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TESTIMONY OF
THE
MARYLAND INSURANCE ADMINISTRATION
BEFORE THE
SENATE FINANCE COMMITTEE

MARCH 10, 2022

SENATE BILL 824 – HEALTH - ACCESSIBILITY OF ELECTRONIC ADVANCE CARE PLANNING DOCUMENTS

POSITION: LETTER OF INFORMATION

Thank you for the opportunity to provide written comments on Senate Bill 824.

SB 824 proposes several revisions to the Health-General Article and Insurance Article that will impact the delivery of electronic advance care planning documents in Maryland. The bill imposes new requirements on the Maryland Health Care Commission (MHCC), commercial insurance carriers, managed care organizations, health care providers, and various health care facilities. The provisions of the bill that apply to the entities regulated by the Maryland Insurance Administration (MIA) amend § 15-122.1 of the Insurance Article. If passed, the new requirements under § 15-122.1 of the Insurance Article, as enacted by SB 824, would impact all policies, contracts, or health benefit plans issued in the state on or after June 1, 2022.

Currently, § 15-122.1 requires carriers to provide an advance directive information sheet to members as part of the carrier's member publications, website, and at the request of a member. An advance directive refers to a witnessed written or electronic document, voluntarily executed by the declarant, or a witnessed oral statement made by the declarant, which considers that declarant's preferences for the receipt of future health care, including life sustaining medical services. SB 824, if enacted, would amend § 15-122.1 to require carriers to provide consumers access to the electronic means to create, execute, and store an advance directive or a health care agent designation, and the capability to upload and update the documents to the State-designated health information exchange.. Subsection (c) of new § 19-145 of the Health-General Article in

lines 11 through 17 on page 10 would also permit, but not require, carriers to contract with an electronic advance directive service vendor that is approved by MHCC, and that meets the technology, security, and privacy standards set by the MHCC.

The addition of § 19-145 to the Health-General Article will require the MHCC to coordinate the accessibility of electronic advance care planning documents in the state. This includes identifying a process to allow individuals to make advance care planning documents accessible to the State-designated health information exchange, and a process to allow health care providers to access electronic advance care planning documents. This also includes identifying options for carriers and health care providers to make electronic advance care planning documents accessible to consumers through a service recognized by MHCC and providing the capability for consumers to upload an advance care planning document to the state designated health information exchange or update an existing document..

To preface, advance directives and advance directive planning involve medical decisions jointly made by individual people and their health care providers, often with guidance from their legal counsel, not insurance decisions made by carriers. The MIA has significant reservations about involving carriers in these decisions and requests that the legislature carefully consider whether it is appropriate for carriers to guide or collect advance directives, and for carriers to choose forms to make available or provide guidance about those forms. The MIA also does not believe that it is appropriate for carriers to be responsible for collecting, storing and transmitting this information, including personally identifiable information about health care agents. And the MIA is concerned that forcing carriers to establish and make forms of legal documents available, to provide information that is advisory in nature regarding decisions that are medical and legal in nature, housing this sensitive data, inevitably for the purpose of making it available to third-parties who may have need of this information in health care settings exposes health insurers to unnecessary risks and potential litigation.

At present, carriers direct members seeking information on advance directives to existing programs administered by the Department of Health and the Office of the Attorney General (OAG). This current practice assures that members have the information necessary to make informed decisions based on a complete suite of advance care planning options developed by lawyers within the OAG. If SB 824 is passed, the MIA is concerned as to what information and which options will be made available to members, as advance directive language and determinations are not always simple and there are many considerations and personal/family circumstances that drive the decision about what legal form to use, when forms should be customized, and which persons and alternatives should be selected for what reasons. Members will inevitably reach out to their carriers for more detail and information and potentially advice – none of which should be provided by an insurance carrier or the individuals that answer the customer service line. If the industry is forced to assume this legal advisory and health planning role, it will be required to develop and update forms and to maintain a system for offering electronic advance directives to members and for receiving advance directives and tracking status updates, which will cause carriers to incur significant costs and expose them to additional risks and liabilities.

Furthermore, it is unclear what the expectations are for carriers once the advance directive forms are received. Who has access to this data? To whom may it be released and under what circumstances? This uncertainty raises concerns about the privacy of this data, and these concerns are further amplified because carriers will be collecting information about third parties who are not their insured customers. Health care agents anticipate that their identity and contact information will be provided to a health care provider. They do not anticipate or give permission for their identity and contact information to be provided to a carrier.

Additionally, the MIA notes two technical concerns. First, it is unknown how the MIA will evaluate whether the carrier has the appropriate level of technology consistent with MHCC, and there is no requirement that carriers notify the Commissioner or MHCC whether they are collecting the information relating to completion of advance directives. Second, the bill appears to be incomplete as it does not include a penalty provision.

The MIA thanks the committee for its attention to this information concerning SB 824.