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Multi-State Health Plans: The Final Rule

By: Jane Hyatt Thorpe, Trish Riley, and Teresa Cascio

Background

In 2014, the Affordable Care Act (ACA) provides near-universal health insurance through a substantial expansion in Medicaid, premium tax credits that will cap premium contributions as a share of income for people purchasing private plans through new state insurance exchanges, and new insurance market rules that will prevent health insurers from denying coverage or charging higher premiums to people with preexisting health conditions. With some exceptions, all individuals will be required to obtain insurance coverage through employers, public programs, the individual market, or the health insurance exchanges for the individual and small group markets.

A primary goal of the law is to increase consumer choice by stimulating market competition among health plans to offer more affordable, value-based options through the new insurance exchanges. The state health insurance exchanges are designed to provide consumers choices among pre-approved health plans that meet certain federal standards ranging from the provision of specific benefits to anti-discriminatory requirements for pre-existing health conditions. Only plans that meet these standards – the qualified health plans, or QHPs – will be allowed to participate in the exchanges. To further foster competition, the ACA also requires two QHPs participating in each exchange to be multi–state plans (MSPs; see a previous MSP Implementation Brief). Unlike other QHPs participating in state-based exchanges that will be regulated at the state level, the MSPs will be regulated jointly by states and the federal Office of Personnel Management (OPM), the same agency that is today responsible for the Federal Employees Health Benefit Plan (FEHBP).

The Director of Personnel Management (Director) must contract with health insurance issuers (Multi-State Plan Program or MSPP Issuers) for the offering of multi-state plans on each State Exchange.[1] Issuers that wish to offer MSPs must, among other requirements, hold licenses in every state in which they plan to offer an MSP and develop MSPs that comply with various MSP requirements (e.g., benefits package, premium determination).[2] MSPs will be phased-in over a four-year period with MSPP Issuers offering MSPs in 60% of states during the first year of the program, 70% during the second, 85% during the third, and all states and the District of Columbia by the fourth year.[3]

The ACA attempts to establish a "level playing field" – if MSPs do not comply with the following list of policies and requirements, private plans are exempt from them as well. Laws subject to the level playing field rule are those that deal with: (1) guaranteed renewal; (2) rating; (3) preexisting conditions; (4) non-discrimination; (5) quality improvement and reporting; (6) fraud and abuse; (7) solvency and financial requirements; (8) market conduct; (9) prompt payment; (10) appeals and grievances; (11) privacy and confidentiality; (12) licensure; and (13) benefit plan material or information.

The MSP Final Rule

After a two-year rulemaking process that included a Request for Information[4] and Notice of Proposed Rulemaking,[5] OPM finalized the following Multi-State Plan Program (MSPP) regulations on March 11, 2013.[6]

- *MSPP Issuer Requirements.*[7] The Final Rule requires MSPP issuers to: (1) be licensed in each state in which they offer insurance; (2) contract with OPM; (3) meet the eligibility, enrollment and termination requirements that apply to QHPs;[8] (4) comply with the MSPP regulations, OPM directions, applicable provisions of the Public Health Service Act (PHSA) and ACA, and applicable non-discrimination statutes; (5) obtain accreditation; (6) comply with data reporting requirements; (7) maintain an adequate provider network; (8) comply with federal and state laws regarding benefit plan material and information; and (9) comply with level playing field requirements.
- *Levels of Coverage.*[9] MSPP issuers must: (1) offer coverage at both the silver and gold levels; (2) comply with ACA § 1402 (regarding cost sharing reduction or elimination); (3) offer child-only plans for each level of coverage offered; and (4) have OPM approve their planned coverage levels. MSPP Issuers *may* offer bronze and platinum level plans.
- *Benefits.*[10] MSPP issuers "must offer a uniform benefits package, including the essential health benefits" established by ACA § 1302. The benefits package must comply with § 1302 and be "substantially equal to" either "the EHB-benchmark plan in each state in which [the Issuer] operates; or any EHB-benchmark plan selected by OPM." MSPP Issuers "must comply with any state standards relating to substitution of benchmark benefits or standard benefit designs." OPM must approve the benefits package of each MSP.
- *State Law Compliance.*[11] MSPP issuers must comply with State laws unless the laws conflict with Title I of the ACA or Part A of Title XXVII of the PHSA. OPM has the authority to determine whether conflicts exist though states may request that OPM review the applicability of a State law to MSPs or MSPP Issuers.
- *Rate Review.*[12] MSPP Issuers must participate in both OPM and state rate review processes. OPM has the authority to make final rate review decisions in the event that a state's withholding of MSP approval would prevent OPM's operation of the MSSP.
- *Rating Factors.*[13] When establishing premiums, MSPP issuers may only use the rating factors specified by PHSA § 2701 and must comply with rules regarding age rating, age bands, age curves, rating areas, tobacco ratings, and implementation of the PHSA § 2702 wellness programs.
- *Medical Loss Ratio.*[14] MSPP issuers must attain the Medical Loss Ratio (MLR) required by PHSA § 2718 and any OPM established MLR. OPM may sanction MSPs that fail to attain a required MLR.
- *Reinsurance, Risk Corridors, and Risk Adjustment.*[15] MSPP issuers must comply with requirements for the transitional reinsurance program, temporary risk corridors program, and risk adjustment program.
- *Application and Contracting Procedures. Application Process.*[16] MSPP issuers may apply to participate in the MSPP on an annual basis in the form and manner specified by OPM. OPM has discretion to negotiate contracts with applicants that meet the application requirements. OPM and applicants must negotiate premiums and may negotiate other terms and conditions that OPM

deems appropriate. MSP contracts must contain a clause certifying the Issuer to offer MSPs on specified Exchanges. Issuers may not offer an MSP on Exchanges without such certification. MSP contracts will last for at least a term year and may be renewed pursuant to a renewal process established by OPM. OPM may decline renewal if an agreement on premiums cannot be reached, the Issuer has failed to comply with the MSPP requirements, or OPM believes that the Issuer is unable to comply with "a material provision" of ACA § 1334.

