



**STATE OF ARIZONA**  
**DEPARTMENT OF INSURANCE**

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Circular Letter 1998-10

**TO:** Health Insurance Industry Representatives, Insurance Trade Associations, Life & Disability Insurers, and other Interested Parties

**FROM:** Charles R. Cohen  
Acting Director of Insurance

**DATE:** September 21, 1998

**RE:** HIPAA Enforcement Issues

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Legislation enacted in 1997 by the Arizona State Legislature, together with legislation enacted by the United States Congress in 1996, aim to ensure the availability of health insurance coverage in both the group and individual markets. See Laws 1997, Ch. 251 (SB 1321) and the Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191; 101 stat. 1936) (HIPAA).

HIPAA guarantees certain consumers the opportunity to purchase health insurance coverage from an indemnity insurer or a health care services organization (collectively "health insurers"). Health insurers who sell health insurance coverage in the small group market must accept every small employer that applies for coverage, including those whose eligible employees have serious medical problems. This same guaranteed issue protection applies to health insurers who sell health insurance coverage in the individual market to HIPAA-eligible individuals. A HIPAA-eligible individual is one who has maintained at least 18 months of health insurance coverage, was most recently covered under a group health plan and has not been without coverage for more than 63 consecutive days.

Regulation of the business of insurance in Arizona is the power and duty of our state government. However, the federal government provided, when it enacted HIPAA, that if a state fails to substantially enforce the provisions of HIPAA, the federal government may enforce HIPAA in that state.

The manner in which health insurers market their products largely determines whether coverage is truly being made available to the public. Traditionally, insurers rely upon producer networks compensated by commissions and other forms of contingent compensation to market their products. The Department has learned that some health insurers in Arizona have reduced or eliminated the payment of commissions to producers for policies sold to high-risk small groups and to individuals eligible for HIPAA-related coverage. The elimination or reduction in commissions for these coverages has been accomplished in several ways. Some health insurers have tied the commission decrease to the number of employee lives in the group. Others have tied the elimination or reduction of commissions to the percentage increase in premium over the standard premium. Still others have eliminated commissions to agents for products offered or sold to high-risk small groups and to individuals eligible for any HIPAA-related coverage.

Earlier this year, at the urging of the President of the United States, the Department of Health and Human Services, through the Health Care Financing Administration, issued a program memorandum that states, in part:

We have become aware that some issuers are attempting to discourage the offering of policies to HIPAA eligible individuals in the individual market, or to small groups containing high risk individuals, by withholding commissions from agents for sales to such individuals or small groups. Agents have sent us copies of notices from a number of issuers stating they will not pay or will reduce commissions and bonuses for sales to high risk groups and/or HIPAA eligible individuals. If an issuer pays agents less through all forms of agent compensation (commissions, bonuses, or other awards) for high risk individuals and groups than it pays for those with better risk profiles, this act constitutes a circumvention of the insurance reform provisions of HIPAA.

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The guaranteed issue provisions of the statute generally require that issuers' normal conduits for receiving applications and offering coverage be open to HIPAA-eligible individuals or small employers. Issuers commonly use agents as an important part of their marketing and distribution system, and ordinarily compensate these agents by paying commissions on the coverage they sell. Commission payment is included among the costs used to calculate the premium rate for a given form of coverage. For an issuer to modify the normal operation of its marketing and distribution system so as not to attract its fair share of the high risk individuals and small groups protected by

HIPAA does not accord with the intent of the statute to protect these individuals and groups. . . .

The Department concurs with HCFA's reasoning.

The legislation presumed that health insurers would continue to genuinely utilize their producer networks to sell health insurance coverage to HIPAA protected individuals and groups just as they do to sell other coverages in the market. If producers receive reduced or no compensation for their production efforts related to the sale of health insurance coverage to HIPAA eligible individuals or small groups, producers will have reduced incentive to serve these populations. The consequence will be to deprive consumers of access to the health insurance coverage that the Legislature and the Congress intended to be made available on a guaranteed issuance basis to individuals and small groups. In short, a health insurer that reduces or eliminates compensation to its producer force for the sale of these guaranteed issue products to discourage marketing to HIPAA-eligible individuals and small groups effectively fails to provide "guaranteed availability" consistent with the requirements of both state and federal law.

We are also concerned that the reduction or elimination of compensation for guaranteed availability products by one health insurer has the effect of unfairly shifting the burden of guaranteed availability to competing health insurers who honor the spirit and intent of the law.

The Department urges health insurers to adhere to the spirit and intent of HIPAA and SB 1321. Failure to compensate producers of guaranteed availability products consistently with producers of similar lines of insurance violates, at least, the spirit of these laws. Moreover, this conduct may constitute unfair competition, unfair discrimination or other violations of the insurance code. The Department will carefully evaluate, on a case-by-case basis, the appropriateness of enforcement action against any health insurer that fails to act in compliance with the law and the purpose that this law was intended to achieve.

Should you have questions relative to this circular letter, please direct them to Mary Butterfield (602) 912-8460.