



May 31, 2023

Glen Youngkin
Governor
Office of the Governor
P.O. Box 1475
Richmond, VA 23218

Scott White
Insurance Commissioner
Virginia Bureau of Insurance
PO Box 1157
Richmond, VA 23218

Dear Governor Youngkin and Commissioner White,

This letter provides the preliminary determination of the Centers for Medicare & Medicaid Services (CMS) pursuant to 45 CFR 150.217¹ that the Commonwealth of Virginia has failed to substantially enforce² certain specified federal market reforms³ and that the failure is continuing.

CMS's preliminary determination is based on implementation and enforcement of a state law, § 38.2-3521.1G of the Code of Virginia, as enacted by HB 768/SB 335 (2022), which allows an association of real estate salespersons to purchase health insurance coverage in the large group market in Virginia (referred to in this letter as the state law). The state law conflicts with and in some cases prevents the application of the specified federal market reforms. CMS is making this preliminary determination after consulting with the Office of the Governor of the Commonwealth of Virginia and the Virginia Bureau of Insurance on April 7, 2023, and after corresponding with the Commonwealth.

As explained in CMS's letter of August 29, 2022, an association of real estate salespersons described in the state law cannot establish or maintain a group health plan as an "employer" under Employee Retirement Income Security Act (ERISA) (section 3(5) and Department of Labor regulations and guidance. Therefore, each association member must receive coverage that complies with the requirements arising out of the member's status as an individual, small

¹ In this letter, part 150 regulatory references are to sections in part 150 of title 45 of the Code of Federal Regulations (CFR).

² Section 2723(a)(2) of the Public Health Service Act (PHS Act) and section 1321(c)(2) of the Patient Protection and Affordable Care Act (Affordable Care Act). See also 45 CFR 150, subpart B. There are several ways in which a state could fail to substantially enforce federal requirements. For example, a state could fail to update its laws to align with new federal requirements, a state could fail to acceptably implement federal requirements, a state could advise that it does not have the authority to enforce federal requirements, or a state could fail to enforce federal requirements. 64 FR 45786 at 45787 (Aug. 20, 1999) and 78 FR 13406 at 13419 (Feb. 27, 2013).

³ The specified federal market reforms are the provisions of title XXVII of the PHS Act and title I of the Affordable Care Act, as well as their implementing regulations, as outlined in Appendix A of this letter.

employer, or large employer. By treating health insurance coverage sold to self-employed individuals and small employers through such an association as coverage offered in the large group market, the state law conflicts with and in some cases prevents the application of the specified federal market reforms that apply to coverage offered in the individual and small group markets.⁴

On September 27, 2022, in response to CMS's August 29, 2022 letter, the Bureau sent a letter to CMS, indicating that consistent with its charge under the Code of Virginia, the Bureau will administer and enforce the laws enacted by the Virginia General Assembly, including the state law at issue here.⁵ The enactment of the state law, together with the Bureau's September 27, 2022, response, therefore created a reasonable question as to whether the Commonwealth is substantially enforcing the specified federal market reforms.⁶

On February 9, 2023, CMS provided notice under § 150.211 to the Governor of the Commonwealth and the Commissioner of the Virginia Bureau of Insurance, explaining that CMS had begun the process described in §§ 150.209 through 150.219 of determining whether the Commonwealth is substantially enforcing the specified federal market reforms.⁷ In that letter, CMS identified the federal market reforms for which there is evidence of a potential failure to substantially enforce; described the factual basis of the alleged failure to enforce; and explained that the consequence of the Commonwealth's failure to substantially enforce is that CMS enforces those provisions. CMS asked the Commonwealth to respond to these concerns by March 11, 2023, and to provide any information it wished CMS to consider in making the preliminary determination under § 150.217 regarding whether the Commonwealth is failing to substantially enforce the specified federal market reforms with respect to coverage sold through an association of real estate salespersons described in the state law.

The Bureau responded on March 9, 2023.⁸ In its March 9, 2023 letter, the Bureau, responding only on its own behalf, reiterated that it is obligated to act consistent with its charge to execute all laws relating to insurance and insurance issuers in Virginia, and that as such, it will administer and enforce the laws enacted by the Virginia General Assembly, including the state law at issue here. The Bureau further stated that it was not aware of any carrier offering or providing coverage to real estate associations under the state law. No additional information or other evidence was provided to demonstrate substantial enforcement of the specified federal market reforms for coverage sold through an association of real estate salespersons described in the state law, and CMS received no response from the Governor.

In consideration of the Bureau's March 9, 2023 response and the lack of a response from the Governor, and following further consultation with the Office of the Governor and the Bureau on April 7, 2023, CMS is issuing this notice of a preliminary determination in

⁴ The August 29, 2022, letter from CMS is attached as Appendix B and is incorporated by reference. See also Centers for Medicare & Medicaid Services, Center for Consumer Information and Insurance Oversight, Questions and Answers Related to the Health Insurance Market Reforms (Apr. 26, 2013), Q7, available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/qa_hmr.

