exchange.” Under Section 2594.2 of the proposed emergency regulations, individual and small group health insurance policies regulated by CDI must provide coverage for the essential health benefits, as defined in Insurance Code section 10112.27 and proposed regulations section 2594.3. Both Insurance Code section 10112.27 and proposed regulations section 2594.3 include pediatric oral care. Ins. Code § 10112.7(a)(1), (5); Proposed 10 Cal. Code Regs. § 2594.3(a)(6)(A). As a result, these emergency regulations would require all CDI-licensed plans to include pediatric dental services as a condition of licensure.

Federal law requires Covered California to permit a Qualified Health Plan (QHP) that does not cover pediatric dental benefits to participate in its Exchange, provided that the Exchange certifies a standalone dental plan that covers the pediatric dental essential health benefit. If these proposed emergency regulations become effective, Covered California will be out of compliance with federal law because a CDI-licensed QHP may not omit the pediatric dental essential health benefit.

Under Affordable Care Act Section 1302(b)(4)(F) (42 U.S.C. § 18022(b)(4)(F)), if a stand-alone dental plan offering the pediatric dental essential health benefit is offered through an Exchange, the Exchange must not fail to treat another health plan offered through that Exchange as a qualified health plan solely because it does not cover the pediatric dental essential health benefit. Section 1311 (42 U.S.C. § 18031(d)(2)(B)(ii)) also requires each Exchange to allow an issuer of a stand-alone dental plan to offer that plan through the Exchange as long as it covers the pediatric dental essential health benefit. The statutes are clear on their face that the Exchange must permit issuers to offer a standalone dental plan separate from a QHP and that, if such a plan is offered, a QHP must be permitted to omit the pediatric dental essential health benefit.

The federal regulations expand upon and bolster this interpretation of the statutory framework. In 45 C.F.R. section 155.1065, the rules restate the statutory requirement that, if a dental plan offering at least the pediatric dental essential health benefit is offered through the Exchange, then the Exchange may not fail to treat another health plan as a QHP if it does not offer the pediatric dental essential health benefit. This section also requires the Exchange to allow the stand-alone dental plan to be offered either separately or in conjunction with a QHP. The preamble interpreting this provision clarifies that “the Exchange must allow stand-alone dental plans to be offered either independently from a QHP or as a subcontractor of a QHP issuer, but cannot limit

participation of stand-alone dental products in the Exchange to only one of these options.” 77 Fed. Reg. 18411 (Mar. 27, 2012).

Our federal colleagues have confirmed that Covered California must permit offering QHPs without pediatric dental in multiple conversations. They were reluctant to provide written guidance on this point because they believed the text of the statute and regulations are so clear.

Additionally, reconciling the state essential health benefit rules with federal law is in keeping with the spirit and letter of those rules. In Section 1 of SB 951, which enacted Insurance Code 10112.27, the Legislature wrote that “it is the intent of the Legislature to comply with federal law and consistently implement the essential health benefits provisions of PPACA and related federal guidance and regulations, by adopting the uniform minimum essential benefits requirement in state-regulated health care coverage.”

Moreover, Insurance Code section 10112.27(j) explicitly says that “nothing in this section shall be implemented in a manner that conflicts with a requirement of PPACA.” As noted, requiring a QHP sold through the Exchange to cover the pediatric dental essential health benefit would conflict with requirements in the PPACA. And subsection (k) of the same section clarifies that the section “shall be implemented only to the extent essential health benefits are required pursuant to PPACA.” As a result, Insurance Code section 10112.27(j) and (k) themselves compel a different result than the one reached in the proposed emergency regulations package.

Finally, the emergency regulations package would cause a delay of Covered California’s health plan solicitation process, possibly by several months. All of the QHPs selected by Covered California exclude the pediatric dental essential health benefit. Consequently, enacting the proposed emergency regulations would delay Covered California’s initial open enrollment period and the very rollout of health care reform in California.

We believe that this problem could be avoided simply by amending the regulations so that they do not explicitly apply to health insurance policies sold in Covered California.

Thank you for paying attention to our comments. We hope that you will consider the conflict with federal law and the serious negative impact to our schedule when deciding how to implement Insurance Code section 10112.27.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter Lee".

Peter Lee
Executive Director

cc: Insurance Commissioner Dave Jones
Deputy Commissioner Janice Rocco