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THE HIPAA RECREATIONAL INJURY TECHNICAL CORRECTION ACT

October 7, 2004.—Ordered to be printed

Mr. GREGG, from the Committee on Health, Education, Labor, and Pensions, submitted the following

R E P O R T

[To accompany S. 423]

The Committee on Health, Education, Labor, and Pensions to which was referred the bill (S. 423) to promote health care coverage parity for individuals participating in legal recreational activities or legal transportation activities, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

CONTENTS

I. PURPOSE AND SUMMARY OF THE LEGISLATION

The legislation is a technical clarification intended to protect individuals in a group health plan from facing discrimination solely as a result of their participation in a legal mode of transportation or a legal recreational activity, such as motorcycling, skiing, snowmobiling, all terrain vehicle-riding, horseback riding, and other similar activities.

The legislation achieves this purpose by prohibiting a group health plan and a health insurance issuer in the group market from denying benefits otherwise provided under the plan or coverage for the treatment of an injury solely because such injury resulted from the participation of the individual in a legal mode of transportation or a legal recreational activity.

The legislation amends the Employee Income Retirement and Security Act of 1974 (ERISA), the Public Health Service Act, (PHSA), and the Internal Revenue Code (IRC).

The non-discrimination provisions of HIPAA, including the amendments made to those provisions by this legislation, apply only to the group health insurance market.

II. BACKGROUND AND NEED FOR LEGISLATION

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 included provisions designed to protect individuals enrolled in a group health plan from discrimination based on health status-related factors. Discrimination under HIPAA relates to eligibility for enrollment and premiums. Specifically a group health plan or insurance issuer may not establish rules for eligibility (including continued eligibility) of any individual under the plan based on health status. Moreover, HIPAA states that a group health plan and an insurance issuer may not require any individual to pay a premium which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of such individual's health status.

HIPAA defines health status to include a variety of factors, including health status, medical condition (including both physical and mental illness), claims experience, receipt of health care, medical history, genetic information, and evidence of insurability (including conditions arising out of acts of domestic violence).

The HIPAA conference report states that inclusion of evidence of insurability in the definition of health status was intended to ensure, among other things, that individuals are not excluded from health care coverage due to their participation in activities such as motorcycling, snowmobiling, all terrain vehicle-riding, horseback riding, skiing and other similar activities.

In January 2001, the Department of Health and Human Service (HHS), the Department of Labor (DOL), and the Internal Revenue Service (IRS) issued interim final regulations pertaining to discrimination in group health insurance (Federal Register, vol. 66, No. 66, January 8, 2001, pages 1378–1420). The rules confirm that a plan and issuer cannot deny enrollment based on an individual's participation in certain activities. However, the regulations go on to state that it is permissible for a plan or issuer to deny benefits if an individual is injured as a result of participating in such an activity. This is sometimes referred to as HIPAA's ''source of injury'' rule.

Under this interpretation, for instance, a plan cannot exclude from coverage an individual who participates regularly in bungee jumping as a form of recreation. However, if the individual is injured while bungee jumping, the plan can deny claims based on the ''source'' of the individual's injury, bungee jumping.

This permissible activity is limited, however, under the departments' interpretation of source of injury. The regulations state that

plans cannot deny benefits using the source of injury rule if the injury results from a medical condition or domestic violence. A common example would be plan provisions excluding coverage for self-inflicted injuries or injuries resulting from suicide attempts. If these injuries are the result of a medical condition (such as depression) the plan would be prohibited from denying benefits based on the source of injury rule.

The regulations distinguish between a denial in enrollment versus a denial of benefits. In addition, the regulations distinguish between different sources of injury—those that result from a medical condition or domestic violence versus all other sources of injury.

This interpretation is not consistent with Congressional intent. Moreover, these regulatory distinctions result in potentially contradictory and unintended policy that could have significant implications for the public's health, the recreational and transportation industries, as well as insurance coverage, and public attitudes about the value of insurance coverage. The technical clarification contained in this legislation is needed to alleviate these problems.

III. LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

On February 14, 2003 Senator Collins introduced, for herself and Senator Feingold, S. 423 to promote health care coverage parity for individuals participating in legal recreational activities or legal transportation activities. The bill was referred to the Committee on Health, Education, Labor, and Pensions. On October 29, 2003 the committee held an executive session to consider S. 423.

During the executive session Senator Gregg introduced, for himself and Senator Kennedy, a manager's amendment in the nature of a substitute to S. 423. The amendment made technical modifications to S. 423 and renamed the bill to the ''HIPAA Recreational Injury Technical Correction Act.'' The manager's amendment was approved by unanimous voice vote. Immediately thereafter, the Committee moved to approve S. 423, as amended, by unanimous voice vote.