- *Compliance.*[17] MSPP issuers must comply with ACA § 1334 and the corresponding regulations. Additionally, issuers must: (1) have sufficient financial resources to participate in the MSPP; (2) maintain, and supply OPM with, financial and statistical records; (3) allow OPM and other government entities to audit their records; and (4) administer the MSPP contract "in accordance with prudent business practices." MSPP issuers must implement quality assurance and fraud and abuse programs. Failure to comply with MSP contract requirements, prudently perform MSPP contracts, or comply with other legal requirements will result in an OPM compliance action. Permissible actions include implementation of a corrective action plan, decertification, and nonrenewal. Issuers may appeal compliance actions.
- *Enrollee Appeals.*[18] MSPP issuers must administer claims and appeals in accordance with the rules for group health plans and health insurance issuers.[19] OPM will externally review adverse benefit determinations through a process similar to that used for disputed claim reviews.[20] Persons may obtain judicial review of OPM decisions in accordance with the Administrative Procedures Act (APA). Decisions by Independent Review Organizations do not constitute final agency actions for purposes of the APA.
- *Abortion.*[21] OPM must ensure that at least one MSP does not cover abortion services. MSPs may not cover abortion services in states that prohibit such coverage.
- *SHOPs.*[22] The Final Rule grants MSPP Issuers the flexibility to phase-in MSPs in the Small Business Health Options Program (SHOP). MSPP issuer's participation in SHOPs must be in accordance with the 45 C.F.R. § 156.200(g) requirements for QHPs and state SHOP standards.

Key Questions

- *Conflicting laws.* The Proposed Rule notes that OPM is currently unable to specifically identify state laws that conflict with the proposed MSPP regulations, but that they intend to monitor state requirements and "identify [conflicts] as they arise."[23] The Final Rule offers no additional guidance. Consequently, potential MSPP issuers must target markets and design their plans without definitive knowledge of the regulatory structure they will face. Additionally, states are unsure about how they will share MSPP oversight with OPM.
- *Phase-In.* MSPP issuers have discretion to choose the markets in which they initially offer their plans. How will issuers decide which markets to enter? Will factors such as existing state laws, familiarity with the market, and population size affect their decision? How will phasing in MSPs impact the insurance market? Will states attempt to attract MSPs or resist implementation until the fourth year of the program?
- *Partial Coverage.* The Final Rule permits OPM to contract with MSPP issuers that can only provide coverage within a limited service area rather than an entire state. Limited service areas could result in "cherry picking" whereby MSPP issuers exclude medically underserved and/or minority

populations from coverage. OPM recognizes the potential for "cherry picking," but believes that allowing for partial coverage will promote competition.[24] Consequently, OPM will assess an MSPP issuers proposed service area to ensure that they have selected it without consideration of racial or social factors.[25]

- *Non-MSP Plans.* Various stakeholders responded to the Proposed Rule with concerns that the network adequacy standards, plan benchmarks, and OPM's ability to classify state laws as "inconsistent" would place non-MSP plans at a competitive advantage or disadvantage.[26] OPM rejected these arguments in the Final Rule, believing that the MSPP regulations are sufficiently designed to avoid market disruption.[27] Regardless of their belief, OPM must remain open to amending the regulations in the event that MSPP implementation disrupts the market.

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[1] The Federal Government and various States also refer to Exchanges as "Marketplaces." The terms are interchangeable.
[2] Patient Protection and Affordable Care Act (Pub. L. 111-148) §1334 (2010) [Hereinafter "ACA"].
[3] *Id.*
[4] Agency Information Collection Activities: Proposed Collection; Comment Request, 76 Fed. Reg, 29804 (May 23, 2011).
[5] Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 77 Fed. Reg. 72582 (Dec. 5, 2012).
[6] Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 78 Fed. Reg. 15560 (Mar. 11, 2013).
[7] 45 C.F.R. §§ 800.101-102; § 800.109; §§ 800.111-113, § 800.115.
[8] *See* 45 C.F.R. part 155 subparts D,E, and H; 45 C.F.R. §156.250, §156.260, §156.265, §156.270, §156.285.
[9] § 800.107.
[10] § 800.105.
[11] § 800.114; § 800.116.
[12] § 800.201(e)-(f).
[13] § 800.202.
[14] § 800.203.
[15] § 800.204.
[16] §§ 800.301-306.
[17] §§ 800.401-405.
[18] §§ 800.501-504.
[19] *See* 45 C.F.R. 147.136(b).
[20] *See* 45 C.F.R. 147.136(d).
[21] § 800.602.
[22] § 800.104(c).
[23] 77 Fed. Reg. at 72608.
[24] 78 Fed. Reg. 15570.
[25] *Id.*
[26] *See* Deirdre W. Savage, Blue Cross Blue Shield of Massachusetts, Comment, Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges; Proposed Rule (Jan. 4, 2013); Jim Riesber, Colorado Insurance Commissioner, Comment (Jan. 3, 2013); Anthony Barrueta, Kaiser Permanente, Comment, Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, (Jan. 4, 2013).
[27] *See* 78 Fed. Reg. 15573.