

December 19, 2012

National Healthcare Operations, Healthcare and Insurance
U.S. Office of Personnel Management
1900 E Street, NW
Room 2347
Washington, DC 20415

Re: RIN 3206-AM47

To Whom It May Concern:

Thank you for the opportunity to comment on the U.S. Office of Personnel Management's (OPM) Notice of Proposed Rulemaking (NPRM) for Establishment of the Multi-State Plan Program (MSPP). 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.

In reviewing the proposed regulation, we were pleased to note that OPM seeks to "ensure a level playing field such that neither Multi-State Plans (MSPs) nor plans offered by non-MSPP issuers are advantaged or disadvantaged on Exchange marketplaces." We support this aim and look forward to working with OPM to ensure that the program, when implemented, meets this standard. As we have noted in our previous letters, MSP issuers are required by statute to be state-licensed entities and are, by the terms of those licenses, bound to comply with all applicable state laws and regulations.

We appreciate and support provisions of the proposed regulation that require MSPP issuers and MSPs to:

- Comply with state rate review processes;
- Meet state solvency and market conduct standards;
- Include MSP enrollees in single risk pools encompassing all business in the MSPP issuer's individual or small group market plans;
- Comply with medical loss ratio (MLR) requirements on a state-by-state basis, pooling MSP and non-MSP experience in the state's individual and small group market segments;
- Participate in transitional reinsurance and risk adjustment programs within a state;
- Comply with state benefit plan material requirements; and,
- Comply with state quality improvement requirements.

These are important provisions that will help realize our shared goal of a level playing field that does not disrupt state insurance markets. There are, however, some provisions of the proposed rule that we continue to have concerns and recommendations.

Essential Health Benefits (EHBs)

The NPRM proposes (§800.105) to give MSPP issuers the choice of using the EHB benchmark package in each state or using one of three benchmark packages identified by the OPM. The NAIC does not support this proposal. While the OPM-designated benchmark plans may be very close to those in most states once actuarially equivalent substitutions of benefits have been taken into account, there will still be some differences that may drive consumers to either the MSP or to its non-MSP competitors based upon their health needs, resulting in adverse selection. In addition, the differences in benefits will complicate the comparison of qualified health plans (QHPs) on Exchanges. Finally, some states may elect to restrict or prohibit actuarially equivalent substitutions of benefits, which would compound the problems that we have described above. Therefore, in addition to requiring that MSPP issuers utilize the EHB packages of each state, we also recommend that they be subject to any restrictions and prohibitions on substitutions enacted by each state.

The proposed rule also requested comment on whether MSPP issuers should be required to provide evidence of actuarial equivalence of substitutions to state regulators in lieu of, or in addition to, the OPM. While we take no position on whether evidence of actuarial equivalence should also be submitted to OPM, it is important that they be provided to each state that requires them to be submitted.

Cost Sharing

Section 800.106 of the proposed rule requires an MSP to comply with §1302(c) of the Affordable Care Act (ACA), as well as any standards that might be set by OPM or the U.S. Department of Health and Human Services (HHS). Some states, however, may enact additional restrictions on cost-sharing, such as standardized cost-sharing arrangements for each level of coverage, in order to make plans more readily comparable by consumers. In these states, an MSP should be required to comply.

Network Adequacy

The preamble to the proposed rule notes that states have specific network adequacy standards and that OPM intends to consult with states to set more specific criteria with respect to network adequacy in future guidance. We appreciate your sensitivity to the importance of these state requirements and your willingness to work with the states to ensure that they are preserved. We look forward to these consultations and to helping OPM develop standards under which MSPs will comply with the same state network adequacy requirements as QHPs, ensuring that neither are advantaged nor disadvantaged by different rules.

Internal and External Review

We are concerned that §800.504 of the proposed regulation would cause confusion for consumers and issuers. While OPM proposes that MSPP issuers comply with its own external review processes, these state-licensed insurance companies will still be subject to external review requirements under state law in states that have an effective external review process that meets the criteria of §2719 of the Public Health Service Act (PHS Act), as enacted by the ACA. We recommend that OPM clarify that adverse benefit determinations in these states remain subject to external review under state law, and that the OPM process will only apply if the state has not met the criteria of §2719 PHS Act. This is the only way that we can read the preamble's statement that the proposed

approach “would not trigger the level playing field provisions of §1324 of the ACA because MSPP issuers will still be subject to the same law as other issuers.” Substituting an OPM standard for longstanding state external review processes would risk triggering the level playing field provision in 1324 of the ACA and would be contrary to 2719(b)(1) of the PHS Act and the regulations implementing that provision, which specifically require all issuers to abide by state external appeals processes that include the consumer protections set forth in NAIC’s Health Carrier Uniform External Review Model Act.

We see no compelling reason why external review must be conducted by OPM under its own standards and processes, rather than existing state requirements, which serve consumers well. If OPM is concerned about being able to monitor MSPP issuer claims payment practices for contract administration purposes, state insurance departments and the NAIC stand ready to assist by providing any information that OPM might need regarding the outcomes of external reviews conducted under state law.

In addition, if a state internal appeals process does not prevent the application of the federal regulations governing internal appeals, MSPs should be subject to this process, just as the QHPs they will be competing against are.

