Illinois Issues Bulletin Prohibiting Offshore TPAs and Out-of-State UR Organizations

On Dec. 20, 2012, Illinois Director of Insurance Andrew Boron issued Company Bulletin #2012-12 (Bulletin) to all insurers, registered utilization review organizations (UROs) and licensed third party administrators (TPAs) conducting business affecting Illinois insureds. The Bulletin states that to reduce costs, many insurance companies have been considering the outsourcing of administrative and utilization review functions to facilities located outside of Illinois and the United States. The Bulletin is intended to provide guidance from the Illinois Department of Insurance (Department) that TPAs performing services regarding Illinois insureds are prohibited from conducting their activities offshore. Additionally, the Bulletin states that UROs performing services for Illinois insureds must be performed within the state of Illinois.

Pharmacy Benefit Managers

Pharmacy Benefit Managers (PBMs) are subject to a PBM registration requirement in a number of states, including but not limited to Connecticut, Georgia, Kansas, Maine, Maryland, Mississippi, and Vermont. However, a number of states explicitly require PBMs to be licensed as third party administrators (TPAs) in their respective states. These states are as follows:

Iowa – “A pharmacy benefits manager doing business in this state shall obtain a certificate as a third party administrator under Chapter 510, and the provision relating to a third party administrator pursuant to Chapter 510 shall apply to a pharmacy benefits manager.” Iowa Code § 510B.2.

Louisiana – “A pharmacy benefit manager shall be deemed to be a third party administrator for purposes of this part. As such, all provisions of this part shall apply to pharmacy benefit managers, … every pharmacy benefit manager shall be required to be licensed by the commissioner of insurance.” La. Rev. Stat. Ann. § 22:1657B.
Illinois Issues Bulletin Prohibiting Offshore TPAs and Out-of-State UROs

The Bulletin states that insurers utilizing the services of a TPA or a URO are subject to market conduct examinations under the Illinois Insurance Code and that the offshoring of TPA functions outside the United States and the “outsourcing” of utilization review (UR) functions outside Illinois denies the Department “convenient and free access to books and records due to the additional time, preparation and expense attendant with foreign travel.” The Bulletin also indicates that the maintenance of the records on a domestically located server will not satisfy the requirement.

Finally, the Bulletin states that UR must be conducted within the state of Illinois, as the Department believes this “ensures that the UR decision-makers will be familiar with appropriate standards of care and accessible by the Illinois courts and administrative processes.”

For more information on Illinois Department of Insurance Bulletin #2012-12, please contact Steve Imber at (913) 234-7469 or simber@polsinelli.com.

Pharmacy Benefit Managers

Massachusetts – “211 CMR 148.00 … governs the registration and reporting requirements applicable to Third party Administrators, including pharmacy benefit managers and other entities with claims data, eligibility data, provider files and other information relating to health care provided to residents of the Commonwealth and health care provided by health care providers in the Commonwealth.” 211 Code Mass. Rules § 148.01.


Rhode Island – “Pharmacy Benefits Managers shall be included within the definition of third party administrator under Chapter 20.7 of this title and shall be regulated as such.” R.I. Gen. Laws § 27-29.1-7.

South Dakota – “No person or entity may perform or act as a pharmacy benefits manager in the state without a valid license to operate as a third party administrator pursuant to Chapter 58-29D.” S.D. Codified Laws § 58-29E-2.

Texas – “PBMs are not insurers, but a PBM that collects premiums or contributions from or adjusts or settles claims for Texas residents must hold a certificate of authority as a third party administrator (TPA) pursuant to Texas Insurance Code Chapter 4151.” Texas Department of Insurance Report on House Bill 4402 and Senate Bill 704 (on Pharmacy Benefit Managers), p.5.

West Virginia – “After June 30, 2009, an entity meeting this definition of a PBM may not operate in West Virginia unless it is licensed or registered as a TPA in accordance with the provision of West Virginia Insurance Code § 33-46-1 et. seq.” Ins. Dept. Informational Letter 166.

