

MEMO

TO: Interested Parties

FR: Ed Haislmaier

DT: January 11, 2010

RE: Issues regarding "multi-state plans" under Sec. 1334 of the Senate health bill.

Relevant Provisions of Sec. 1334:

Subsection (a) instructs the Director of OPM to contract with insurers to offer "multi-state plans "through each Exchange in each State" and to negotiate with each plan: a medical loss ratio; a profit margin; premiums, and; "such other terms and conditions of coverage as are in the interests of enrollees in such plans."

Subsection (b) specifies that to be eligible to enter into a contract with OPM to offer a multi-state plan a health insurer must offer a plan that meets the requirements of subsection (c), and "is licensed in each State and is subject to all requirements of State law not inconsistent with this section."

Subsection (c) specifies that a multi-state plan must offer the minimum benefits package (specified in Sec. 1302) and be subject to the rating and coverage rules applied to all plans through the provisions of the Public Health Service Act (as amended elsewhere in the bill).

Subsection (d) provides that multi-state plans are deemed to be certified for purposes of the state exchange plan certification process.

Subsection (e) specifies that "Notwithstanding paragraphs (1) and (2) of subsection (b), the Director shall enter into a contract with a health insurance issuer for the offering of a multi-State qualified health plan under subsection (a) if," the insurer offers the plan in at least 60 percent of the states the first year, 70 percent the second year, 85 percent the third year, and all states in all subsequent years.

Discussion:

Subsection (a) gives the Director of OPM the same wide latitude in setting terms and conditions for contracting with the new "multi-state" plans as for contracting with participating FEHBP plans.

Subsection (b) says that to be eligible to offer a multi-state plan an insurer must meet the same federal requirements as other plans -- as specified in subsection (c) -- and must be state licensed and subject to state laws that do not conflict with federal law. By inference, this last point can be interpreted to mean that the multi-state plans would be subject to state insurer financial regulation.

The effect of the 'deeming' provision of subsection (d) would be to exempt all multi-state plans contracted with by OPM from the Exchange "gatekeeper" function of certifying that any plans offered comply with the requirements for being a "qualified plan" under this legislation. Thus, the determination that a multi-state plan is a "qualified plan" would be entirely up to OPM.

However, subsection (e) provides for OPM to contract with certain insurers offering multi-state plans without meeting the requirements of subsection (b) -- and by extension, without meeting the requirements of subsection (c), since subsection (b)(1) requires multi-state plans to meet the provisions of subsection (c) -- if the plan is offered in a minimum number of states.

Thus, it would appear that plans that OPM contracts with under the terms of subsection (e) could effectively operate exempt from state insurer financial regulation. Such an interpretation would leave OPM free to devise its own financial regulatory standards for those plans. The legislation contains no provisions explicitly prohibiting such action by OPM. Conversely, neither does the legislation anticipate such an eventuality and set parameters to guide OPM in this regard.

The absence of legislative clarity on this point -- coupled with the absence of legislative clarity on whether the federal government could bail-out money-losing multi-state plans - - leaves open the possibility that such plans could under-price their coverage offerings (either on their own initiative or as a result of pressure from OPM) relative to their competitors, knowing that any losses would be covered by federal bailouts. The political and financial dynamic would be similar to that of "cost overruns" on DOD procurement contracts.

Nowhere in the legislation is there an explicit provision for addressing an insolvent multi-state plan (that is, a plan that consistently loses money). In theory, to the extent that such plans are subject to state insurer financial regulation, existing state mechanisms for dealing with insurer insolvency would apply (including state regulators shutting down the plan and reassigning enrollees to coverage with other carriers). However, the wording of subsection (e) leaves open the possibility that at least some multi-state plans might be exempted from state insurer financial regulation.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR2009121004057.html>