

## Department of Financial Services

### Industry Guidance

June 22, 2018

**TO: All insurers and fraternal benefit societies authorized to write life insurance or accident and health insurance in New York State**

**RE: Underwriting in life insurance, disability income insurance, and long term care insurance for the use of antiretroviral pre-exposure prophylaxis (“PrEP”) to reduce the risk of contracting human immunodeficiency virus (“HIV”) infection**

STATUTORY REFERENCES: Insurance Law §§ 4224 and 4525

#### **I. Summary**

The purpose of this circular letter is to advise insurers and fraternal benefit societies authorized to write life insurance and accident and health insurance in this state (collectively “issuers”) of their statutory obligations regarding underwriting in life insurance, disability income insurance, and long term care insurance for the use of PrEP to reduce the risk of contracting HIV infection. PrEP is an HIV prevention strategy where individuals who are not infected with HIV but may be at risk of exposure to the virus take medication to reduce their risk of becoming infected.

#### **II. Discussion**

Following reports that some issuers may be denying applications for life insurance, disability income insurance, or long term care insurance if an applicant used PrEP, the New York State Department of Financial Services (“Department”) commenced an investigation of issuers’ underwriting guidelines and practices in New York related to HIV prevention strategies, such as the use of PrEP to reduce the risk of contracting HIV infection. Specifically, the Department examined underwriting guidelines and practices where a consumer applies for life insurance, disability income insurance, or long term care insurance and the applicant is engaging in or has

engaged in an HIV prevention strategy, such as PrEP. The Department concludes that adverse underwriting decisions based solely on an applicant's use of PrEP are inconsistent with the Insurance Law.

Insurance Law § 4224(a)(1) prohibits a life insurer from making or permitting any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof. Underwriting practices in which adverse decisions are based on an applicant's use of PrEP violate § 4224(a)(1) because these practices result in unfair discrimination between individuals with the same level of potential exposure to HIV. These practices result in adverse underwriting decisions for individuals who are taking steps to mitigate the risk of contracting HIV infection but no adverse underwriting decisions for individuals with the same level of potential exposure to HIV who are not taking steps to mitigate the risk.

Further, Insurance Law § 4224(a)(2) and (b)(2) prohibits issuers of life insurance, disability income insurance, and long term care insurance from refusing to insure or continue to insure, limiting the amount, extent or kind of coverage, or charging a different rate for the same coverage solely because of the physical or mental disability, impairment or disease, or prior history of the disability or disease of an insured or potential insured except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Issuers may underwrite for increased health risk if based on sound actuarial principles or if related to actual or reasonably anticipated experience. However, practices that rely solely on the use of PrEP to identify and underwrite a higher risk of HIV infection are contrary to the Insurance Law. These underwriting practices in which adverse underwriting decisions are applied to individuals who take PrEP to mitigate the risk of contracting HIV, but no adverse underwriting decisions are applied to individuals with the same level of potential exposure to HIV who do not take PrEP to mitigate the risk of contracting HIV, are neither based on sound actuarial principles nor related to actual or reasonably anticipated experience. Indeed, evidence suggests that the use of PrEP can significantly reduce the risk of contracting HIV infection. According to a March 2018 consumer fact sheet published by the Centers for Disease Control and Prevention entitled "PrEP 101," the daily use of PrEP reduces the risk of contracting HIV from sex by more than 90%.<sup>1</sup>

### **III. Conclusion**

Therefore, under Insurance Law § 4224, issuers may not unfairly discriminate in their underwriting or rate setting based on an applicant's use of HIV prevention strategies, such as PrEP. Consumers taking steps to prevent contraction of HIV should be able to purchase life insurance, disability income insurance, and long term care insurance at fair and reasonable premium rates. In addition, consumers should not be subject to postponement of coverage, maximum benefit periods, or exclusions for HIV solely because they are taking PrEP to mitigate the risk of contracting HIV. Issuers are advised that the Superintendent of Financial Services may examine issuers to confirm that any underwriting of life insurance, disability income insurance, or long term care insurance, where HIV prevention strategies are relevant, is based on sound underwriting and actuarial principles reasonably related to actual or anticipated experience.

Please direct any questions regarding this circular letter regarding life insurance to: Peter Dumar, Chief Insurance Attorney, Life Bureau, New York State Department of Financial Services, One Commerce Plaza, Albany, New York 12257 or by email at [peter.dumar@dfs.ny.gov](mailto:peter.dumar@dfs.ny.gov).

Please direct any questions regarding this circular letter regarding disability income insurance or long term care insurance to: Christina Fernet, Senior Attorney, Health Bureau, New York State Department of Financial Services, One Commerce Plaza, Albany, New York 12257 or by e-mail at [christina.fernet@dfs.ny.gov](mailto:christina.fernet@dfs.ny.gov).

Sincerely	
James Regalbuto Deputy Superintendent Life Insurance	Troy Oechsner Deputy Superintendent Health Insurance

<sup>1</sup> See <https://www.cdc.gov/hiv/basics/prep.html>

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