In addition to the above states, it is possible that other state insurance departments could determine that the activities of a PBM bring it within the tentacles of the TPA laws. State insurance regulators could view PBM activities involving the administration or management of pharmacy benefits as TPA activities, including functions such as claims processing and payment of claims to pharmacies for prescription drugs dispensed to covered individuals, clinical formulary development and management services, rebate contracting and administration, certain patient compliance, therapeutic intervention and generic substitution programs, and disease management programs.

Generally, a PBM must comply with a number of requirements to become licensed and remain licensed as a TPA, including utilizing an administrative services agreement containing statutory required provisions, maintaining bonds, and obtaining an audited financial statement by an independent certified public accountant, as well as complying with various other statutory requirements for TPAs.

PBMs are also subject to other types of laws and regulations, including various requirements governing audits of pharmacies and disclosures to contracting parties. There are laws governing required payments and electronic payments. Prompt payment laws are also applicable.

For additional information regarding TPA and PBM licensing and compliance, please contact Steve Imber at (913) 234-7469 or simber@polsinelli.com.
Administrative Service-Only Exemptions for Insurers

Many states have enacted the National Association of Insurance Commissioners’ Third Party Administrator Model Law (2001) (TPA Model Law) or legislation similar or related to the TPA Model Law. Section 1 of the TPA Model Law defines the terms “administrator,” “third party administrator” or “TPA” as a “person who directly or indirectly underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state in connection with life, annuity or health coverage provided by an insurer.” The TPA Model Law lists 12 exceptions to the definition of a TPA, one of which includes: “an insurer that is authorized to transact insurance in this state.” Notwithstanding this language, there are a number of states which require an insurer performing administrative services only for an unaffiliated insurer to either (1) be licensed as a TPA or (2) make an exemption filing.

The following states, however, do not allow an exemption for insurers that administer insurance coverage for unaffiliated insurers and require such insurers to be licensed as a TPA.

- **Kentucky** – An “administrator” is an individual or business entity who collects charges or premiums from or who adjusts or settles claims on residents of this state in connection with life insurance, health insurance, annuities, nonprofit hospital, medical-surgical, dental, and health service corporation contracts, health maintenance organization contracts, or other life, health, or annuity benefit plans. The following are not considered to be acting as administrator … (c) An insurer, which is acting as the insurer with respect to the contract if the insurer is authorized or permitted to transact business in Kentucky or if the contract is lawfully delivered or issued for delivery by it in and pursuant to the laws of a state in which it was authorized or permitted to do business. Ky. Rev. Stat. Ann. § 304.9-051.

- **Massachusetts** – As used in 211 CMR 148.00, the following words mean … Third party Administrator: A person domiciled inside or outside of the Commonwealth who, on behalf of a Health Insurer or purchaser of health benefits, receives or collects charges, contributions or premiums for, or adjusts or settles claims on or for residents of the Commonwealth. 211 Code Mass. Rules § 148.02. [Note: No exemption is provided for an insurer.]

The following states allow for an exemption for insurers to administer business for another insurer, provided the insurer acting as a TPA is licensed as an insurer in the lines of insurance coverage being administered:

- **Nevada** – Except as limited by this section, “administrator” means a person who: (a) Directly or indirectly underwrites or collects charges or premiums from or adjusts or settles claims of residents of this state or any other state from within this state in connection with workers’ compensation insurance, life or health insurance coverage or annuities; … or (f) is an insurance company that is licensed to do business in this state or is acting as an insurer with respect to a policy lawfully issued and delivered in a state where the insurer is authorized to do business, if the insurance company performs any act described in paragraphs (a) to (e), inclusive, for or on behalf of another insurer. Nev. Rev. Stat. § 683A.025 1.

- **Connecticut** – Any insurer licensed in this state that directly or indirectly underwrites, collects premiums or charges from, or adjusts or settles claims for other than its policyholders, subscribers and certificate holders shall be exempt from sections 20 to 34, inclusive, of this act, provided such activities only involve the lines of insurance for which such insurer is licensed in this state. Conn. Gen. Stat. § 38a-720a (b)(1).

- **Rhode Island** – You do not need a Certificate of Authority to do the following if you are in any of the following categories: Insurers, including nonprofit hospital, medical, dental or legal service corporations and health maintenance organizations holding a Rhode Island Certificate of Authority or otherwise authorized to do a life, annuity and/or health insurance business in Rhode Island whose administration activities are limited to that authority. Ins. Dept. Bulletin 2002-3 (Revised).