IV. EXPLANATION OF BILL AND COMMITTEE VIEWS

In the committee's view, the interpretation of HIPAA adopted by HHS, DOL, and Treasury in publishing the final regulations does not reflect Congressional intent and thus requires modification. HIPAA's Congressional history included language intended specifically to ensure that ''individuals are not excluded from health care coverage due to their participation in activities such as motorcycling, snowmobiling, all terrain vehicle-riding, horseback riding, skiing and other similar activities.'' The committee does not believe that, in including this history, Congress even contemplated the difference in exclusions between enrollment and benefits.

Moreover, in the committee's view, the regulatory interpretation results in contradictory policy. For instance, an individual who regularly rides a motorcycle for transportation can't be denied coverage. However, if the same person is injured in a motorcycle accident, the plan or issuer can deny claims based on that person's source of injury, a motorcycle accident. In the committee's view, an individual who rides a motorcycle and is enrolled in a health plan

should also be covered for injuries related to legally engaging in this activity.

In addition to the distinction between enrollment and benefits, the regulations also draw a distinction between sources of injury that may stem from an underlying medical condition, such as mental illness, versus all other sources of injury. This is another distinction that, in the committee's view, was not contemplated by Congress and results in unnecessary ambiguity. Moreover, in the committee's view, this distinction raises equity concerns.

In considering this legislation, the committee reviewed a sample of group insurance contracts and practices regarding source of injury exclusions. In general, the committee found very few group contracts that exclude coverage for legal recreational activities or legal modes of transportation, such as skiing or motorcycling. The committee did find many examples of contracts that exclude coverage for extra-hazardous activities, such as handling explosives. The committee further found that, while not common, some plans may include what they consider to be high risk recreational activities, such as bungee jumping, among the excluded activities. The committee found that such exclusions are more often found in niche markets, such as college insurance plans, rather than mainstream commercial products. Finally, although the committee found no evidence that such exclusions are actually used by plans to deny coverage, it lacked the evidence necessary to disprove the existence of such practices.

While the committee did not find widespread denials based on source of injury, it is the committee's view that the regulatory interpretation by HHS, DOL and Treasury is contrary to Congressional intent and not in the best interest of public policy. While contracts are most likely to exclude high-risk activities, the committee is concerned that, without a technical clarification, contract exclusions could include a range of sports-related activities from bungee jumping and scuba diving to tennis and golf. With obesity increasing as a national public health concern, it is the committee's view that these regulations send a negative message to consumers about the value of pursuing a healthy lifestyle. The committee also believes that the regulatory endorsement of source of injury denials also sends a negative message to consumers about the value of health insurance. Finally, the recreational and transportation industries assert that the regulatory endorsement of source of injury denials unfairly tarnishes their industries, discourages healthy family activities, and potentially exposes these industries to increased financial liability. The committee concurs.

The committee acknowledges that in an era of increasing health care costs and the uninsured, employers that voluntarily offer health benefits face challenges in providing affordable health benefits. The committee also recognizes that, in interpreting HIPAA, the agencies faced a difficult challenge in balancing the rights created by HIPAA, with HIPAA's strong statement that nothing in the statute requires a plan to provide specific benefits.

The committee believes that this technical clarification does not jeopardize or break precedent with the principles inherent in our voluntary health system or HIPAA. It is the committee's view that this clarification will have only minimal impact on a very limited number of plans. Group health plans and issuers will still have

broad latitude to design and exclude benefits and services. Finally, in limiting the clarification to "legal" activities, it is the committee's intent to give plans the continued ability to protect their enrollees against risks and costs associated with illegal behavior.

V. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 2, 2003.

Hon. JUDD GREGG,
Chairman, Committee on Health Education, Labor, and Pensions, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 423, the HIPAA Recreational Injury Technical Correction Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Margaret Nowak.

Sincerely,

ELIZABETH ROBINSON,
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 423—HIPAA Recreational Injury Technical Correction Act

S. 423 would modify the Employee Retirement Income Security Act, the Public Health Service Act, and the Internal Revenue Code. The bill would prohibit a group health plan from denying benefits, otherwise provided under the plan, for treatment of an injury solely because the injury resulted from participation in a legal mode of transportation or legal recreational activity. CBO estimates that the bill would have no impact on federal outlays. The bill would affect the spending on health benefits for firms that provide health insurance and, therefore, would affect the share of employees' compensation that is tax-advantaged or taxable. At this time, CBO cannot estimate the effect on revenues of those changes in the mix of compensation.

The bill contains no intergovernmental mandates as defended in the Unfunded Mandates Reform Act (UMRA). State, local, and tribal governments operating health care plans for their employees would be exempt from the bill's requirements or would be able to opt out of the requirements.

S. 423 contains a private-sector mandate as defined in UMRA by requiring that group health plans and health insurance providers not deny benefits otherwise provided because of the source of injury. Several industry sources indicate that such source-of-injury exclusions are rare in the private health care market, but they do exist. For such cases the added cost of covered care could be considered per case, but data on the number of source-of-injury exclusion cases per year is unavailable. CBO cannot determine whether the cost of that mandate would exceed the threshold specified in UMRA ($120 million in 2004, adjusted annually for inflation).