⁵ The September 27, 2022, letter from the Bureau is attached as Appendix C and is incorporated by reference.

⁶ § 150.211.

⁷ The February 9, 2023, letter from CMS is attached as Appendix D and is incorporated by reference.

⁸ The March 9, 2023, letter from the Bureau is attached as Appendix E and is incorporated by reference.

accordance with § 150.217 that the Commonwealth is failing to substantially enforce the specified federal market reforms with respect to coverage sold through an association of real estate salespersons described in the state law. Specifically, the Commonwealth has not established to CMS's satisfaction that it is substantially enforcing the specified federal market reforms with respect to coverage offered to self-employed individuals and small employers through an association of real estate salespersons described in the state law.⁹

Consistent with § 150.217(c), the Commonwealth has another opportunity to show evidence of substantial enforcement of the specified federal market reforms for coverage sold through an association of real estate salespersons described in the state law before CMS makes a final determination under § 150.219. Please provide any additional information or evidence you wish CMS to consider by June 30, 2023. If, in accordance with § 150.219, we find that the Commonwealth has not corrected the failure to substantially enforce the specified federal market reforms, we will provide the Commonwealth written notice of CMS's final determination. CMS will then assume enforcement authority for the specified federal market reforms that the Commonwealth is not enforcing with respect to health insurance issuers in Virginia for coverage sold through an association of real estate salespersons described in the state law.

If you have any questions, please contact Jacob Ackerman, Senior Advisor, Center for Consumer Information & Insurance Oversight, at jacob.ackerman1@cms.hhs.gov or (202) 641-8967.

Sincerely,



Chiquita Brooks-LaSure

cc: James H. Williams, Deputy Secretary of Health and Human Resources,
Office of the Governor
Meade Browder, Jr., Senior Assistant Attorney General, Office of the Attorney General
Julie Blauvelt, Deputy Commissioner, Bureau of Insurance

⁹ While CMS could have considered the Bureau's September 27, 2022, and March 9, 2023, letters as constituting notice from the Commonwealth that it was not enforcing the specified federal market reforms with respect to coverage sold through an association of real estate salespersons described in the state law, triggering CMS enforcement under § 150.203(a), CMS instead is treating this situation as one in which the agency received or obtained information that indicates a state may not be substantially enforcing, triggering the process described in §§ 150.209 through 150.219.

Appendix A: List of Federal Market Reform Requirements the Commonwealth Has Failed and Is Failing to Substantially Enforce

This Appendix identifies the federal market reform requirements that, based on § 38.2-3521.1 of the Code of Virginia, as amended and reenacted by HB 768/SB 335 (2022), and the Bureau's September 27, 2022 and March 9, 2023 responses, CMS believes the Commonwealth of Virginia has failed and is failing to substantially enforce by treating health insurance coverage offered to self-employed individuals and small employers through an association described in § 38.2-3521.1G as coverage offered in the large group market.

Public Health Service Act

- Section 2701 (relating to fair health insurance premiums);
- Section 2702 (relating to guaranteed availability of coverage), as implemented at 45 CFR 147.104(f), with respect to the requirement that coverage be offered on a calendar-year basis in the individual market;
- Section 2703 (relating to guaranteed renewability of coverage), as implemented at 45 CFR 147.106(e) and (f), with respect to uniform modification of coverage and standard notice requirements;
- Section 2705 (relating to the prohibition of discrimination against individual participants and beneficiaries based on health status), with respect to the prohibition on offering health-contingent wellness programs in the individual market;
- Section 2707 (relating to comprehensive health insurance coverage), with respect to actuarial value levels of coverage;
- Section 2746 (relating to disclosure to enrollees of individual market coverage); and
- Section 2794 (relating to ensuring the consumers get value for their dollars).

Affordable Care Act

- Section 1312(c) (relating to single risk pool).



August 29, 2022

Scott White
Insurance Commissioner
Virginia Bureau of Insurance
PO Box 1157
Richmond, VA 23218

Dear Commissioner White:

I write on behalf of the Department of Health and Human Services (the Department) regarding HB 768/SB 335 (2022)¹ (generally referred to as the state law or the Virginia law in this letter). This legislation, recently enacted by the Virginia General Assembly and signed by the Governor, allows an association of real estate salespersons to purchase health insurance coverage in the large group market in Virginia, effective July 1, 2022.

