STATE OF NEW MEXICO
OFFICE OF SUPERINTENDENT OF INSURANCE

SUPERINTENDENT OF INSURANCE
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DEPUTY SUPERINTENDENT
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BULLETIN 2021-016

August 4, 2021

TO: EVERY PHARMACY BENEFITS MANAGER ("PBM") OPERATING IN NEW MEXICO

RE: AMENDMENTS TO RULE 13.10.30 NMAC

On January 14, 2021, the Office of Superintendent of Insurance ("OSI") promulgated Rule 13.10.30 NMAC (the "PBM Rules"). Stakeholders subsequently identified implementation challenges presented by the PBM rules and brought those to the attention of the OSI. Based on stakeholder input, the OSI recognizes that amendments to the PBM rules will facilitate the regulatory objectives of those rules while minimizing administrative burdens and providing necessary clarity. This bulletin identifies the most material rule amendments contemplated by the OSI.

Part 15, Paragraph F of Rule 13.10.30 NMAC –

This part of the rule requires every PBM to allow the Superintendent of Insurance access to a searchable online database containing all maximum allowable cost ("MAC") pricing data accrued during the preceding five years. Because PBMs use a multitude of different data hosting platforms and user interfaces for these databases, implementing this requirement would require OSI to be granted secure access to, and learn operability of, each of the various interfaces. The resources required to ensure secure, meaningful, access by OSI to the different databases, and the risk of a data breach, far outweigh the utility of direct access to the OSI. The OSI intends to amend this rule to eliminate the direct access requirement and substitute an obligation for PBMs to provide historical MAC list data in response to specific OSI requests. To provide additional clarity, the amended rule will specify that January 14, 2021 is start date for the five-year data retention requirement.

Part 16, Paragraph B of Rule 13.10.30 NMAC –

This part of the rule confers confidential treatment of a PBM's annual report but allows the OSI to publish aggregated data from those reports. The rule recognizes that PBMs operate in a

highly competitive space, and that MAC price data is treated and recognized as a trade secret. Considering the contemplated changes to Rule 13.10.30.15(F), the superintendent may obtain PBM specific data that is not aggregable. To ensure the confidentiality of MAC price data contemplated by Rule 13.10.30.16(B), even if the data is not contained in an annual report, the OSI intends to amend the rule to specify that all non-aggregable MAC price data will be deemed confidential and OSI will only publish aggregated data that is more than 12 months old. The amended rule will create confidentiality exceptions if OSI uses data for regulatory purposes, such as market conduct examinations, enforcement or rulemaking, or if the data is used for any legislative purpose.

To further ensure confidential treatment and security of PBM trade secrets, the OSI will also require third parties who have access to confidential data to (1) disclose potential conflicts of interest, (2) maintain appropriate data safeguards and firewalls, and (3) sign non-disclosure and non-use agreements.

Part 16, Paragraph A of 13.10.30 NMAC –

This part of the rule requires a PBM to submit an annual report that complies with instructions posted on the OSI website. This requirement emerged from PBM objections to specific annual report requirements that would require disclosure of trade secrets. Because the contemplated amendments to Rules 13.10.30.16(B) and 13.10.30.16(A), will eliminate those concerns, the Superintendent intends to amend Rule 13.10.30.16(A) to include specific annual report requirements, including some or all of the previously proposed requirements.

Other Amendments

The foregoing list of contemplated amendments is not exhaustive. OSI staff will likely propose additional amendments to strengthen and clarify the PBM rules. As with any proposed rulemaking, all proposed rules will be subject to public review and comment as required by the State Rules Act. The OSI also intends to engage in continued collaborative discussions with all stakeholders, including health plans, PBMs, pharmacies and consumers, before publishing a notice of proposed rulemaking for any future amendments. The OSI will initiate rulemaking in December of 2021.

ISSUED this 4th day of August, 2021.

RUSSELL TOAL
Superintendent of Insurance