The following states do not require an insurer administering coverage for another insurer to become licensed as a TPA and instead require an exemption filing or an exemption notice to be submitted to their respective state insurance department:

- **Massachusetts** – As used in 211 CMR 148.00, the following words mean … Third party Administrator: A person domiciled inside or outside of the Commonwealth who, on behalf of a Health Insurer or purchaser of health benefits, receives or collects charges, contributions or premiums for, or adjusts or settles claims on or for residents of the Commonwealth. 211 Code Mass. Rules § 148.02. [Note: No exemption is provided for an insurer.]
Alaska – An admitted insurer in good standing is not required to be registered as a third party administrator (TPA). Ins. Dept. Bulletin B 05-08.

An insurer that holds a certificate of authority issued by the director and is in good standing under this title is not required to be registered as a third party administrator in this state. Alaska Stat. § 21.27.630 (k).

A person that is not required to be registered as a third party administrator under (e)-(k) of this section must file a certification with the director that the person meets the requirements for exemption. Alaska Stat. § 21.27.630 (l).

Georgia – Notwithstanding the provisions of subsection (a) of this Code section, the following are exempt from licensure as long as such entities are acting directly through their officers and employees … (3) An insurance company licensed in this state or its affiliate unless the affiliate administrator is placing business with a nonaffiliate insurer not licensed in this state. Ga. Code Ann. § 33-23-100(b).

Any business entity acting as an administrator that claims an exemption from the licensure requirements as defined by O.C.G.A. § 33-23-100(b)(1-12) shall file an annual claim of exemption each December 31 on a form as prescribed by the Commissioner. Ga. Comp. R. & Regs. r. 120-2-49-.03 (7).

New Hampshire – “Administrator” or “third party administrator” or “TPA” means a person who directly or indirectly underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state, in connection with life, annuity, or health coverage or workers’ compensation insurance, other than persons subject to regulation under RSA 281-A:5-d [regarding workers’ compensation] offered or provided by an insurer or under a self-funded governmental plan that is exempt from the provisions of the Employee Retirement Income Security Act pursuant to 29 U.S.C. section 1003(b)(1), except any of the following … (c) An insurer that is authorized to transact insurance in this state pursuant to RSA 401 or a subsidiary or affiliated corporation of such insurer if the insurer and the subsidiary or affiliated corporation have overlapping directorates. N.H. Rev. Stat. Ann. § 402-H:1 I.

Texas – A person is not an administrator if the person is … (3) an insurer or a group hospital service corporation subject to Chapter 842 acting with respect to a policy lawfully issued and delivered by the insurer or corporation in and under the law of a state in which the insurer or corporation was authorized to engage in the business of insurance. Tex. Ins. Code § 4151.002.

An insurer or health maintenance organization that is not exempt under Section 4151.002 (3) or (4) is subject to all provisions of this chapter other than Sections 4151.005 [exemption from agent licensure], 4151.051-4151.054, 4151.056 [these sections impose the administrator licensing requirement], and 4151.206(a)(1) [filing fee for third party administrator licensure]. Tex. Ins. Code § 4151.004.

Insurers should assess whether their administrative service-only activities trigger the state TPA laws. If so, a TPA license or registration may be required absent an applicable exemption.

For additional information regarding TPA licensing requirements and/or exemptions for insurers, please contact Steve Imber at (913) 234-7469 or simber@polsinelli.com; or Justin Liby at (913) 234-7427 or jlliby@polsinelli.com.
A battle is pending in Georgia over its prompt-pay law and whether it applies to third party administrators (TPAs) of self-funded plans under the Employee Retirement Income Security Act (ERISA). Georgia revised its prompt-pay law last year in its “Insurance Delivery Enhancement Act” to require payment of electronic claims in 15 days and paper claims in 30 days and to impose a 12 percent penalty on late payments.

The heart of the litigation involves an amendment that applies the prompt-pay deadlines to TPAs of self-insured employers, whose plans are governed by ERISA. The law went into effect January 1, 2013 for TPAs.