Having reviewed HB 768/SB 335 and following discussions with the Virginia Bureau of Insurance on May 4, 2022, the Department is concerned that these amendments to state law are inconsistent with the individual and small group market requirements under title XXVII of the Public Health Service Act (PHS Act) and title I of the Patient Protection and Affordable Care Act (ACA) (collectively, the federal market reforms). Those requirements include the ACA's rating reforms as well as the medical loss ratio, rate review, and risk adjustment programs. This letter explains how the federal market reforms apply to health insurance coverage sold to or through an association described in the Virginia law, discusses the Department's concerns in more detail, and seeks information to help the Department assess whether the Commonwealth of Virginia should retain primary enforcement authority of those provisions with respect to issuers offering health insurance coverage in connection with such an association in Virginia.²

Description of State Law

HB 768/SB 335 amends and reenacts § 38.2-3521.1 of the Code of Virginia, relating to health insurance; association health plan for real estate salespersons. The state law allows a health insurance issuer to issue a large group policy of accident and sickness insurance to an association of real estate salespersons³ under certain conditions, including that the association must have at

¹ See <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0349+pdf> and <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0350+pdf>.

² This letter does not constitute notice pursuant to 45 CFR 150.211 and 150.213 that the Department has begun the investigatory process described in 45 CFR 150.209 through 150.219 to determine whether the state is substantially enforcing the federal market reforms. However, information collected as a result of this letter may be used as part of such an investigation.

³ "Real estate salesperson" means any individual, or business entity, who for compensation or valuable consideration is employed either directly or indirectly by, or affiliated as an independent contractor with, a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease,

the outset a minimum of 25,000 members and meet certain other criteria. Under the state law, members of the association include employers with at least one employee that is domiciled in the Commonwealth of Virginia or certain self-employed individuals.⁴

The state law provides that health insurance coverage issued to such an association, which is deemed the policyholder, will be considered a large group market policy subject to the large group market and group health plan coverage requirements under the PHS Act and the ACA. The state law also requires the policy to comply with the requirement to provide essential health benefits and cost-sharing requirements as set forth in § 38.2-3451 and to provide an actuarial value of at least 60 percent. Further, the state law provides that the issuer of the coverage must rate the group as a single risk pool and set premiums on the basis of the collective group experience. Under the state law, premiums for the association coverage cannot vary based on gender or health status of an individual employee or self-employed individual, but may vary by age within a 4:1 ratio.

How the Federal Market Reforms Apply to Coverage Sold to or Through an Association described in the Virginia law

The Department has issued regulations and guidance explaining how the federal market reforms apply to health insurance coverage sold to or through associations.⁵ In short, the test for determining whether health insurance coverage offered through an association is group market coverage, or individual market coverage, for purposes of the federal market reforms, is the same test as that applied to health insurance offered directly to employers or individuals. If the health insurance is offered in connection with a group health plan as defined in section 2791(a)(1) of the PHS Act and 45 CFR 144.103, it is considered group market coverage for purposes of the federal market reforms. If the health insurance offered to an association member is offered other than in connection with a group health plan, the coverage is generally considered individual market coverage for purposes of the federal market reforms.⁶

For the purpose of determining whether any particular insurance coverage is group rather than individual coverage within the meaning of title XXVII of the PHS Act, it is irrelevant whether

rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon. § 54.1-2101 of the Code of Virginia.

⁴ A self-employed individual is defined as an individual who: (a) has an ownership right in a “trade or business,” regardless of whether the trade or business is incorporated or unincorporated, (b) earns wages or self-employment income from the trade or business, and (c) works at least 20 hours a week or 80 hours a month providing personal services to the trade or business or earns income from the trade or business that at least equals the self-employed individual’s cost of the health coverage. § 38.2–3521.1(G)(1) of the Code of Virginia.

⁵ See 45 CFR 144.102(c). See also CMS Insurance Standards Bulletin Transmittal No. 02-02, Application of Group and Individual Market Requirements Under Title XXVII of the Public Health Service (PHS) Act When Insurance Coverage is Sold To, or Through, Associations (Aug. 2002), available at <https://www.cms.gov/Regulations-and-Guidance/Health-Insurance-Reform/HealthInsReformforConsume/downloads/HIPAA-02-02.pdf>; and CMS Insurance Standards Bulletin, Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations (Sept. 1, 2011), available at https://www.cms.gov/ccio/resources/files/downloads/association_coverage_9_1_2011.pdf.

⁶ See 45 CFR 144.103 for the definitions of group market and individual market. See also section 1304(a)(2) of the ACA.

there is an association involved, and it is also irrelevant whether state law classifies association coverage as “group” coverage for purposes of state insurance laws.

