

October 24, 2012

John J. O'Brien
Director
Healthcare and Insurance
United States Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415

Re: Draft MSPP Application

Dear Mr. O'Brien:

Thank you for the opportunity to comment on the Draft 2014 Multi-State Plan (MSP) Program Application. We write as the chief insurance regulators of our respective states and members of the National Association of Insurance Commissioners. The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

While we appreciate the opportunity to comment on the draft application, it is impossible to provide meaningful feedback on the document without any details about how this program will operate, the standards that Multi-State Plans (MSPs) will be expected to meet, and how OPM proposes to fulfill its obligation to contract with MSPs within the framework of state-based insurance regulation. We understand the difficulty of implementing this provision of the ACA and your intention to work cooperatively with States to ensure a level playing field and avoid disruption of State health insurance markets. It is, however, critically important that the MSP Program is operated in a way that preserves a level playing field and respects the regulatory responsibilities of the states. With the beginning of the October 1, 2013 initial open enrollment period now less than one year away, we need detailed guidance about these and other critical questions as soon as possible. We also urge you to publish this guidance in the form of a Notice of Proposed Rulemaking to allow you to fully receive and consider comments on the standards that will apply to MSPs.

Without concrete guidance many of the concerns we expressed last August 2011 in response to an OPM Request for Information remain. It is absolutely essential that MSPs compete on a level playing field with other Qualified Health Plans (QHPs) which are subject to state insurance law and QHP certification criteria. While we accept that the statute empowers OPM to negotiate and enter into contracts with MSPs, we also note that nothing in the statute exempts them from the state insurance laws and regulations with which they, as state-licensed entities, are obligated to comply. In particular, we would like to reiterate a few of our major concerns that we hope will be addressed in any regulations proposed by the OPM to implement the MSP Program.

Compliance with State Form Review Requirements

The requirement for insurers to file policy forms with the Department of Insurance for review is a critical part of the regulatory process in every state that allows regulators to verify compliance with a wide range of state laws and consumer protections. It is very important that MSPs selling coverage in the individual and small group markets comply with form filing and approval requirements, just like every other licensed insurer participating in the Exchanges. Any MSP issuer selling an unfiled, unapproved plan in violation of state law would no longer be in good standing and would place itself at risk of losing its license to sell insurance in the state.

Preventing Risk Segmentation

Section 1312(c) of PPACA requires insurers to “consider all enrollees in all health plans (other than grandfathered health plans) offered by such issuer in the individual market, including those enrollees who do not enroll in such plans through the Exchange, to be members of a single risk pool.” Similarly, they must also consider all enrollees in small group market plans to be members of a second single risk pool. If federal regulations allow MSPs to pool risk separately from other policies offered by the same carrier in the individual and small group markets of a state, the single risk pool requirement will have been frustrated and a potential will have been created for MSPs to separate Exchange business from business sold outside of the Exchange. Insurers could exploit this ability to segment risk by offering predominantly bronze-level and catastrophic plans outside the Exchange, which will likely attract a disproportionate share of younger and healthier enrollees. By maintaining a separate risk pool, insurers would not be required to charge higher premiums to this population in order to subsidize the more heterogeneous risk that the insurers will attract for its Exchange business, where they are required to offer silver and gold level plans that could attract older and sicker enrollees. This practice would give insurers offering MSPs a distinct advantage over their smaller competitors that would be required to pool all of their risk together. Such a problem can be avoided by requiring all of an issuer’s business in a state market segment to be pooled together, whether that business is sold as an MSP or as a locally-issued plan. In addition, MSPs must also be required to fully participate in the risk adjustment and temporary reinsurance programs that will be administered by each state.

