STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

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

MEMORANDUM IN LIEU OF HEARING

The Office of the Health Care Advocate (HCA) asks the Green Mountain Care Board (Board) to reject the Blue Cross and Blue Shield of Vermont (BCBSVT) Association Health Plan Health Insurance Filing (Filing), GMCB-004-19rr, because it is for an illegal product.

I. STATUTORY BACKGROUND

BCBSVT bears the burden of demonstrating that its proposed rate meets the multi-faceted test governing the lawfulness of a rate increase in Vermont: whether it is not unjust, unfair, inequitable, misleading, or *contrary to law;* whether the requested rate is affordable; whether it promotes quality care; whether it promotes access to health care; whether it protects insurer solvency; and whether it is not excessive, inadequate, or unfairly discriminatory.[1]

Absent such a demonstration, the Board may, in its discretion, modify the proposed rate or any element of the rate.[2] When "deciding whether to approve, modify, or disapprove each rate request, the Board must make a determination on each of the statutory criteria" including whether the filing is contrary to law.[3]

[1] GMCB Rule 2.104(c); GMCB Rule 2.301(b); GMCB Rule 2.401; see also, 8 V.S.A. §4062(a)(3); In re MVP Health Insurance Company, 203 Vt. 274 (2016).
[2] E.g., GMCB-009-18rr, Decision at 17 (reducing a proposed rate in recognition that "health care costs remain unaffordable for too many Vermonters, impeding their access to care"); GMCB-016-14rr, Decision at 4 (disapproving an insurer's proposed administrative costs and contribution to reserve based on the insurer failing to meet "its burden for the requested increase…").
[3] 8 V.S.A §4062(a)(3).

II. ASSOCIATION HEALTH PLANS AND THE U.S. DEPARTMENT OF LABOR RULE

In June of 2018, the U.S. Department of Labor (DOL) issued a rule that, among other things, altered the definition of "bona fide" associations and "employers" under the Employee Retirement Income Security Act of 1974 (ERISA).[4] The DOL, through agency rule, attempted to allow sole proprietors (as working owners) and a large number of small groups to obtain health insurance that is not subject to rating and other requirements mandated by the Affordable Care Act (ACA) and Vermont law.[5] Functionally, the DOL rule provided an avenue for individuals and loosely related small groups to be treated as one large employer and 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 sole proprietors 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 sole proprietors were unlawful and vacated them.[6] Calling the DOL's rule "absurd," the Court found that the rule's interpretation of ERISA exceeds the DOL's authority, and "relies on a tortured reading of the ACA's statutory text that undermines the market structure that Congress so carefully crafted."[7] The Court further noted that the DOL rule was "intended and designed to end run the requirements of the ACA."[8]

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.[9] In response to these facts, the Vermont Department of Financial Regulation (DFR) and the DOL recently released a bulletin and guidance

[4] Definition of "Employer" Under Section 3(5) of ERISA Association Health Plans, 24 C.F.R § 2510 (2018).
[5] Id; N.Y. v. United States Dep't of Lab., 363 F.Supp.3d. 109, 120 (D. D.C. 2019).
[6] 363 F.Supp.3d. at 141.
[7] Id. at 137, 141.
[8] Id. at 141.
[9] See, e.g., Harmon v. Thornburgh, 878 F.2d 484, n.21 (D.C. Cir. 1989).

prohibiting AHPs formed under the DOL rule from marketing or enrolling new employer groups.[10] The DOL also issued a statement clarifying that plans for existing AHP members who wish to renew must comply with "the relevant market requirements for that employer's size" including rating requirements.[11]

On April 29, 2019, the HCA moved the Board to reject the Filing without prejudice as the Filing is for an illegal product in light of the binding Court decision. On May 2, 2019, the Board denied the motion but declined to rule on the motion's merits. In its May 2, 2019, order, the Board acknowledged that it must "always consider compliance with the law (i.e., a rate's "legality")" when ruling on a filing and encouraged the parties to present arguments regarding the legality of the Filing in their memoranda in lieu of hearing.[12]

III. ARGUMENT

Vermont law explicitly directs the Board to consider whether a rate filing is legal.[13] Vermont law also 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).[14]