Under section 2791(a)(1) of the PHS Act, the term “group health plan” is defined by reference to the term “employee welfare benefit plan” under the Employee Retirement Income Security Act of 1974 (ERISA). The definition of “group health plan” in title I of the ACA cross references section 2791(a)(1) of the PHS Act.⁷

An employee welfare benefit plan is defined in section 3(1) of ERISA to include, among other arrangements, “any plan, fund, or program...established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants, or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment” (Emphasis added). The term “employee organization” is defined in section 3(4) of ERISA, as explained in more detail below. The term “employer” is defined in section 3(5) of ERISA as “. . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” The ERISA definition of “employer” includes the “direct” (or common law) employer of the covered employees or “any person acting... indirectly in the interest of” the common law employer.⁸

The Department of Labor has taken the view that, in the absence of the involvement of an employee organization, a single “multiple employer” plan may exist as a group health plan when a cognizable group or association of employers acting as an employer establishes a benefit program for the employees of member employers and exercises control over the amendment process, plan termination, and other similar functions on behalf of these employer members with respect to the plan and any trust established under the program.⁹ These entities are generally referred to as “bona fide” employer groups or associations under the Department of Labor’s guidance.¹⁰

Thus, in order to be an employee welfare benefit plan, a plan must, among other criteria, be established or maintained by an employee organization, by an employer, or by both. It appears, however, that the association described in the Virginia law could not establish or maintain a plan

⁷ See section 1301(b)(3) of the ACA. See also section 1304 of the ACA for definitions relating to markets and employers in title I of the ACA.

⁸ ERISA section 3(5). See also *Nationwide Mutual Insurance Co. et al. v. Darden*, 503 U.S., 318, 112 S. Ct. 1344(1992).

⁹ Advisory Opinion 2008–07A. Although not implicated with respect to the association described in the Virginia law, the Department of Labor has recognized certain other ways in which groups of employers can participate in a single ERISA plan, for example, because they share substantial common ownership (e.g., a controlled group of corporations).

¹⁰ See, e.g., Advisory Opinions 2008–07A, 2003–17A and 2001–04A. See also Advisory Opinion 96–25A (stating that, if an employer adopts for its employees a program of benefits sponsored by an employer group or association that does not itself constitute an “employer,” such an adopting employer may have established a separate, single-employer benefit plan covered by Title I of ERISA).

under either ERISA definition, including as a bona fide employer group or association under the Department of Labor's guidance.

Definition of Employee Organization under ERISA Section 3(4)

Section 3(4) of ERISA, in relevant part, defines the term "employee organization" to mean "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." The association described in the Virginia law does not appear to be one in which "employees participate" or that exists "for the purpose, in whole or in part, of dealing with employers . . ." Furthermore, in several opinion letters, the Department of Labor has identified several necessary criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4) of ERISA. One of those criteria is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union.¹¹ However, membership in the association described in the Virginia law is not conditioned upon one's employment status but rather is open to both employers and self-employed individuals.

Definition of Employer under ERISA Section 3(5)

Additionally, it appears that the association, as described by the Virginia law, cannot establish or maintain a plan as an "employer" within the meaning of ERISA section 3(5). The association is not the direct or common law employer of the association members.

Nor can the association as described by the Virginia law establish or maintain the plan on the theory that it is a bona fide group or association of employers acting in the interest of its employer-members to provide benefits for their employees.¹² The Department of Labor's guidance states that when membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (such as members who are not common-law employers) or where control of the group or association is not, directly or indirectly, vested solely in employer members, in form and in substance, the group or association is not a bona fide group or association of employers for purposes of ERISA section 3(5) and cannot act as an "employer" sponsor of a group health plan covering individuals who are not employees of employer members of the group or association.¹³ The association described in the Virginia law is open to real estate professionals regardless of their status as employers (such as

¹¹ See, e.g., ERISA Advisory Opinion 91-42A (Nov. 12, 1991).

¹² See, e.g., Advisory Opinion 2008-07A; U.S. Department of Labor, Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation (2022), available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf>.

¹³ See Advisory Opinion 2003-13A.

self-employed real-estate professionals without common law employees) and therefore the association cannot act as the employer sponsor of a group health plan.¹⁴

Discussion of Federal Market Reforms

For the reasons discussed above, each member of an association described in the Virginia law must receive coverage that complies with the requirements arising out of its status as an individual, small employer, or large employer. Under the federal market reforms, the group market is divided into the small group market and the large group market, depending on the number of employees employed by the employer.¹⁵ Coverage issued through an association described in the Virginia law to a small employer-member (generally meaning an employer with 50 or fewer employees) would be subject to the federal market reform requirements applicable to the small group market, while coverage issued through an association described in the Virginia law to a self-employed individual, without any common law employees, would be subject to the federal market reform requirements applicable to the individual market. This is true regardless of whether the association is deemed the policyholder for purposes of state law.

The requirements applicable to individual and small group (or merged) market coverage include, among others, the community rating rules under section 2701 of the PHS Act (restricting premium variation to certain specified factors), rate review under section 2794 of the PHS Act (establishing a process to determine whether rate increases are unreasonable), and the single risk pool provision under section 1312(c) of the ACA (establishing a specified rating methodology for individual and small group (or merged) market coverage). Moreover, the experience of enrollees in health insurance policies issued to individuals and small employers must be categorized in the individual or small group (or merged) market, respectively, for purposes of section 2718 of the PHS Act (relating to the medical loss ratio) and section 1343 of the ACA (relating to risk adjustment).

