

New York appreciates the opportunity to comment on the proposed regulations for 45 CFR 800; Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges; Office of Personnel Management; Proposed Rule [RIN-3206-AM47].

New York State respectfully recommends that to assure a level playing field and encourage robust issuer participation and choice within the New York State Health Benefit Exchange (the “Exchange”), it is critical to assure compliance with important and long-standing mandates in State law, incorporated in New York’s Essential Health Benefit Benchmark selection, as outlined below. In addition, as set forth in the proposed regulations, Multi-State Plan Program (MSPP) issuers will be licensed by the State of New York, and thus will be subject to the requirements of State law.

New York would like to offer the following additional comments:

Subpart B – Multi-State Plan Issuer Requirements

- §800.104 Phased Expansion / §800.110 Service Areas

The proposed regulations provide for partial coverage within a state, meaning that an MSPP issuer may cover fewer than all service areas specified for that State pursuant to section 800.110 of the proposed regulation. Section 800.110 provides that an MSPP issuer must offer an MSPP within one or more service areas defined by each Exchange pursuant to 45 CFR 155.1055.

The New York Health Benefit Exchange anticipates issuers, as opposed to the Exchange, defining the service areas consistent with existing practice. The Exchange will approve rates for the particular areas. The Exchange anticipates requiring issuers to offer products within each county of their approved service area, to ensure that consumers have adequate choice of coverage. MSPP issuers should be required to comply with the service area requirements applicable to all other issuers, to support the objectives of the MSP program.

- §800.105 Benefits

With respect to any conflicts that may arise on issues with plan design, OPM has indicated that there will be a collaborative approach in working with the states and HHS to resolve potential differences. We encourage OPM to provide additional detail on the process to resolve such differences.

The proposed regulations provide that an MSPP issuer must offer a benefits package in all states that is “substantially equal” to (1) the EHB benchmark plan in each state in which it operates, or (2) any EHB selected benchmark plan selected by OPM. New York respectfully recommends that a process by which individual states review benefits and provide OPM with a recommendation would support a level playing field and create administrative efficiencies for State Exchanges, as well as providing consumers with better ability to compare choices, an important objective of the Affordable Care Act.

To assure a level playing field within the State market it is our view that issuers could accomplish consistency in their benefit offerings by adhering to State EHB benchmark plans and applying the EHB substitution rules set forth at 45 CFR 156.115. Applications to make benefit substitutions within each EHB category, including evidence of actuarial equivalence, could be submitted by issuers to the State, copying OPM. This approach will facilitate the shopping experience for consumers.

The proposal to allow MSPs to select the Federal Employee Health Benefits Program (“FEHBP”) complicates the ability of the Exchange to provide “apples to apples” comparison of plans for consumers.

- §800.107 Levels of Coverage

The proposed regulations are silent on the topic of MSPP issuers offering catastrophic coverage and the Exchange requests that HHS explicitly permit MSPP issuers to offer catastrophic coverage.

The Exchange anticipates requiring issuers to offer a standard product at each metal level, and a standard catastrophic product, in each county of its service area to give consumers and small businesses choice. Allowing an MSP to offer only the gold and silver levels would place MSPs at a competitive advantage over other issuers. MSPs should be required to comply with all State participation parameters applicable to other QHPs.

- §800.109 Network Adequacy

New York respectfully submits that the regulations should clarify that MSPP issuers are subject to state Exchange network adequacy standards and review. In addition, they should clarify that MSPP issuers are required to comply with network adequacy requirements that are mandated in individual states to protect consumers. For example, New York State law has for many years provided strong protections for consumers enrolled in HMOs, which allow for access to appropriate out-of-network providers in certain circumstances.

- §800.112 Reporting Information

New York has developed a process for QHPs to collect and report provider network and quality data for use by consumers in selecting a health plan. State-based Exchanges should be permitted to require MSPP issuers to submit and report the same data so that consumers have the ability to compare the quality rating and consumer satisfaction ratings across QHP options. This is consistent with the intent of the MSP program and the Affordable Care Act.

- §800.113 Benefit Plan Material or Information

The proposed regulation indicates that while OPM intends to review and approve policy forms for health insurance coverage, OPM expects MSPP issuers to

comply with related state law requirements for policy form review. This approach, however, presents practical difficulties for both issuers and regulators.

New York, in consultation with issuers, will develop model form language for use by QHPs participating in the Exchange. This approach streamlines form approval and reduces administrative burden. More importantly, it helps ensure that consumers have consistent descriptions of benefits and features across all QHPs. MSPP issuers should be required to use model form language developed by the State.

New York plans to use the System for Electronic Rate and Form Filing (SERFF), developed by the National Association of Insurance Commissioners (NAIC) to receive forms, rates and templates from health plans applying to be QHPs. If the state chooses, information for MSPPs should also be transmitted to the State-based Exchange using SERFF.

- §800.114 Compliance with applicable State Law
OPM proposes that MSPP issuers generally must comply with State law in accordance with §1334(b)(2) of the Affordable Care Act. However, the Affordable Care Act provides that MSPs and MSPP issuers need not comply with State laws that: (1) Are inconsistent with §1334 of the Affordable Care Act or implementing regulations; (2) Prevent the application of a requirement of part A of title XXVII of the PHS Act; or (3) Prevent the application of a requirement of title I of the Affordable Care Act. The proposed regulation further states:

“Accordingly, OPM reserves the right to determine in its judgment, as effectuated through an MSPP contract, these regulations, or OPM guidance, whether particular State laws fall into these categories.”