Here, the Filing is for an illegal product because it covers AHPs created under the now-vacated DOL rule, and the groups covered by the filing are not rated according to their employer size.[15] In essence, the

[10]Vt. Dep't of Fin. Reg., Ins. Bull. #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; U.S. Dep't of Lab., Federal District Court Ruling in *State of New York v. United States Department of Labor* Concerning Department of Labor's Final Rule on Association Health Plans: Question and Answers – Part Two (May 13, 2019), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ahp-q-and-a-court-ruling-part-2.pdf.
[11]U.S. Dep't of Lab., Statement Relating to the U.S. District Court Ruling in *State of New York v. United States Department of Labor* (April 29, 2019), https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB85/ahp-statement-court-ruling/.
[12] GMCB-004-19rr, Order Denying Mot. For Summ. Rate Rejection Without Prejudice at 2.
[13] 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).
[14] 8 V.S.A. §4062c.
[15] BCBSVT alluded to the group's precarious legal position related to state law in the Filing. GMCB-004-19rr, SERFF at 2. We note, however, that regardless of *state* law that *federal* law makes AHPs formed under the vacated DOL rule illegal.

filing treats these groups as large groups for rating purposes, but it is no longer legally permitted to do so. Regardless of the current appeal, this Filing is for a health insurance product that is currently not lawful. [16]

Further, the Court vacating the DOL AHP rule is good for Vermonters, because the expansion of AHPs is bad policy. As demonstrated in BCBSVT's and MVP's recent individual and small group filings, AHPs allow healthier, lower-cost members to leave the Combined Pool at the expense of increasing rates for the individuals and small groups remaining in the Combined Pool.[17] BCBSVT further tipped the scales in favor of lower costs for AHPs by choosing not to offer platinum level AHP plans. This allowed them to keep the most expensive small groups in the Combined Pool.[18] This cost shifting is unfair, unjust, and inequitable and undermines Vermont's efforts to bend the cost curve and fairly distribute the cost of health insurance among Vermonters.[19]

[16] The D.C. Circuit court issued a scheduling order for the appeal of the Court's decision. That order listed the following briefing deadlines: Appellant's Brief: 5.31.2019; Brief of Amicus in Support of Appellant, if any: 6.7.2019; Appellee's Brief: 7.15.2019; Brief of Amicus in Support of Appellees, if any: 7.22.2019; Appellant's Reply Brief: 7.25.2019; Differed Appendix: 8.1.2019; Final Briefs: 8.8.2019. The order provides no indication when the appellate court intends to issue a final order in the matter. U.S. Ct. of Appeals – D.C. Cir., U.S. Dep't. of Lab. v. N.Y., Case Numb. 19-5121, 5.10.2019 Order, accessed via PACER.
[17] See GMCB-009-18rr, 7.18.2018 Amend. at 7-10; GMCB-006-19rr, SERFF at 16-17, Ex. 5.
[18] GMCB-006-19rr, SERFF at 16-17.
[19] We also note that because contributions to reserve (CTR) are charged as a percentage of premium, the Filing increases CTR costs for the individual and small group market while lowering the per member per month (PMPM) CTR for those who purchase an AHP. If the Filing was for a legal product, which it is not, we would ask the Board to increase CTR to the maximum allowed under the MLR limits for the Filing, and reduce the CTR for the individual and small groups accordingly. This balancing of CTR would reduce the price differential between the two groups, increasing equity and fairness and dis-incentivizing exodus from the individual and small group market to the AHP market.

Conclusion

In sum, the Green Mountain Care Board should not, and cannot, approve a filing for an illegal product. Therefore, we ask the Board to reject the Filing.

Dated at Montpelier, Vermont this 20th day of May, 2019.

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CERTIFICATE OF SERVICE

I, Eric Schultheis, hereby certify that I have served the above Memorandum in Lieu of Hearing 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; Rebecca Heintz, BCBSVT General Counsel; and Michael Durkin, BCBSVT Assistant General Counsel, by electronic mail, return receipt requested, this 20th day of May, 2019.

s/ *Eric Schultheis*

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