Federal Preemption Standard

Section 2724(a) of the PHS Act and section 1321(d) of the ACA, respectively, specify that state law will generally be preempted only to the extent it prevents the application of a provision of title XXVII of the PHS Act or title I of the ACA. The Department's guidance explains state law "prevents the application" of a PHS Act provision if the state law makes it impossible for an issuer to comply with federal law. If a state law simply permits, but does not require, an action that is prohibited under federal law, the state law would not be applicable. The issuer simply could not take advantage of the state law provision.¹⁶

¹⁴ The Department of Labor previously issued a final regulation creating a different pathway for associations to achieve association health plan status. That regulation has since been vacated by a district court. *See State of New York, et al. v. United States Department of Labor, et al.*, 363 F.Supp.3d 109 (D.D.C. 2019). The Department of Labor's appeal of the decision in the Court of Appeals for the District of Columbia Circuit remains pending. Thus, the rule cannot supply a basis for the association to achieve association health plan status.

¹⁵ *See* section 2791(e)(2) – (5) of the PHS Act and section 1304(a) and (b) of the ACA. *See also* 45 CFR 144.103.

¹⁶ *See* Section IV, HCFA Program Memorandum, The Relationship of Certain Types of State Laws to the Application of the Guaranteed Availability Requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in the Small Group Market, Program Memorandum/Insurance Commissioners/Insurance Issuers,

The Virginia law requires issuers to rate coverage offered to an association of real estate salespersons based on a separate, experience-rated risk pool. This provision, if applied to coverage that is individual or small group (including merged) market coverage under federal law, would make it impossible for an issuer to comply with the ACA's single risk pool requirement, and accordingly, would be preempted. Furthermore, the Virginia law classifies coverage offered to an association of real estate salespersons as being in the large group market for state law purposes and permits premiums to vary up to a 4:1 ratio based on age. This ratio, however, exceeds the 3:1 ratio permitted by federal law. Therefore, issuers offering non-grandfathered small group or individual health insurance coverage through an association described in the Virginia law are not permitted to take advantage of this state law provision to vary premiums.

Issuers also must use the relevant market classifications under the federal market reform framework for purposes of determining which federal requirements apply, including the risk adjustment, rate review, single risk pool, and medical loss ratio requirements.¹⁷ The Virginia law will be preempted or will not apply to the extent it prevents the application of these or other federal market reforms.

Enforcement of Federal Market Reforms

Pursuant to section 2723 of the PHS Act and section 1321(c)(2) of the ACA, states have the opportunity to be the primary enforcers of the federal market reforms applicable to health insurance issuers that issue, sell, renew, or offer health insurance coverage in the individual or group market in the state.¹⁸ In the event the Centers for Medicare & Medicaid Services (CMS) determines that a state is not substantially enforcing one or more of the federal market reform requirements with respect to health insurance issuers, CMS is responsible for enforcement of those provisions in the state.¹⁹ Any issuer subject to CMS' enforcement authority that fails to comply with an applicable provision of title XXVII of the PHS Act or title I of the ACA may be subject to a civil money penalty.²⁰

If CMS assumes enforcement authority of one or more federal market reforms in Virginia, CMS may take enforcement action against any issuer that fails to comply with applicable federal requirements, including in situations where the issuer otherwise received approval from the state to offer such coverage. In addition, CMS would review policy forms and rate filings of issuers and perform market conduct examinations or conduct investigations, as necessary, to ensure compliance with the requirements that CMS is responsible for enforcing. If any issuer subject to CMS enforcement authority does not comply with applicable federal market reforms that CMS is responsible for enforcing, CMS may impose a civil money penalty of up to \$100 each day, as

Transmittal No. 00-03 (June 2000), available at <https://www.cms.gov/Regulations-and-Guidance/Health-Insurance-Reform/HealthInsReformforConsume/downloads/HIPAA-00-03.pdf>.

¹⁷ See, e.g., 45 CFR 153.20, 45 CFR Part 153, Subparts D, G, and H (risk adjustment); 45 CFR 154.102 and 154.103 and 76 FR 54969 (Sept. 6, 2011) (rate review); 45 CFR 156.80 (single risk pool); 45 CFR 158.103 and 158.120 and MLR Annual Reporting Form Filing Instructions for the 2021 MLR Reporting Year, pp 6-7, available at <https://www.cms.gov/files/document/2021-mlr-form-instructions.pdf> (medical loss ratio).

¹⁸ See section 2723(a)(2) of the PHS Act and section 1321(c)(2) of the ACA.

¹⁹ Ibid. See also 45 CFR 150.101, et. seq.