New York respectfully requests that the above language be stricken from the proposed regulation. OPM has indicated with respect to plan design that there will be a collaborative approach with the states and HHS. For OPM to maintain unilateral discretion in determining whether State law applies is inconsistent with this approach.

Subpart C – Premiums, Rating Factors

- §800.201 General Requirements; §800.202 Rating Factors

The New York State Department of Financial Services (DFS) must review and approve rates for certain community rated policies. Proposed rate increases are subject to a prior approval process that includes specific notice and comment periods to provide policyholders with the opportunity to request more information or comment. New York has been deemed to have an effective rate review program by HHS.

MSPs should be subject to the same rate review process as QHP issuers to provide a level playing field and promote the transparency and consumer protection provided by existing State law, consistent with the purposes of the ACA.

In addition, to promote administrative efficiencies as well as a level playing field, New York suggests that OPM have access to New York's version of SERFF and that MSPs be required submit their rate information through SERFF with an identifier for "MSPs." DFS would review the rates consistent with its process for other product offerings, and communicate its determination to OPM.

The Preamble of the proposed regulation states that OPM may accept a rate if the State has rejected it for reasons that OPM deems arbitrary and capricious in its discretion. New York State respectfully disagrees with the ability of OPM to unilaterally overrule State regulators, particularly with respect to an issue that is squarely within the expertise and experience of the DFS.

We suggest that as a matter of process, and to advance the goals of the MSP program, the ultimate approval of rates should be made by an individual State regulator such as DFS.

Subpart D – Application and Contracting Procedures

- §800.303 MSPP Contracting
To become an MSPP issuer, an applicant must sign a contract with the Director of OPM. Each contract will contain a certification that specifies the Exchanges in which the MSPP issuer is authorized to offer an MSP, as well as the specific benefit packages to be offered on each Exchange and the premiums to be charged. OPM may elect to negotiate with an applicant such additional terms, conditions and requirements that are (1) in the interests of MSPP enrollees, or (2) OPM determines to be appropriate. Contract renewal, contract performance and contract quality assurance are within the purview of OPM.

While MSPPs will be deemed certified by OPM and regulated on an ongoing basis by OPM, they will be accessed through and associated with the New York Health Benefit Exchange. The Exchange, however, is not a party to the contract and pursuant to the proposed regulations has no role or input with respect to certification, performance evaluation or quality assurance.

New York respectfully suggests that the initial certification and contracting process with MSPPs incorporate a process for consultation and review and by individual State Exchanges, particularly in the areas of Network Adequacy, Performance and Quality Assurance. The New York Health Benefit Exchange will be responsible for monitoring service delivery by QHPs. It will be managing a call center to assist individual and small business consumers accessing coverage through the Exchange. Yet, the proposed regulations do not contemplate any mechanism for consultation, communication or exchange of data between OPM

and an individual state Exchange during the initial certification process and beyond. The MSP Contract should incorporate consultation with individual State Exchanges into certification and performance.

New York further suggests that a Memorandum of Understanding between OPM and individual state Exchanges would be useful to outline the process for consultation and review with respect to Network Adequacy, Performance and Quality Assurance, as well as State financial reserve requirements and the review of benefit plan material and other issues where coordination would ease administrative burden and benefit consumers.

- §800.306 Nonrenewal
Nonrenewal of a group health insurance policy in a state may trigger requirements beyond a 90 day notice to the group policyholder and insured members prior to termination. Certain states may otherwise condition or restrict non-renewal of a class of contracts to protect the insured. MSP issuers should be required to comply with any requirements of state law with respect to non-renewal.

Subpart E – Compliance

- §800.401 Contract Performance; §800.402 Contract Quality Assurance; §800.403 Fraud and Abuse; §800.404 Compliance Actions

As set forth in Subpart “E,” OPM will be the primary reviewer of many responsibilities which have been historically and traditionally left to the states as part of the regulation of its licensees, such as company financial resources, financial and statistical records, novation and change of name agreements and compliance with claims processing practices.

As set forth above with respect to rate review, we respectfully suggest that MSPP issuers should be subject to the requirements of State law. To promote administrative efficiencies and a level playing field, we suggest that the State review company financial resources, records, novation and change of name agreements and claims processing practices, all of which is squarely within its expertise and experience; and communicate its determination to OPM.

The proposed regulations provide for the creation of performance escrow accounts through an assessment on issuers, from which rebates could be provided to enrollees in the event of poor performance. In the event performance standards are met, funds would be returned to the issuer. We ~~would respectfully~~ suggest that the regulations clarify that the assessment is limited to MSPP issuers only. We ~~would~~ also suggest that the assessment be based on premium amount, as opposed to a flat fee per enrollee; and that it be assessed at the beginning of the year. We ~~would~~ recommend a refund to consumers similar to MLR. ~~We would also propose that performance escrow accounts could be used to encourage quality measures with respect to payment reforms, such as the use of provider contracts with quality measures and shared savings.~~

In addition, compliance and enforcement actions are also traditionally the role of the state in the regulation of its licensees. We respectfully suggest that the proposed regulations recognize state authority in this area.

Subpart F – Appeals by Enrollees for Denials of Claims for Payment or Service

- § 800.504 External Review
OPM has proposed use of an external review process for MSPPs similar to the disputed claims process administered under the FEHBP. We respectfully disagree with is approach. MSPs should be subject to the requirements of state law with respect to external appeals, which provide important protections for consumers.