STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: Blue Cross Blue Shield of Vermont Association Health Plan Filing	)))	GMCB-004-19rr

MOTION FOR SUMMARY RATE REJECTION WITHOUT PREJEDUDICE

The Office of the Health Care Advocate (HCA) moves the Green Mountain Care Board (Board) to summarily reject, without prejudice, the Blue Cross and Blue Shield of Vermont (BCBSVT) Association Health Plan Health Insurance Filing (Filing), GMCB-004-19rr, on the basis that it is for an illegal product.[1] The Filing must be rejected prior to the end of the full review process as, although the product covered by the Filing was legally permissible at the time it was filed, a recent federal court ruling causes the Filing to be for a product that does not comply with federal and state law. At this time, consideration of the Filing would both unnecessarily burden the Board with reviewing an illegal product and require the parties to argue the details of and the Board to make a decision on a product where material facts such as the required rating approach and expected population are highly uncertain.

Argument

Vermont law explicitly requires health insurers that issue, sell, renew, or offer health insurance coverage in Vermont to comply with the Patient Protection and Affordable Care Act (ACA).[2] In June of 2018, the U.S. Department of Labor (DOL) issued a rule that, among other things, relaxed the definition of "bona fide" associations and working owners under the Employee Retirement Income Security Act of 1974 (ERISA).[3]

[1] See, 8 V.S.A. §4062(a)(3) (requiring the Board to consider whether a rate is contrary to the laws of Vermont); 18 V.S.A. §9375(b)(6) (requiring the Board to set health insurance rates considering requirements in the underlying statutes); GMCB Rule 2.500(a) (authorizing the Board to adopt procedures to prevent unnecessary hardship, delay, or injustice or for other good cause).
[2] 8 V.S.A. §4062c.
[3] Definition of "Employer" Under Section 3(5) of ERISA Association Health Plans, 24 C.F.R § 2510 (2018).

This change attempted to allow working owners and a greater number of small groups to obtain health insurance under ERISA, insurance that is not subject to rating and other requirements mandated by the ACA and Vermont law.[4] Functionally, the DOL rule provided an avenue for working owners a much wider range of small groups to purchase health insurance plans that are rated outside of Vermont's combined individual and small group risk pool (Combined Pool). The Filing is for a product to be supplied to these working owners and small groups.

On March 28, 2019, a federal district court (Court) held that the DOL rule's provisions related to "bona fide" associations and working owners were unlawful and vacated them.[5] As a result of the Court's decision, association health plans (AHPs) that were formed under the new rule no longer qualify as ERISA plans and must comply with ACA requirements for individuals and small groups. The Court's decision has immediate nationwide effect.[6] In response these facts, the Department of Financial Regulation (DFR) recently released a bulletin prohibiting AHPs from marketing or enrolling new employer groups.[7]

Here, the Filing covers AHPs, composed of working owners and small groups, which presumably no longer qualify as permissible associations under ERISA. The Filing also proposes a rating methodology for these AHPs, composed of working owners and small groups, separate from the Combined Pool rating methodology. Such a separate rating methodology is no longer in compliance with the law given the Court's decision. We recognize that the decision could be appealed or stayed, but until that time, this Filing is for a health insurance product that is not permissible under the law.

A rejection of the Filing does not place an undue burden on BCBSVT. If the Court's decision is successfully appealed or stayed, BCBSVT could simply resubmit the current filing. If the filing should

[4] Id; New York v. United States Department of Labor, 18-1747 (JDB), 2019 WL 1410370 (D. D.C. 2019) at 2.
[5] 2019 WL 1410370.
[6] See, e.g., Harmon v. Thornburgh, 878 F.2D 484, n. 21 (D.C. Cir. 1989).
[7] Insurance Bulletin #204: Impact of Federal District Court Ruling in State of New York v, United States Department of Labor on Vermont Association Health Plans (April 23, 2019). https://dfr.vermont.gov/reg-bul-ord/impact-federal-district-court-ruling-state-new-york-v-united-states-department-labor.

become permissible under law and if it is resubmitted, any Objections and Objection Responses from the Filing that apply to the new filing could be incorporated into the record by motion.[8]

In sum, it is not in the Green Mountain Care Board's interest to spend additional time and resources reviewing a filing for a health insurance product that is not permissible under the law. Additionally, it is unclear how the Board can make an informed decision on a filing when there is so much uncertainty about the product covered by the Filing including the permissible ratings approach and the categories of current and potential members that will be allowed to purchase this product in 2020. Therefore we ask the Board to summarily reject the Filing without prejudice.

Dated at Montpelier, Vermont this 29th day of April, 2019.

s/ Kaili Kuiper
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[8] See, GMCB Rule 2.500(c).

CERTIFICATE OF SERVICE

I, Eric Schultheis, hereby certify that I have served the above MOTION FOR SUMMARY RATE REJECTION WITHOUT PREJUDICE on Amerin Aborjaily, Green Mountain Care Board Staff Attorney; Thomas Crompton, Green Mountain Care Board Health Systems Finance Associate Director; Christina McLaughlin, Green Mountain Care Board Health Policy Analyst; Michael Barber, Green Mountain Care Board General Counsel; and Rebecca Heintz, representative of BCBSVT in the above-captioned matter, by electronic mail, return receipt requested, this 29th day of April, 2019.

s/ *Eric Schultheis*_____
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