Compliance with State Rate Review Requirements

Nearly every state requires issuers in the individual and small group markets to file health insurance rates for review by state regulators. While these requirements are an important element of state efforts to keep health insurance premiums as affordable as possible for consumers, regulators also use this process to ensure that rates are sufficient to cover expected claims, preventing insurers from putting themselves in a hazardous financial condition by attempting to gain market share with unrealistically low premiums. Furthermore, states are beginning to use their rate review processes to accelerate payment reform and other system improvement initiatives. In Rhode Island, for example, the Office of the Health Insurance Commissioner attaches Hospital Contracting Conditions to modified and approved rates. These conditions are part of a larger set of Affordability Standards, in which insurers participate in affordability initiatives such as expanding the state’s primary care resources, promoting medical homes with special attention to chronic conditions, and building the infrastructure needed for meaningful care coordination between health care providers. Exempting MSPs from these requirements will undermine state delivery system transformation efforts, upon which the long-term success or failure of the ACA ultimately rests.

Compliance with Medical Loss Ratio Requirements

State regulators have a number of concerns regarding application of the Medical Loss Ratio (MLR) provisions to MSPs. The statute is very clear that the MLR is to be based on the entirety of an insurer's business in each market segment (individual, small group and large group) of each state. As such, we recommend that the experience of MSPs issued by each insurer be reported together with the experience of all other individual or small-group market plans issued by that insurer in each state. Both the NAIC and HHS gave the question of how experience should be aggregated full consideration and determined that state-by-state aggregation of insurer experience best served consumers in the 50 states. Nationally aggregating the experience of MSPs would be inconsistent with the intent of the statute and subsequent regulations and would allow insurers to mask lower MLRs in some states with higher MLRs in other states, preventing all consumers from benefitting from this provision.

While the statute does give OPM the authority to negotiate a MLR with each issuer, this provision should be interpreted as granting OPM authority to impose contractual terms that supplement, not modify or replace, the minimum MLR guaranteed by section 2718 of the Public Health Service Act and OPM should use the formula used by all other plans to calculate the MLR. This will ensure that consumers comparing MSPs and locally-issued plans can make valid comparisons and select the plan that offers the best value. If OPM were to require issuers to maintain higher MLRs on their MSP business, it would probably not cause significant disruption in the marketplace, so long as issuers also meet existing MLR requirements on their entire experience in each state's individual and small group markets. Allowing a lower MLR, however, could give these larger insurers an additional advantage in the marketplace and should be avoided.

In addition to the above concerns, we would like to stress the critical importance of coordination between the OPM and state and federal regulators. As you are aware, the NAIC has been working over the past year to make enhancements to its System for Electronic Rate and Form Filing (SERFF), which is used by 49 states and the District of Columbia to receive rate and form filings from insurers. These enhancements will enable states to use SERFF to perform QHP certification and management functions in their health insurance Exchanges and prevent QHP issuers from having to make filings with both Exchanges and Departments of Insurance. There may also be an opportunity for OPM to leverage these enhancements to verify that MSP rates and forms have been filed and approved and that the plans may legally be sold in the state. We look forward to discussing this with you further in the near future.

Once MSPs are available for purchase on Exchanges, additional coordination between OPM, the Exchange, and the Department of Insurance to monitor and resolve consumer complaints will be critically important in order to ensure that those enrolled in these plans do not slip through the cracks between the Department of Insurance's regulatory responsibilities and OPM's contract compliance enforcement responsibilities. In states with Federally Facilitated Exchanges, close coordination with HHS will also be critically important.

In conclusion, we would like to thank you again for the opportunity to comment on the draft application. While it is impossible to assess the appropriateness of the application without having seen the regulations that will govern the program and the standards for which the application seeks to gauge compliance, we look forward to seeing those regulations in the near future and to providing additional comments. We appreciate the difficulty of implementing this provision and stand ready to provide whatever assistance we can to ensure that the MSP program gets off the ground smoothly and without disrupting state insurance markets.

Mr. John O'Brien
October 24, 2012

Sincerely,



Kevin M. McCarty
NAIC President
Florida Insurance Commissioner



James J. Donelon
NAIC President-Elect
Louisiana Insurance Commissioner



Adam Hamm
NAIC Vice President
North Dakota Insurance Commissioner



Monica J. Lindeen
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