Geographic Service Areas

MSPP issuers should be required to comply with all state requirements regarding geographic scope of coverage. If a state requires QHPs to offer coverage across the entire state or an entire service area, an MSP should be required to comply with that requirement in the first year it sells coverage in that state.

SHOP participation

The proposed rule does not require an MSPP issuer to offer MSPs in a state’s Small Business Health Options Program (SHOP) Exchange until their fourth year of participation in the program, when it must offer coverage in all 50 states and the District of Columbia. While, as a general rule, we do not object to this proposal, there are likely to be states that require issuers participating in the individual Exchange to offer coverage in the SHOP Exchange as well. We recommend that in these states, MSPP issuers be required to immediately participate in the SHOP Exchange.

Age Rating

We support the statute’s requirement, as codified in this proposed regulation, that MSPs follow state age rating ratios. While we also interpret the proposed rule’s requirement that MSPP issuers use age rating curves established under regulations implementing §2701(a) of the PHS Act to mean that MSPP issuers must also use any age curves established by a state pursuant to 45 CFR 147.103(e), we believe that a clarification of this provision would be helpful.

Rate Review

We support the proposed rule’s requirement that an MSP be subject to a state’s rate review process. While we understand OPM’s need to retain some authority to make a final decision to approve rates for participation in the MSPP in the event of a state withholding approval for reasons that are “arbitrary, capricious, or an abuse of discretion,” we note that there are remedies available under state law for issuers who believe that a rate approval has been withheld for any of these reasons. As the preamble to the proposed rule notes, this is an eventuality that will rarely, if ever arise, and existing remedies should be more than adequate to deal with it.

Reporting Requirements

The preamble notes that OPM intends to collect data from MSPP issuers by race, ethnicity, sex, primary language, and disability status. Issuers may not currently collect some of this information about enrollees, and states may prohibit them from collecting this data.

Process for Dispute Resolution

We appreciate the proposal for a dispute resolution process in the event that OPM determines that a state requirement will not apply to a MSP. However, we recommend that the first sentence of §800.114(b) (“OPM reserves the right to determine, in its judgment, as effectuated through an MSPP contract, these regulations, or OPM guidance whether the standards set forth in paragraph (a) of this section are satisfied with respect to particular State laws.”) should be deleted. This sentence provides too much discretion for OPM to exempt MSP issuers from important state law requirements that will apply to their competitors, creating an unlevel playing field.

Furthermore, we would suggest the following changes to §800.114(b)(1) through (4) that will more appropriately realize the goal that we both share of a marketplace where neither MSPs nor QHPs competing against them are advantaged or disadvantaged:

- Delete (b)(2) and incorporate administrative burdens and costs into (b)(1);
- Modify (b)(3) addressing burdens placed upon OPM in administering the program, to add an additional condition that the burden must be unreasonable; and,
- Amend (b)(4) to clarify that it is limited to state actions to explicitly bar MSPs from an Exchange.

As modified, the final sentence of §800.114 would read as follows:

OPM will consider whether the State law at issue:

- (1) Imposes on MSPP issuers or MSPs any requirement or requirements, administrative burdens, or costs that differ from those applicable to QHP issuers or QHPs offered in one or more Exchanges in that state;*
- (2) Creates responsibilities, administrative burdens, or costs for OPM that significantly and unreasonably deter or impede OPM's effective implementation of the MSPP;*
- (3) Explicitly prevents an MSPP issuer from offering an MSP on one or more Exchanges*

We recommend a similar dispute resolution process that would apply to requirements listed in §1324 of the ACA and codified in §800.115. We do not believe that the factors being considered for state requirements generally are appropriate for those listed in the level playing field provision, as preemption of requirements listed under §1324(b) of the ACA would result in the elimination of those requirements for all health plans in the market. For this reason, the sole factor that should be taken into consideration should be whether the state requirement falls under a listed category. If it does, the state requirement must apply to MSPP issuers and MSPs.

Form Review

While we note that the preamble to the proposed regulation states that “OPM expects MSPP issuers to comply with related state law requirements for policy form review,” we believe that a clear statement within the

regulation itself of the requirement for MSPP issuers to comply with state form review processes would clarify OPM's intent.

Thank you again for the opportunity to comment on this notice of proposed rulemaking. We appreciate the work you have done to make ensure that MSPs and QHPs are neither advantaged nor disadvantaged, and look forward to working with you to ensure that, when implemented, all plans will compete on an equal footing on Exchanges. Please do not hesitate to call upon us if we can be of any assistance in this regard.

Sincerely,



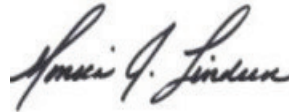
Kevin M. McCarty
NAIC President
Florida Insurance Commissioner



James J. Donelon
NAIC President-Elect
Louisiana Insurance Commissioner



Adam Hamm
NAIC Vice President
North Dakota Insurance Commissioner
Insurance



Monica J. Lindeen
NAIC Secretary-Treasurer
Montana Commissioner of Securities &



Sandy Praeger
Commissioner, Kansas Department of Insurance
Chair, NAIC Health Insurance and Managed Care Committee