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Title: Insurance Standards Bulletin Series – INFORMATION

Subject: **Sunset of MHPAEA opt-out provision for self-funded, non-Federal governmental group health plans**

I. Purpose

The Consolidated Appropriations Act, 2023 (CAA, 2023),¹ enacted on December 29, 2022, includes a sunset provision for the self-funded, non-Federal governmental group health plan² election under section 2722(a)(2) of the Public Health Service Act (PHS Act) to opt out of compliance with the requirements of PHS Act section 2726, the Mental Health Parity and Addiction Equity Act (MHPAEA).³ This Bulletin describes the amendments made by the CAA, 2023 to the opt-out provision and explains when self-funded, non-Federal governmental group health plans that currently opt out of compliance with MHPAEA are required to come into compliance with these requirements.

II. When and How the CAA, 2023 Amendments Affect MHPAEA Opt-Out Elections

Sponsors of self-funded, non-Federal governmental group health plans are permitted to elect to exempt those plans from (“opt out of”) certain provisions of title XXVII of the PHS Act.^{4,5} Prior to the enactment of the CAA, 2023, self-funded, non-Federal governmental group health plans

¹ Pub. L. 117–328.

² The term “non-Federal governmental plan” is defined as “a governmental plan that is not a Federal governmental plan.” PHS Act section 2791(d)(8)(C). Examples of non-Federal governmental plans include plans that are sponsored by states, counties, school districts, and municipalities for state or local government employees.

³ Section 1321 of title I of Division FF of the CAA, 2023.

⁴ PHS Act section 2722(a)(2) and 45 C.F.R. § 146.180.

⁵ Section 2721(b)(2) of the PHS Act, as added by the Health Insurance Portability and Accountability Act (HIPAA), permitted sponsors of self-funded, non-Federal governmental plans to elect to opt out of 7 provisions of title XXVII of the PHS Act. The Patient Protection and Affordable Care Act, Pub. L. 111-148, made a number of changes, with the result that sponsors of self-funded, non-Federal governmental plans could only opt out of 4 title XXVII provisions. For more information on the opt-out election, *see* 79 FR 15807, 15814-15 (Mar. 21, 2014); https://www.cms.gov/CCIIO/Resources/Files/Downloads/opt_out_memo.pdf; and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/non_federal_governmental_plans_04072011.

could elect to opt out of compliance with the requirements under MHPAEA, among three other provisions of title XXVII of the PHS Act.⁶

Section 1321 of title I of Division FF of the CAA, 2023 amended section 2722(a)(2) of the PHS Act to eliminate the ability for self-funded, non-Federal governmental group health plans to opt out of compliance with the requirements of MHPAEA. Specifically, PHS Act section 2722(a)(2), as amended by the CAA, 2023, provides that no election to opt out of compliance with the requirements of MHPAEA may be made on or after December 29, 2022 (the date of enactment of the CAA, 2023) and that generally no such election with respect to MHPAEA expiring on or after June 27, 2023 (the date that is 180 days after the date of enactment of the CAA, 2023) may be renewed.⁷

PHS Act section 2722(a)(2), as amended by the CAA, 2023, includes a special rule for certain collectively bargained plans. Specifically, a self-funded, non-Federal governmental group health plan that is subject to multiple collective bargaining agreements (CBAs) of varying lengths and that has a MHPAEA opt-out election in effect on December 29, 2022, that expires on or after June 27, 2023, may extend such election until the date on which the term of the last CBA expires.⁸ The guidance that follows specifies the form and manner for submission of opt-out renewal election requests⁹ to operationalize this special rule for certain collectively bargained plans.

If the sponsor of a self-funded, non-Federal governmental group health plan subject to multiple CBAs wishes to extend an existing opt-out election for MHPAEA as permitted by the CAA, 2023, the plan sponsor must first send an email to the HIPAA opt-out email box (HIPAAOptOut@cms.hhs.gov) and provide documentation of the existing CBA(s) effective date, term of the CBA(s), and must show that the CBA(s) encompass the self-funded, non-Federal governmental group health plan for which the extension is being sought. Once CMS has reviewed the documents and concluded that the plan is eligible for an extension under the special rule, CMS will notify the plan sponsor. The plan sponsor must then submit a renewal opt-out for MHPAEA in HIOS to extend the plan's existing opt-out. This renewal must be filed with CMS in HIOS before the first day of the plan year governed by a CBA, or by the 45th day after the latest applicable date of the term of the CBA, as specified in 45 C.F.R. § 146.180(b)(2)(i) if the 45th day falls on or after the first day of the plan year. The end date of this renewal is the same as the end date of the last associated CBA. Review PHS Act section 2722(a)(2) and 45 C.F.R. § 146.180 to ensure that you are following all opt-out requirements, including listing all CBAs associated with the plan when submitting a renewal opt-out and providing proper notice to enrollees.

⁶ As a result of the CAA, 2023 amendments to PHS Act section 2722(a)(2), self-funded, non-Federal governmental group health plan sponsors may elect to opt-out of only the following three PHS Act provisions: Standards relating to benefits for newborns and mothers (PHS Act section 2725), Required coverage for reconstructive surgery following mastectomies (PHS Act section 2727), and Coverage for dependent students on a medically necessary leave of absence (PHS Act section 2728).

⁷ PHS Act section 2722(a)(2)(F)(i).

⁸ PHS Act section 2722(a)(2)(F)(ii).

⁹ PHS Act section 2722(a)(2)(A) and 45 C.F.R. § 146.180(b) and (f).

III. Enforcement

CMS has direct enforcement authority over non-Federal governmental group health plans (whether fully insured or self-funded) with respect to applicable provisions of title XXVII of the PHS Act, including MHPAEA, in all 50 states, the District of Columbia, and the U.S. territories.¹⁰ If a plan fails to comply with applicable PHS Act requirements, CMS may pursue enforcement action, including the potential imposition of civil money penalties pursuant to 45 C.F.R. § 150.301.¹¹

Where to get more information

If you have any questions regarding HIPAA opt-outs, please contact CMS via e-mail at HIPAAOptOut@cms.hhs.gov

If you have any questions regarding MHPAEA, please contact CMS via e-mail at MHPAEA@cms.hhs.gov

For more detailed technical information regarding these opt-out elections, please see the HIOS Non-Federal Governmental Plans User Manual, which can be accessed via: <https://www.cms.gov/CCIIO/Resources/FormsReports-and-Other-Resources/Downloads/HIOS-NonFed-UserManual.pdf>

¹⁰ PHS Act section 2723(b)(1)(B) and 45 C.F.R. § 150.101(b)(1).

¹¹ *Ibid.* See also PHS Act section 2723(b)(2).