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Office of the Legislative Counsel
925 L Street, Suite 700
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Re: Legal Opinion Pursuant to Insurance Code Section 12921.9¹ Regarding Limitations by Health Insurers on Small Employers' Payment of Employee Deductibles

Dear Ms. Goldkuhl:

You requested my legal opinion on the following question: Is it permissible under the Small Employer Health Insurance chapter of the Insurance Code, Ins. Code §§ 10700-10718.7, for a health insurer selling a high-deductible plan to a small employer to restrict or otherwise place conditions on the employer's payment of employees' deductibles?

I. Answer

Yes. However, any restrictions or conditions placed on the employer's payment of employees' deductibles must be a component of the benefit plan design. In addition, insurers must submit all of their benefit plan designs to the Commissioner for review and approval (Ins. Code § 10717), as well as offer to all small employers all the benefit plan designs the insurer offers to other

¹ Insurance Code Section 12921.9 provides:

- (a) A letter or legal opinion signed by the Commissioner or the Chief Counsel of the Department of Insurance that was prepared in response to an inquiry from an insured or other person or entity and that discusses either generally or in connection with a specific fact situation the application of the Insurance Code or regulations promulgated by the commissioner shall be made public. The department may redact the name, address, policy number, and other identifying information regarding a particular insured or other person or entity from the letter or legal opinion when it is made public.
- (b) A letter or legal opinion made public pursuant to this section shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation, as those terms are described in Sections 11340.5 and 11342.600 of the Government Code.

small employers in each geographic region where the insurer provides benefits (*id.* § 10705(a) & (c)). The insurer may price benefit plan designs differently (e.g., to reflect a determination by an insurer that a plan in which a small employer pays its employees' deductibles presents a higher actuarial risk than one in which the employer does not pay employees' deductibles). *Id.* § 10714(a) & (b); *id.* § 10700(v). Insurers must fully disclose to agents, brokers and small employers all of the benefit plan designs the insurer offers and the terms of those plans. *Id.* § 10705(d).

II. Analysis

The Small Employer Health Insurance chapter of the Insurance Code, Ins. Code §§ 10700-10718.7 ("the Act"), sets forth the terms and conditions under which health insurance plans are to be sold to small employers in California. The Act specifically provides for the sale of "benefit plan designs" to small employers. A "benefit plan design" is defined as:

[A] specific health coverage product issued by a carrier to small employers, to trustees of associations that include small employers, or to individuals if the coverage is offered through employment or sponsored by an employer. It includes services covered and levels of copayment and deductibles, and it may include the professional providers who are to provide those services and the sites where those services are to be provided. *A benefit plan design may also be an integrated system for the financing and delivery of quality health care services which has significant incentives for the covered individuals to use the system.*

Ins. Code § 10700(b) (emphasis added).

The phrase "an integrated system for the financing and delivery of quality health care services which has significant incentives for the covered individuals to use the system" is sufficiently broad to encompass conditions an insurer may choose to place on a small employer's payment of its employees' deductibles. Specifically, conditions related to funding deductibles may be part of "an integrated system for the financing and delivery of quality health care services." Along with premiums and other factors, deductibles relate both to "financing" and "delivery" of health care services.²

Thus, insurers with actuarial concerns about small employers paying employees' deductibles have a mechanism to address those concerns: Specifying conditions on paying deductibles in the insurer's benefit plan designs. While such concerns usually would not be implicated by health insurance plans with low deductibles, the use of high-deductible plans in combination with a

² The "integrated system" referred to in the definition of "benefit plan design" must also have "significant incentives for the covered individuals to use the system." However, that clause applies to the integrated system as a whole. Thus, a condition related to an employer's payment of deductibles need not itself create a "significant incentive for the covered individuals to use the system" so long as other elements of the system do.

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Health Savings Account or a Health Reimbursement Account may sometimes raise issues related to actuarial assumptions made by the insurer in pricing its policy.

To address those concerns, an insurer could, for example, offer one benefit plan design that precludes employers from paying employees' deductibles (and offer such a policy at a specific price) and another plan that allows employers to pay for employees' deductibles (and offer that policy at a higher price to account for an expected higher level of benefit usage). The Act permits the insurer to price each benefit plan design differently. *See* Ins. Code § 10714(a) & (b) (describing premium setting for benefit plan designs sold to small employers; premium is based, in part, on "risk categories"); *id.* § 10700(v) (a risk category includes "the benefit plan design selected by the small employer").

The Act provides that "[e]ach carrier, except a self-funded employer, shall fairly and affirmatively offer, market, and sell all of the carrier's benefit plan designs that are sold to, offered through, or sponsored, by small employers or associations that include small employers to all small employers in each geographic region in which the carrier makes coverage available or provides benefits." Ins. Code § 10705(a); *see also id.* § 10705(c) ("[e]ach carrier shall make available to each small employer all benefit plan designs that the carrier offers or sells to small employers or to associations that include small employers"). As required by those provisions, an insurer must offer, market and sell all its benefit plan designs, including those with conditions related to small employers' payment of employees' deductibles, to all small employers if the insurer offers, markets or sells the plan to any small employer in the applicable geographic region.

Finally, an insurer placing conditions in its benefit plan designs on small employers' payment of employee deductibles would need to comply with all other provisions of the Act. For example, an insurer must submit each of its benefit plan designs to the Commissioner for review and approval. Ins. Code § 10717. Insurers also must fully disclose to agents, brokers and small employers all of the benefit plan designs the insurer offers and the terms of those plans. *Id.* § 10705(d). In addition, insurers may not reject applications from small employers for benefit plan designs except as authorized in the Act. *Id.* § 10705(g).

Very truly yours,

/s/

Adam M. Cole
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