²⁰ See section 2723(b)(2) of the PHS Act and section 1321(c)(2) of the ACA.

adjusted under 45 CFR Part 102, for each responsible entity, for each individual affected by the violation.²¹

* * *

I ask for your assistance in ensuring that consumers in Virginia receive all the protections they are entitled to under the PHS Act and the ACA. Please respond within 30 days of the date of this letter to indicate whether the Virginia Bureau of Insurance will enforce applicable federal market reform requirements, consistent with the information outlined above regarding the Department's regulations and guidance, with respect to coverage sold through an association of real estate salespersons described in the Virginia law.

For further information, please contact Jacob Ackerman, Senior Advisor, Center for Consumer Information & Insurance Oversight, by email at jacob.ackerman1@cms.hhs.gov or phone at 202-641-8967.

Sincerely,

A handwritten signature in blue ink that reads "Chiquita Brooks-LaSure". The signature is written in a cursive, flowing style.

Chiquita Brooks-LaSure

²¹ See sections 2718(b)(3) and 2723(b)(2) of the PHS Act and section 1321(c)(2) of the ACA. See also, e.g., 45 CFR 150.315, 153.740, 156.805, and 158.606.

COMMONWEALTH OF VIRGINIA

SCOTT A. WHITE
COMMISSIONER OF INSURANCE
STATE CORPORATION COMMISSION
BUREAU OF INSURANCE



P.O. BOX 1157
RICHMOND, VIRGINIA 23218
1300 E. MAIN STREET
RICHMOND, VIRGINIA 23219
TELEPHONE: (804) 371-9741
scc.virginia.gov

September 27, 2022

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health & Human Services

Via Email to CMS CCIIO Office of the Director

Dear Ms. Brooks-LaSure:

The Bureau of Insurance (the Bureau) is in receipt of your letter dated August 29, 2022, regarding HB 768/SB 335 enacted during the 2022 Virginia General Assembly Session. The provisions of HB 768/SB 335 became effective July 1, 2022, and are codified at § 38.2-3521.1 of the Code of Virginia (the Code). This law allows an association of real estate salespersons to purchase large group health insurance coverage from a licensed insurance carrier in Virginia.

In its letter to the Bureau, the Department of Health and Human Services (the Department) expressed concerns that portions of this law, as identified on page 6 of the letter, are inconsistent with individual and small group market reform requirements under Title XXVII of the Public Health Service Act (PHS Act) and the Patient Protection and Affordable Care Act (ACA). The Department requested that the Bureau respond within 30 days of the date of the Department's letter "to indicate whether the [Bureau] will enforce applicable federal market reform requirements, consistent with the information outlined [in the letter] regarding the Department's regulations and guidance, with respect to coverage sold through an association of real estate salespersons as described in [HB 768/SB 335]."

A division of the State Corporation Commission, a Virginia constitutionally created department of government, the Bureau "is charged with the execution of all laws relating to insurance and insurers" in Virginia.^[1] Further, although the Bureau possesses authority to promulgate regulations, in doing so it cannot rewrite insurance statutes.^[2] Consistent with its charge, the Bureau does, and will continue to, administer and enforce the laws enacted by the Virginia General Assembly, including § 38.2-3521.1 of the Code, as amended.

Should you need additional information or have further questions, please contact Julie Blauvelt, Deputy Commissioner, Life & Health Division, Bureau of Insurance, by email at Julie.Blauvelt@scc.virginia.gov or phone at (804) 371-9865.

A handwritten signature in black ink, appearing to read 'Scott White'.

Scott White
Commissioner of Insurance
Virginia Bureau of Insurance

cc: Jacob Ackerman, Senior Advisor, Center for Consumer Information & Insurance Oversight
C. Meade Browder, Jr., Senior Assistant Attorney General, Office of the Attorney General
Julie Blauvelt, Deputy Commissioner, Bureau of Insurance

^[1] See Va. Code Ann. § 38.2-200 (establishing general powers of the Commission relative to insurance).

^[2] See, e.g., *Level 3 Commc'n, LLC v. State Corp. Comm'n*, 710 S.E. 2d 474 (Va. 2011).



