

MHBE'S APPROACH TO IMPLEMENTING FEDERAL REQUIREMENTS THROUGH STATE REGULATIONS

Background and Summary

In commenting on drafts of MHBE's proposed regulations, several stakeholders have stated that where the proposed regulations are implementing federal regulations, MHBE should simply incorporate by cross reference the applicable federal regulations rather than replicate the federal requirements in the state regulations. MHBE considered this approach, which would have been easier, at the outset. For the reasons set forth more fully below, however, we believe that MHBE cannot take this approach. In brief:

- 1) Federal regulations apply to the Exchange, not carriers and consumers:** For the most part, the federal regulations do not apply to consumers and carriers directly. Rather, they regulate the Exchange, which in turn is required to regulate its consumers and carriers;
- 2) Federal regulations often require more specificity and choices among options:** The federal regulations in many instances require or permit states to choose among different options or to supplement broad requirements with their own specific policies and procedures;
- 3) MHBE is subject to the APA:** Maryland's Administrative Procedure Act requires MHBE to promulgate regulations for any policies or requirements it adopts that affect directly the rights or procedures available to the public, including consumers and carriers;
- 4) Incorporating federal regulations by reference only would be very confusing:** Federal regulations are complex and often incorporate by reference additional layers of federal regulations. State regulations should be clear and easily understood by Marylanders, and must also conform to the Division of State Documents Style Manual. State regulations which simply incorporate multiple layers of complex federal regulations by reference would run afoul of these requirements; and
- 5) The federal government's analogous regulatory relationship with Medicaid has informed MHBE's approach:** The federal government's regulation of the Exchange is most closely analogous to its regulation of the Medicaid program. Both MHBE and Medicaid are federal/state partnerships through which the federal government regulates the state program, and the state program in turn regulates its beneficiaries and partners. This model stands in contrast to other state agencies, like MIA or DHR, where relevant federal regulations either administer programs through block grants or, instead of regulating the state agencies, instead impose requirements directly on entities the agencies also regulate (*e.g.* MIA and carriers).

DISCUSSION

Federal regulations apply to the Exchange, not consumers and carriers, and they require states to elect options and establish implementing procedures.

Parts 155 and 156 of Title 45 of the Code of Federal Regulations regulate the Exchange, and, in some places, issuers. Because the purpose of the federal regulations is to establish the relationship between HHS and the Exchanges (including the FFM), the federal regulations usually do not regulate consumers, carriers, or plans directly. Among other things, the regulations direct the Exchange to make decisions about the eligibility of individuals to enroll in coverage through the Exchange and about carrier and plan participation. Some of these federal regulations do not fully describe the required processes or give a choice of options and the Exchange is, therefore, charged with establishing the contemplated process through its own processes and procedures. For example, 45 CFR 155.420(b)(2)(i) allows the Exchange to choose between two effective dates for special enrollment periods for birth, adoptions and placement in foster care. Since the two options under this regulation are not broken into two provisions, a cross-references to this regulation alone would not provide sufficient specificity to third parties about MHBE's choice of the effective date for this special enrollment period. In addition, for other federal requirements, such as plan certification and processing of enrollment files, the Exchange is permitted to supplement the federal requirements. Therefore, mere incorporation by cross-reference of the federal regulations into state regulations does not instruct third parties who interact with MHBE about the policies and procedures of MHBE. For example, 45 CFR 155.400(f) states that the Exchange may provide instructions to issuers for processing of enrollment files.

Maryland's Administrative Procedure Act requires MHBE to adopt its own regulations.

MHBE is subject to the portions of the Maryland Administrative Procedures Act governing regulations. Md. Code, § 31-103(a)(3)(i). It, therefore, must promulgate a regulation if it adopts any policy that "affect[s] directly the rights of the public or the procedures available to the public." Md. Code Ann., State Gov't § 10-101. Since the federal regulations are largely directed at the Exchange, MHBE must promulgate state regulations that set forth the rights of the public, including carriers. And since the federal regulations often give a choice of procedures or do not fully specify procedures, MHBE must also promulgate regulations setting forth the procedures available to the public, including carriers.

MHBE's relationship to the federal government and approach to regulations is similar to that of Medicaid.

Further, MHBE has closely followed the Maryland medical assistance program's (Medicaid's) approach to implementing federal programs through state regulation. Similar to the Medicaid program, the Exchange must carry out a complex set of eligibility, enrollment and relationships with health care entities and applicants that build on federal requirements. Medicaid sets forth federal requirements, in addition to specific state elections where permitted, within COMAR in lieu of cross-references to the applicable federal regulation to ensure that the public is able to clearly identify the State requirement. For example, COMAR 10.09.24 captures requirements

about Medicaid eligibility covered under Part 435 of the Public Health Title. Because the federal regulations often cross-reference other federal laws and regulations, the confusion may be compounded for individuals who must string together requirements in multiple sources. Similar to Medicaid's historical approach to State regulations, MHBE believes that this approach works best for Exchange regulations as well. MHBE (and Medicaid) are different than other state agencies, such as MIA or the DHR programs of SNAP or TANF that are administered through block grants, that do not have the same regulatory relationship with federal requirements. A cross-reference, for example, would be appropriate if a federal regulation imposes a requirement on a carrier that the carrier must follow but the regulation does not regulate MIA.

Regulations track the language of the relevant federal regulations to the extent possible.

Finally, MHBE has undertaken a rigorous process to ensure that the draft regulations mirror the counterpart federal regulation where appropriate. Edits are necessary to the federal text for a variety of reasons, including: Edits must be made to the exact text of the regulation in order to address MHBE's audience – individuals, carriers and other third parties involved with the Exchange – instead of the Exchange itself. Further, edits must be made to reference applicable State law and set forth MHBE-specific policies and procedures. For example, 45 CFR §155.400(b)(2) requires the Exchange to establish a process for the carrier to establish receipt of an enrollment file and 45 CFR §155.420(c)(6) allows the Exchange to determine the length of certain types of special enrollment periods. Additionally, edits have been made to the federal text in instances where MHBE believes that combining federal regulations covered in different sections improves consumer readability of the information. For example, MHBE includes the application and eligibility process together in draft COMAR 14.35.07 while the federal regulations cover these sections in 45 CFR §§155.230, 155.305, 155.310, 155.330, 155.420 and other sections. MHBE has also tried to limit the need for a reader to rely on multiple resources by pulling in the text of cross-references used in a requirement within the draft regulation. Edits are also necessary to comply with the Division of State Documents style manual. Departures from the style manual will be rejected by the Division of State Documents and, in many instances, the manual precludes verbatim adoption of federal text.

Adoption of purpose regulation to clarify State regulations' relationship with federal rules

MHBE intends to also propose a purpose regulation that specifically states that MHBE intends these regulations to implement the federal regulations and should be read in *pari materia* to the extent possible with the corresponding federal regulations.

MHBE's intent in promulgating these regulations is to closely mirror federal requirements, and MHBE believes that interpretations contrary to federal regulation would be rejected by adjudicatory bodies under preemption doctrine theories. MHBE welcomes stakeholder feedback about any improvements MHBE can make in enhancing parity to federal regulations while accomplishing its readability goals and complying with the Division of State Documents style manual. MHBE will be sharing responses to any stakeholder comments already provided on this issue.