Medicare Managed Care Manual

Chapter 10 - MA Organization Compliance with State Law and Preemption by Federal Law

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Table of Contents
(Revision 76, 10/28/05)

10 - MA Organization Compliance with State Law and Preemption by Federal Law

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Federal preemption of State law that is addressed at 42 CFR 422.402, the rules established in this §80 and set forth at 42 CFR 422.108 supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to MA plans.

The MMA amended §1856(b)(3) of the Act and significantly broadened the scope of Federal preemption of State law. The revised MA regulations at §422.402 state that MA standards supersede State law and regulation with the exception of licensing laws and laws relating to plan solvency. In other words, with those exceptions, State laws do not apply to MA plans offered by MA organizations. State laws that relate to ‘‘State licensing’’ must be limited to State requirements for becoming State licensed, and do not extend to any requirement that the State might impose on licensed health plans that in the absence of Federal preemption, must be met as a condition for keeping a State license. For example, State-licensing requirements may include requirements such as filing articles of incorporation with the appropriate State Agency, or satisfying State governance requirements. State licensure requirements cannot be used as an indirect way to regulate MA plans by imposing requirements not generally associated with licensure that a State might otherwise impose on a non-MA (i.e., commercial) health plan.

20 - Extent of Federal Preemption with Respect to State Regulation of MA Plans

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CMS will defer to the States on whether an entity meets the requirements to be State licensed or whether the entity has adequate financial solvency to be a risk bearing entity. However, the State licensure requirement cannot impose a requirement that CMS does not consider a licensure requirement, such as a requirement that governs not whether the organization is fit to serve as a health insurer, but how the entity operates its insurance upon receipt of a health insurance license.

In the final rule for the MA program, we explained the difference between requirements for becoming State licensed and requirements that must be met as a condition for keeping a State license or that could be viewed as an indirect means of imposing health plan regulations on MA plans. (70 **Federal Register** at Page 4664 - January 28, 2005). We explained that only those requirements that are directly related to becoming State licensed would be free from the possibility of Federal preemption. In general, a valid State licensure requirement is one that determines whether an entity at the time of application is capable of offering health insurance in the State. We differentiate between requirements that govern the fitness of the organization to serve as a health insurer or risk

bearing entity, and the requirements that govern the ongoing operation of how the entity provides benefits, where it provides benefits, or to whom it provides the benefits.

We have not listed the parameters of State licensure in our regulations or in this manual as there may be other legitimate aspects of State licensure we have not noted. Additional examples of the scope of Federal preemption can be determined by reference to the Code of Federal Regulations (CFR) Part 422. States are preempted from imposing requirements on MA plans in all areas where Federal standards currently exist as described in existing Federal regulations. However, Federal preemption is not exclusive to existing areas of Federal regulation. State standards, including those established through case law, are preempted to the extent that they specifically would regulate MA plans, with exceptions of State licensing and solvency laws. We recognize that there still may be questions about the extent of allowable State regulation. As in the case of the pre-MMA preemption provisions, we intend to address these specific preemption questions in cooperation with States on a case-by-case basis. State health and safety standards, or generally applicable standards, which do not involve regulation of an MA plan are not preempted.

30 - State Licensure of Marketing Representatives

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As described in the marketing chapter at §50.3.1, MA organizations must employ only marketing representatives meeting State certification/licensure requirements, if a State has such requirements.

40 - Medicare Secondary Payer (MSP) Rules

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A State cannot take away an MA organization's right under Federal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer. The MA organization may exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations at 42 CFR Part 411, Subparts B through D.

50 - State Premium Taxes or Other Fees Imposed on Federal Payment to MA Organizations

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The MA regulations at 42 CFR 422.404 prohibit States from imposing a premium tax, fee, or any other fee on the payment CMS makes to MA organizations (on behalf of MA enrollees) or payments made by MA enrollees to MA plans or by a third party to a MA plan on a beneficiary’s behalf.

60 - Case Studies of Federal Preemption

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Introduction: Under Federal regulations at 42 CFR 422.400 each MA organization must be licensed under State law and must demonstrate to CMS that the scope of its State license allows the organization to offer the type of MA plan or plans that it intends to offer in the State. On its web site along with the application forms for MA plans, CMS has provided a State certification form (see link below - document is identified as cert.zip) which the MA organization will provide to the State or States in which it is proposing to offer an MA plan.

http://www.cms.hhs.gov/healthplans/madvantage/maapps.asp

1 - An MA organization applies to a State to offer a new MA PPO plan in the State. The organization offering the proposed PPO plan indicates that it will offer its plan to Medicare beneficiaries in the entire State. The State denies the license on the basis that the organization lacks the financial solvency to operate serve the entire State.

- Federal law does not preempt State solvency requirements. States may decline to license an MA plan to operate in a State if the State determines that the organization offering the MA plan does not meet State solvency requirements. The State may also elect to limit the service area for which the plan is licensed based on the financial resources (i.e., solvency) of the MA organization proposing to offer the MA plan.

2 - An MA HMO plan currently being offered in a State seeks to expand its service area from 6 counties to encompass the entire State. The MA organization requests that the State certify that the scope of its license allows it to be offered in the entire State. The State denies the service area expansion request on the basis that the plan has not demonstrated to the State that it has adequate network and organizational systems capacity to serve the entire State.

- In this case Federal law preempts State law. The State has already licensed the MA organization as a risk-bearing entity, and CMS has comprehensive network and organizational capacity standards. An MA plan is only required to meet Federal standards. States may not review or impose State standards for network or organizational capacity

3 - An MA organization which is currently offering an MA HMO plan requests certification from a State to offer an MA private fee-for-service (PFFS) plan to serve Medicare beneficiaries in the entire State under its existing State license. The State denies the request on the basis that the PFFS product must be licensed as an indemnity insurance product and cannot be offered by the MA organization under a State HMO license.

- A State may require that an MA plan offered in the State operate within the scope of its license. In this case the MA organization seeking to offer an MA PFFS plan in the State must meet the licensure requirements for an indemnity insurance product. However, we note that the scope of State licensure requirements is restricted by Federal preemption authority as we have previously described.

Transmittals Issued for this Chapter

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