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May 24, 2018

Scott A. White  
Commissioner of Insurance  
Bureau of Insurance  
State Corporation Commission  
P.O. Box 1157  
Richmond, VA 23218-1157

Dear Commissioner White:

Our commercial members are very concerned about the apparent conflict with federal law caused by Senate Bill 672, a bill passed during the 2018 General Assembly session that broadens the definition of small group to include sole proprietors.

We understand you and your staff have had informal conversation with the staff at the Centers for Medicare and Medicaid (CMS) about this potential conflict. It is our understanding that CMS believes there is a conflict, however they believe that the Bureau of Insurance is the primary regulator at the state level. This type of guidance falls far short of answering the question of the legality of allowing sole proprietors to file in the small group market under federal law.

The implementation date for this policy change is rapidly approaching and we would ask that the Bureau request a formal guidance and ruling from the relevant federal regulatory authorities such as CMS, the Internal Revenue Service (IRS) and the Department of Labor in writing. Without such assurance from the federal government, our plans would be put in a precarious position of skirting federal law with allowing sole proprietors to purchase a small group product and ignoring state law under your jurisdiction if we deny these sole proprietors.

Under the ACA, a sole proprietor with no eligible employees does not fall within the definition of 'small employer,' and is treated as an individual. The federal rules also require plans to include all individual market members in the same risk pool for rating purposes and for purposes of determining the medical loss ratio. If carriers are required to sell small employer policies to sole proprietors, we are concerned that CMS could still consider them to be individuals for purposes of the rating, MLR, risk adjustment and other market rules dictated by federal law. It would not be possible, however, for a carrier to comply with these federal rules while complying with the Virginia statute.

If carriers were to comply with the Virginia law, it would be necessary for CMS to agree that the sole proprietors could be treated as small employers for all purposes, including the federal rating, risk adjustment, claims reporting, and MLR rules.

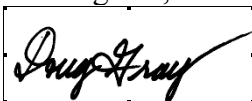
We would also request that the Bureau of Insurance issue a compliance bulletin or administrative letter on what is expected of the plans to comply with SB 672 given the inherent conflict with federal law. We understand the Bureau has stated they expect plans to comply with the rule as written, however, the timing of implementation and nature of the rule change gives our companies little assurance that we will be held accountable for disregarding this section of the Affordable Care Act both now and in the future. This type of compliance document will go a long way in guiding our members to properly enroll these individuals in the proper product.

As you know, there is not a limited enrollment period for the small group market. Our plans also assume that there are many individuals that currently are enrolled in an individual plan for the 2018 plan year that would be eligible to sign up for a small group policy. This change would undermine the rate assumptions made by the plans during the rate filing process in 2017. The movement of members prompts a series of questions from our member plans that we would hope a bulletin or administrative letter would address:

1. Would the Bureau consider limiting these signups to January 1, 2019 so as to allow those enrolled in an individual plan to finish their coverage year?
2. Would the Bureau consider limiting the small group signups for these sole proprietors to once a year, ala an enrollment period similar to the individual market?
3. Does the Bureau envision a change in Medical Loss Ratio (MLR) calculations to account for the sole proprietors added to the small group risk pool?
4. How does the Bureau plan on calculating risk adjustment under the new rule?
5. Does this bill violate guaranteed availability statutes at either the state or federal level?
6. Would plans be allowed to request a sole proprietors' W-2 for the purposes of employment verification?
7. If the Bureau of Insurance directs plans to allow immediate enrollment on July 1<sup>st</sup>, will plans be permitted to update their rates in both the individual and small group markets?

As stated above, the effective date for the bill is rapidly approaching and our member plans are beginning to field questions about plan offerings under the new rule. If allowed to go into effect, sole proprietors would begin enrollment and our plans would be put in a very untenable position. We would ask that the Bureau of Insurance issue a formal guidance in writing as soon as possible as the plans continue to develop their individual rates for the coming 2019 plan year and will need to begin enrolling these individuals in the small group market very soon.

Best regards,

A handwritten signature in black ink, appearing to read "Doug Gray", enclosed within a rectangular border.

Doug Gray  
Executive Director