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MISSISSIPPI INSURANCE DEPARTMENT BULLETIN 2017-2

TO: ALL INSURANCE CARRIERS WRITING HOSPITAL INDEMNITY OR OTHER FIXED INDEMNITY COVERAGE IN THE INDIVIDUAL MARKET

**FROM: MIKE CHANEY
COMMISSIONER OF INSURANCE**

DATE: March 31, 2017

SUBJECT: ENFORCEMENT ACTIVITIES RELATED TO THE ATTESTATION REQUIREMENT PREVIOUSLY IMPOSED ON HOSPITAL INDEMNITY OR OTHER FIXED INDEMNITY INSURERS

I. Purpose

The purpose of this bulletin is to update all insurance carriers writing hospital indemnity or other fixed indemnity coverage in Mississippi's individual market ("indemnity carriers") of the Mississippi Insurance Department's ("MID") enforcement activities relating to the attestation requirement previously imposed by the Center for Medicare and Medicaid Services ("CMS") and later declared invalid and unenforceable in *Central United Life, Inc. v. Burwell* ("Central United").

II. Background

On August 14, 2014, MID issued Bulletin 2014-8 to notify all indemnity carriers of new criteria being imposed by CMS's *Final Rule on the Exchange and Insurance Market Standards for 2015 and Beyond*. Specifically, Bulletin 2014-8 addressed a new "attestation requirement" found in 45 C.F.R. § 148.220 (the "Regulation"), which restricted the sale of indemnity coverage to "individuals who attest, in their fixed indemnity insurance application, that they have other

health coverage that is minimum essential coverage within the meaning of section 5000A(f) of the Internal Revenue Code.”¹ This effectively required indemnity carriers to include attestations in their indemnity insurance applications. Bulletin 2014-8 also addressed the Regulation’s “notice requirement” which required the following language to be displayed in indemnity insurance application materials:

THIS IS A SUPPLEMENT TO HEALTH INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL COVERAGE. LACK OF MAJOR MEDICAL COVERAGE (OR OTHER MINIMUM ESSENTIAL COVERAGE) MAY RESULT IN AN ADDITIONAL PAYMENT WITH YOUR TAXES.²

On September 11, 2015, the United States District Court for the District of Columbia (“District Court”) permanently enjoined CMS from enforcing the attestation requirement by issuing the following language in its *Central United* Court Order:

[D]efendants are enjoined from enforcing the restrictions on the sales and marketing of fixed indemnity insurance plans set forth at 45 C.F.R. § 148.220 insofar as those restrictions prohibit or penalize the sale of such plans to anyone other than persons who attest that they have other health coverage that is “minimum essential coverage” within the meaning of § 5000A(f) of the Internal Revenue Code.³

On July 1, 2016, the United States Court of Appeals for the District of Columbia Circuit (“Appellate Court”) affirmed the District Court’s permanent injunction. However, the Appellate Court clarified that its affirmation did not affect the notice requirement.⁴ Based on the Appellate Court’s decision, the District Court released its final order on October 14, 2016, and officially declared the attestation requirement “invalid and unenforceable.”⁵

III. Enforcement

Because Bulletin 2014-8 was based on Federal regulation (i.e. 45 CFR § 148.220) and not State law (i.e. Mississippi has no attestation requirement in State law), MID has been unable to enforce the attestation requirement since the date of the District Court’s injunction. MID’s non-enforcement will continue now that the Appellate Court has affirmed the District Court’s ruling and the District Court has released its final order. However, the notice requirement and other

¹ 45 C.F.R. § 148.220(b)(4)(i).

² 45 C.F.R. § 148.220(b)(4)(iv).

³ Order, *Central United Life, Inc. v. Burwell*, No. 1:14-cv-01954-RCL (D.C. Sept. 11, 2015).

⁴ *Central United Life, Inc. v. Burwell*, No. 15-5310, n. 1 at 7-8 (D.C. Cir. July 1, 2016); In footnote 1, the Appellate Court clarified its ruling with the following language: “HHS’s rule also requires fixed indemnity application materials to include a notice that prominently states: ‘This is a supplement to health insurance and is not a substitute for major medical coverage. Lack of major medical coverage (or other minimum essential coverage) may result in an additional payment with your taxes.’ 45 C.F.R. § 148.220(b)(4)(iv). No one has challenged this part of the rule, and we express no opinion as to its validity.”

⁵ Order, *Central United Life, Inc. v. Burwell*, No. 1:14-cv-01954-RCL (D.C. Oct. 14, 2016).

criteria detailed in Bulletin 2014-8 will remain unaffected by the District and Appellate Court decisions.

Indemnity carriers may amend previous filings to reflect the changes discussed in this Bulletin or it may incorporate such changes in its future filings. However, no amendments or changes are required by MID. Please direct any questions to the Life and Health Actuarial Division at 601-359-2012.

Issued the 31st day of March, 2017.



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COMMISSIONER OF INSURANCE