February 9, 2023

Glen Youngkin
Governor
Office of the Governor
P.O. Box 1475
Richmond, VA 23218

Scott White
Insurance Commissioner
Virginia Bureau of Insurance
PO Box 1157
Richmond, VA 23218

Dear Governor Youngkin and Commissioner White:

This letter serves as notice under 45 CFR 150.211 to the Commonwealth of Virginia that the Centers for Medicare & Medicaid Services (CMS) has begun the process described in §§ 150.209 through 150.219 to determine whether the Commonwealth is substantially enforcing federal market reform requirements.¹

On August 29, 2022, CMS sent a letter to the Virginia Bureau of Insurance (the Bureau) regarding provisions of § 38.2-3521.1 of the Code of Virginia, as amended and reenacted by HB 768/SB 335 during the 2022 Virginia General Assembly Session. This letter is attached as Appendix B and incorporated by reference. Effective July 1, 2022, this state law allows an association of real estate salespersons to purchase health insurance coverage in the large group market from a licensed health insurance issuer in Virginia. In the letter to the Bureau, CMS expressed concerns that provisions of this state law are inconsistent with the individual and small group market requirements under title XXVII of the Public Health Service Act (PHS Act) and title I of the Patient Protection and Affordable Care Act (ACA) (collectively referred to as federal market reform requirements).² CMS requested a response in writing from the Bureau to indicate whether the Bureau would enforce applicable federal market reform requirements, consistent with the information outlined in CMS's letter regarding federal regulations and guidance, with respect to coverage sold through an association of real estate salespersons described in § 38.2-3521.1 G of the Code of Virginia.

¹ In this letter, part 150 regulatory references are to sections in part 150 of title 45 of the Code of Federal Regulations.

² See the August 29, 2022 letter from CMS (attached as Appendix B).

The Bureau responded in a letter on September 27, 2022, explaining that, consistent with its charge under the Code of Virginia, the Bureau will administer and enforce the laws enacted by the Virginia General Assembly, including § 38.2-3521.1, as amended and reenacted by HB 768/SB 335 (2022).³

Pursuant to section 2723 of the PHS Act and section 1321(c)(2) of the ACA, each state may enforce the federal market reform requirements applicable to health insurance issuers that issue, sell, renew, or offer health insurance coverage in the individual or group market in the state.⁴ In the event CMS determines that a state is not substantially enforcing one or more of the federal market reform requirements with respect to health insurance issuers, CMS is responsible for enforcement of those provisions in the state.⁵

Based on our review of § 38.2-3521.1 of the Code of Virginia, as amended and reenacted by HB 768/SB 335 (2022), and the Bureau's September 27, 2022 response, and for the reasons described in CMS's August 29, 2022 letter, there is a reasonable question as to whether the Commonwealth of Virginia is substantially enforcing applicable federal market reform requirements with respect to coverage sold to self-employed individuals and small employers through an association described in § 38.2-3521.1 G of the Code of Virginia.

When CMS obtains information indicating that a state may be failing to substantially enforce federal market reform requirements, as it has here, we follow the procedures in §§ 150.209 through 150.219 to determine whether the state is substantially enforcing these requirements. In accordance with § 150.211, we are sending this letter to the Commonwealth, based on our review of state law, as amended and reenacted by HB 786/SB 355 (2022), and the information in the Bureau's September 27, 2022 response, which has created a reasonable question as to whether the Commonwealth is substantially enforcing the federal market reform requirements. Appendix A of this letter identifies the specific federal market reform requirements that CMS is concerned the Commonwealth may be failing to substantially enforce. The August 29, 2022 letter from CMS provides an overview of the applicable federal market reform requirements for which there is evidence of a potential failure to substantially enforce and also describes the factual basis for the allegations that the Commonwealth is failing to substantially enforce the identified federal market reform requirements. The August 29, 2022 letter also describes provisions of state law that prevent the application of federal law and would therefore be preempted.

The Commonwealth has until March 11, 2023, 30 days from the date of this letter, to respond to the concerns that Virginia may not be substantially enforcing the identified federal market reform requirements based on § 38.2-3521.1 of the Code of Virginia, as amended and reenacted by HB 768/SB 335 (2022). The Commonwealth's response should include any information that the Commonwealth wishes CMS to consider in making the preliminary determination described in § 150.217. The Commonwealth may request an extension of this timeframe for good cause.⁶

³ See the September 27, 2022 letter from the Bureau (attached as Appendix C).

⁴ See PHS Act § 2723(a)(1) and ACA § 1321(c)(2). See also 45 CFR 150.201.

⁵ See PHS Act § 2723(a)(2) and ACA § 1321(c)(2). See also 45 CFR Part 150.

⁶ See 45 CFR 150.215.

If CMS assumes enforcement authority of one or more federal market reform requirements with respect to coverage sold to an association of real estate salespersons in Virginia, CMS may take enforcement action against any issuer that fails to comply with applicable federal market reform requirements that CMS is responsible for enforcing, including in situations where the issuer otherwise received approval from the state to offer such coverage. In addition, CMS could review policy forms and rate filings of issuers and perform market conduct examinations or conduct investigations, as necessary, to ensure compliance with the federal market reform requirements that CMS is responsible for enforcing.⁷ If any issuer subject to CMS enforcement authority does not comply with applicable federal market reform requirements that CMS is responsible for enforcing, CMS may impose a civil money penalty of up to \$100 each day, as adjusted under 45 CFR Part 102, for each responsible entity, for each individual affected by the violation.⁸

A state that demonstrates that it is prepared to undertake substantial enforcement may at any time work with CMS to resume enforcement of the federal market reform requirements. If and when CMS determines that responsibility for enforcement should be returned to the state, CMS will work with the state to ensure a smooth transition to state enforcement, as outlined in § 150.221.