Last August, America’s Health Insurance Plans (AHIP), the trade association for insurance companies that sell health coverage and often act as TPAs for self-insured plans, sued Georgia in the U.S. District Court of Atlanta. AHIP sought an injunction to prevent the law from going into effect with respect to self-insured plans. On Nov. 20, 2012 oral arguments were heard on the motion for preliminary injunction. On Dec. 31, 2012, the court issued an order granting the preliminary injunction, finding that AHIP was likely to prevail on its ERISA preemption claim.

The lawsuit asserts that ERISA preempts state law, because Congress intended for there to be national standards with respect to self-funded plans, not conflicting state laws and regulations. Under ERISA’s requirements, self-funded plans are required to notify a physician about “an adverse benefit determination” within 30 days, with an additional 15 days for any needed extension. Therefore, TPAs of such plans essentially have 45 days to process claims under ERISA.

The American Medical Association (AMA) and the Medical Association of Georgia (MAG) have asked for leave to intervene in the case. The AMA and MAG assert that TPAs should be subject to the prompt-pay laws in order to protect physicians from slow payments and that ERISA does not preempt Georgia law. They state that this protection is important because employers are increasingly shifting away from traditional insurance plans to self-funded ERISA plans managed by TPAs. AHIP has asked that the court reject the AMA and MAG’s motion to intervene, in part since they would only duplicate Georgia’s defense of the law.

For more information on the Georgia prompt pay law or prompt-pay laws generally, please contact Steve Imber at (913) 234-7469 or simber@polsinelli.com or Jennifer Osborn Nix at (913) 234-7472 or josborn@polsinelli.com.

New Jersey Insurance Department Obtains Judgment Against Unlicensed TPA

The New Jersey Department of Banking and Insurance (DOBI), in conjunction with the New Jersey Attorney General’s office, has obtained an $859,250 judgment against National Benefits, Inc. in connection with the company’s alleged unlawful operation as a third party administrator (TPA) in New Jersey.

According to the DOBI, National Benefits, Inc.’s license to operate as a TPA was revoked by the DOBI in 2008. However, the DOBI alleged that National Benefits, Inc. continued to operate as a TPA in New Jersey and allegedly entered into a number of TPA administrative agreements after its TPA license was revoked. The DOBI also alleged that National Benefits, Inc. failed to respond or answer to repeated inquiries by the DOBI concerning its alleged unlawful activities the past few years.

In December 2010, the DOBI sued to stop National Benefits, Inc. and three of its corporate officers from operating without a license. The matter was subsequently decided in favor of the DOBI by a New Jersey Administrative Law Judge. A subsequent order against National Benefits, Inc. issued by the DOBI in 2012 incorporated the findings of the Administrative Law Judge and assessed a civil penalty of $855,000 against National Benefits, Inc. and three of its officers, as well as a $3,000 penalty for allegedly refusing to respond to DOBI’s inquiries. The order also assessed costs of $1,250.
Third Party Administrator Compliance and Regulatory Services

Polsinelli Shughart is pleased to offer its Third Party Administrator Compliance and Regulatory Services to TPAs and insurers. Services provided to TPAs and insurers include, but are not limited to:

- Assist TPAs with licensing and registration with state insurance departments on a multistate or national basis in the 43 states that license or register TPAs.
- Assist TPAs with multistate or national research.
- Assist TPAs with monitoring legislative and regulatory developments.
- Assist TPAs responding to regulatory investigations or regulatory actions.
- Assist TPAs with annual license/registration renewals and reports.
- Assist TPAs with negotiating Administrative Service Agreements with insurers.
- Review Administrative Service Agreements for compliance with state TPA laws.
- Assist TPAs with Market Conduct Examinations or audits.
- Assist TPAs with foreign qualifications with Secretaries of State.

Polsinelli Shughart’s Insurance Business and Regulatory Law group has experience representing third party administrators and other insurance businesses on a variety of compliance and regulatory issues on both a state and national basis. Attorneys in our group include two members who were formerly general counsel at state insurance departments, as well as three members who were formerly in-house counsel for third party administrators.

For additional information about our Third Party Administrator Compliance and Regulatory Services or the contents of this Update, please contact:

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The Third Party Administrator Update is a source of general information concerning third party administrators. Polsinelli Shughart provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

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