The CBO staff contact is Margaret Nowak. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee has determined that there will be minimal increases in the regulatory burden imposed by the bill.

VII. APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA) requires a description of the application of this bill to the legislative branch. S. 423 clarifies protections for individuals in a group health plan from facing discrimination solely as a result of their participation in a legal mode of transportation or a legal recreational activity. With respect to health insurance, the provisions of S. 423 would indirectly apply to the Federal Employees Health Benefits Program (FEHBP) which contracts with insurance issuers and provides coverage to Members and employees of the Legislative Branch. The impact of this legislation on the (FEHBP) may not be relevant, however, given that the FEHBP already has broad non-discrimination rules in place.

VIII. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title as the ''HIPAA Recreations Injury Technical Correction Act''

Section 2. Coverage amendments

Subsection 2(a) amends ERISA Section 702(a)(3) of the Employee Retirement Income Security Act of 1974.

Subsection (2)(a)(1)—Strikes ''Construction'' and replaces with ''Scope.'' Inserts ''Waiting Periods'' as (2)(a)(1)A); and

Subsection (2)(a)(1)(B)—This subsection amends ERISA Section 702(a)(3) to prohibit a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, from denying benefits otherwise provided under the plan to an individual who was injured solely from participating in a legal mode of transportation or a legal recreational activity.

Subsection (2)(b)—amends Section 2702(a)(3) of the Public Health Service Act.

Subsection (2)(b)(1)—Strikes ''Construction'' and replaces with ''Scope.'' Inserts ''Waiting Periods'' as (2)(a)(1)A); and

Subsection (2)(a)(1)(B)—This subsection amends PHSA 2702(a)(3) to prohibit a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, from denying benefits otherwise provided under the plan to an individual who was injured solely from participating in a legal mode of transportation or a legal recreational activity.

Subsection (c)—amends 9802(a)(3) of the Internal Revenue Code of 1986.

Subsection (c)(2)(B)—Limitation on denial of benefits.

Subsection (2)(c)(1)—Strikes ''Construction'' and replaces with ''Scope.'' Inserts ''Waiting Periods'' as (2)(a)(1)A); and

Subsection (2)(c)(1)(B)—This subsection amends IRC Section 9802(a)(3) to prohibit a group health plan from denying benefits

otherwise provided under the plan to an individual who was injured solely from participating in a legal mode of transportation or a legal recreational activity.

IX. CHANGES IN EXISTING LAW

In compliance with rule XXVI, paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is show in roman).

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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SEC. 702. PROHIBITING DISCRIMINATION AGAINST INDIVIDUAL PARTICIPANTS AND BENEFICIARIES BASED ON HEALTH STATUS.

(a) IN ELIGIBILITY TO ENROLL.—

(1) IN GENERAL.—* * *

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(3) ¿CONSTRUCTION.—For *SCOPE.—*

(A) *WAITING PERIODS.—For* purposes of paragraph (1), rules for eligibility to enroll under a plan include rules defining any applicable waiting periods for such enrollment.

(B) LIMITATION ON DENIAL OF BENEFITS.—For purposes of paragraph (2), a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not deny benefits otherwise provided under the plan or coverage for the treatment of an injury solely because such injury resulted from the participation of the individual in a legal mode of transportation or a legal recreational activity.

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PUBLIC HEALTH SERVICE ACT

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SEC. 2702. PROHIBITING DISCRIMINATION AGAINST INDIVIDUAL PARTICIPANTS AND BENEFICIARIES BASED ON HEALTH STATUS.

(a) IN ELIGIBILITY TO ENROLL.—

(1) IN GENERAL.—* * *

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(3) ¿CONSTRUCTION.—For *SCOPE.—*

(A) *WAITING PERIODS.—For* purposes of paragraph (1), rules for eligibility to enroll under a plan include rules defining any applicable waiting periods for such enrollment.

(B) LIMITATION ON DENIAL OF BENEFITS.—For purposes of paragraph (2), a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not deny benefits otherwide provided under the plan or coverage for the treat-

ment of an injury solely because such injury resulted from the participation of the individual in a legal mode of transportation or a legal recreational activity.

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INTERNAL REVENUE CODE OF 1986

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SEC. 9802. PROHIBITING DISCRIMINATION AGAINST INDIVIDUAL PARTICIPANTS AND BENEFICIARIES BASED ON HEALTH STATUS.

(a) IN ELIGIBILITY TO ENROLL.—

(1) IN GENERAL.—* * *

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(3) ¿CONSTRUCTION.—For *SCOPE.—*

(A) *WAITING PERIODS.—For* purposes of paragraph (1), rules for eligibility to enroll under a plan include rules defining any applicable waiting periods for such enrollment.

(B) LIMITATION ON DENIAL OF BENEFITS.—For purposes of paragraph (2), a group health plan may not deny benefits otherwide provided under the plan for the treatment of an injury solely because such injury resulted from the participation of the individual in a legal mode of transportation or a legal recreational activity.

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