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SECRETARY OF STATE

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June 30, 2009

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

**AGENCY:** Offices of the Insurance Commissioner

**RULE:** Amendments, 114CSR24, Medicare Supplement Insurance

**DATE FILED AS AN EMERGENCY RULE:** June 29, 2009

**DECISION NO. 8-09**

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script, appearing to read "Natalie E. Tennant", written over a horizontal line.

**NATALIE E. TENNANT**  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 8-09)

AGENCY: Offices of the Insurance Commissioner  
RULE: Amendments, 114CSR24, Medicare Supplement Insurance  
FILED AS AN EMERGENCY RULE: June 29, 2009

- par. 1 The Offices of the Insurance Commissioner (Commissioner) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commissioner filed this emergency rule with supporting documents with the Secretary of State June 29, 2009 and with the LRMRC June 30, 2009.
- par. 7 It is the determination of the Secretary of State that the Commissioner has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code 33-28-5b(2) reads:  
  
*(2) The commissioner may issue reasonable rules that specify prohibited policy provisions not otherwise specifically authorized by statute which, in the opinion of the commissioner, are unjust, unfair or unfairly discriminatory to any person insured or proposed for coverage under a medicare supplement policy.*
- par. 9 It is the determination of the Secretary of State that the Commissioner has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commissioner are as follows:

The amendments to the Title 114, Series 24 legislative rule are mandated by federal legislation that required the National Association of Insurance Commissioners ("NAIC") to make changes to their Medicare Supplement Insurance Regulation (Model 651), often referred to as "Medigap." There are 3 basic parts to this rule:

1) The Medicare, Prescription Drug, Improvement and Modernization Act of 2003 (MMA) conference report encouraged the NAIC to modernize the Medigap market, prompting NAIC to review these plans and benefits. On July 15, 2008, authority was granted by the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) to allow states to adopt revisions to the NAIC Medigap Model.

2) MIPPA also required additional changes to be made to the model as well with respect to the offer of certain plans.

3) In May 2008, Congress enacted the Genetic Information Nondiscrimination Act of 2008 (GINA) that also required changes to the NAIC Medigap model.

NAIC adopted all the revisions to its Medigap model rule on September 24, 2008. GINA and MIPPA also requires strict implementation dates by the states: Until July 1, 2009 to make the GINA changes and until September 24, 2009, to make the MIPPA changes. If the changes to a state Medigap regulation is not made to comply with the revised Medigap model, the state will be considered out of compliance with federal requirements and will no longer be able to regulate Medigap plans, which means Medigap business would be regulated by the Centers for Medicare and Medicaid Services instead of the state.

A 2010 Standardized Medigap policy cannot be effective until June 1, 2010 and a 1990 Standardized Medigap policy cannot carry an effective date that is on or after June 1, 2010. The implementation dates are set by federal law and the gap between required implementation of the NAIC Medigap model and the dates upon which the new 2010 Standardized Medigap policy can be effective is so that both states and companies can have the time to allow Medicare supplement issuers to file and get their 2010 Medicare supplement policy forms and rates filed and approved. These changes affect every Medigap plan, except for Plans K and L, which requires all Medigap carriers to submit new filings (including certificates, rates, advertisements, etc.) during the time period between implementation and authorized effective dates.

The changes to the NAIC Medigap model, which are being amended in this rule, include the

following:

- 1) Reducing the number of plans from 14 to 11;
- 2) Eliminating Plans H, I, and J (Became duplicative after MMA enacted);
- 3) Eliminating Plan E (Became duplicative after other changes made);
- 4) Creating new plans M and N (New portions with higher beneficiary cost-sharing and lower anticipated premiums);
- 5) Eliminating the outdated "At-Home-Recovery" benefit;
- 6) Creating a new "Hospice" benefit, which is added to every plan as part of Basic Core Benefits;
- 7) Eliminating the outdated and underutilized "Preventive Care" benefit; and
- 8) Replacing the 80% Part B Excess Charges Benefit with a 100% Benefit.

Existing policy holders may keep their old policies and there is transition language included to permit companies to offer existing policyholders the opportunity to leave their old policy and purchase a new policy, if they choose to do so. The changes to the Medigap model being amended in this rule, also include changes from GINA which prohibits the denial, condition, or discrimination in the pricing of a Medicare supplement policy on the basis of genetic information. It also limits the ability of Medicare supplement issuers from requesting or requiring genetic testing, and prohibits the collection of genetic information for underwriting purposes or other purposes prior to enrollment. The changes by MIPPA that were revised in the NAIC Medigap model and are being amended in this rule, require that any carrier that chooses to offer a Medigap policy other than Plan A, must also offer either Plan C or Plan F.

The emergency rule is needed in order for the state to meet the implementation dates set forth by GINA and MIPPA which are July 1, 2009 and September 24, 2009, July 1 being the earlier of the two. The emergency rule is needed by July 1, 2009 in order for the state to continue to regulate the Medicare supplement business.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "federal time limitation" and "prevent substantial harm to public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 8-09 or ERD 8-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Insurance Commissioner, the Attorney General and the Legislative Rule Making Review Committee.

  
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NATALIE E. TENNANT  
Secretary of State

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