Sincerely,



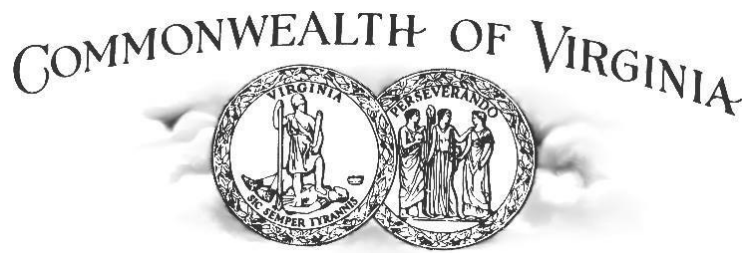
Chiquita Brooks-LaSure

Enclosure

cc: Meade Browder, Jr., Senior Assistant Attorney General, Office of the Attorney General
Julie Blauvelt, Deputy Commissioner, Bureau of Insurance

⁷ See PHS Act § 2723(b)(2) and ACA § 1321(c)(2). See also, e.g., 45 CFR 150.301, 150.303, and 150.313.

⁸ See PHS Act §§ 2718(b)(3) and 2723(b)(2) and ACA § 1321(c)(2). See also, e.g., 45 CFR 150.315, 153.740, 156.805, and 158.606.



SCOTT A. WHITE
COMMISSIONER OF INSURANCE
STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

P.O. BOX 1157
RICHMOND, VIRGINIA 23218
1300 E. MAIN STREET
RICHMOND, VIRGINIA 23219
TELEPHONE: (804) 371-9741
www.scc.virginia.gov/boi

March 9, 2023

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health & Human Services

Via Email to CMS CCIIO Office of the Director

Dear Ms. Brooks-LaSure:

The Bureau of Insurance (“Bureau”) received your letter dated February 9, 2023 and appreciates the opportunity to respond. The letter provides notice under 45 CFR 150.211 (“Federal Regulations”) to the Commonwealth of Virginia that the Centers for Medicare and Medicaid Services (“CMS”) has begun the process described in §§ 150.209 through 150.219 of the Federal Regulations. Pursuant to this process, CMS will determine whether Virginia is substantially enforcing federal market reform requirements with respect to coverage sold through an association of real estate salespersons as set forth in § 38.2-3521.1 G of the Code of Virginia (“Code”).¹

In its letter to the Bureau, CMS indicates that it has reviewed § 38.2-3521.1 of the Code, as well as the information contained in the Bureau’s previous correspondence with CMS dated September 27, 2022 (“September 27 Letter”). Based on its review, CMS notes that Virginia may be failing to substantially enforce federal market reform requirements under Title XXVII of the Public Health Service Act (PHS Act) and the Patient Protection and Affordable Care Act (ACA). Specifically, CMS notes that this failure may result from treating health insurance coverage offered to self-employed individuals and small employers through an association described in § 38.2-3521.1 G of the Code as coverage offered in the large group market in violation of these federal market reform requirements. Addressing its letter both to the Bureau and Governor Glenn Youngkin, CMS requested a response to these concerns by March 11, 2023, and provided an opportunity to submit any information that Virginia wishes CMS to consider in making its preliminary determination under § 150.217 of the Federal Regulations.

As previously stated in its response dated September 27, 2022, the Bureau is obligated to act consistent with its charge to execute all laws relating to insurance and insurers in Virginia.² As such, the Bureau does, and will continue to, administer, and enforce the laws enacted by the Virginia General Assembly, including § 38.2-3521.1 G of the Code. Currently, the Bureau is not aware of any carrier offering or providing coverage to real estate associations under this statute.

¹ CMS’s February 9, 2023 letter follows its initial letter to the Bureau, dated August 29, 2022, and the Bureau’s response, dated September 27, 2022.

² See Va. Code Ann. § 38.2-200 (establishing general powers of the Commission relative to insurance).

The Bureau provides this response only on its own behalf. Should you need additional information or have further questions, please contact Julie Blauvelt, Deputy Commissioner, Life & Health Division, Bureau of Insurance, by email at Julie.Blauvelt@scc.virginia.gov or phone at (804) 371-9865.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott White". The signature is fluid and cursive, with a large loop at the end.

Scott White
Commissioner of Insurance
Virginia Bureau of Insurance

cc: James H. Williams, Deputy Secretary of Health and Human Resources,
Office of the Governor
Meade Browder Jr., Senior Assistant Attorney General, Office of the Attorney General
Julie Blauvelt, Deputy Commissioner, Bureau of Insurance