



Multi-State Plan Program Administration Letter

Number: 2014-003

Date: March 14, 2014

Subject: Multi-State Plan Program Dispute Resolution Process for States

Background

The U.S. Office of Personnel Management (OPM) published a final rule (78 Fed. Reg. 15560) on March 11, 2013, establishing the Multi-State Plan (MSP) Program, as required by section 1334 of the Affordable Care Act. Section 1334(b)(2) of the Affordable Care Act requires that MSP products and MSP issuers must generally comply with State standards. OPM's rule codified this requirement at 45 C.F.R. § 800.114(a).

Section 1334(b)(2) of the Affordable Care Act further provides, however, that MSP issuers shall not be subject to State standards if those standards are inconsistent with section 1334 of the Affordable Care Act, prevent the application of a requirement of part A of title XXVII of the Public Health Service (PHS) Act, or prevent the application of a requirement of title I of the Affordable Care Act. In the final rule, at 45 C.F.R. § 800.114(b), OPM reserved the right to determine whether, based on the standards set out by law and articulated in 45 C.F.R. § 800.114(a), a particular State standard is inapplicable to an MSP issuer or an MSP product. In these situations, OPM, after consulting with the U.S. Department of Health and Human Services (HHS) and the affected State, may determine a State standard to be inapplicable to an MSP product or MSP issuer. We anticipate that any determination of inapplicability will be rare.

The MSP Program is administered by National Healthcare Operations (NHO), a unit within OPM's Healthcare and Insurance office. This Multi-State Plan Program Administration Letter provides details about the MSP Program Dispute Resolution Process created under the MSP Program final rule, at 45 C.F.R. § 800.116. The following sections describe: 1) the purpose of the Dispute Resolution Process; 2) OPM's intended consultation process; 3) the process for determining a State standard is inapplicable to MSP issuers or products; 4) requirements for entering the Dispute Resolution Process; 5) review and screening procedures for potential disputes; 6) the requirements for entering the Dispute Resolution Process; 7) the standards, process, and timeline to be used for review; and 8) how the Dispute Resolution Process will conclude with a Final Agency Action.

Purpose of Dispute Resolution Process

OPM offers the MSP Program Dispute Resolution Process as a route to seek efficient resolution of a conflict between a State and OPM without having to initiate costly, contentious litigation over the applicability of State standard under the MSP Program. OPM acknowledges that proper administration of the MSP Program may occasionally lead to a difference of opinion concerning whether certain State standards that would otherwise govern private health insurance issuers regulated by State Departments of Insurance properly apply to MSP products and issuers. We also acknowledge that, in administering the MSP Program, OPM may make a determination that has the effect of rendering a State standard inapplicable to MSP issuers and products. In the event that a State disagrees with OPM's determination of inapplicability of State standard, the final rule (45 C.F.R. § 800.116) established an MSP Program Dispute Resolution Process for States.

Consultation with States and HHS

OPM intends to review laws and regulations that affect MSP issuers to try to identify potential conflicts between State regulation of health insurance in the relevant markets and OPM administration and regulation of the MSP Program, issuers, and products. OPM will consult with the affected State and with HHS before making any determination of inapplicability. In addition to OPM contacting a State with a potential conflict, OPM also welcomes States notifying OPM of any potential conflicts. Early identification will allow for a robust discussion before OPM makes a determination about inapplicability. OPM and States have already been working collaboratively to monitor and provide oversight of MSP issuers and products.

Determination of Inapplicability

OPM will designate a senior agency official to serve as the Initial Decision Maker (IDM). The IDM will make the initial decision of inapplicability of State standards to MSP issuers or MSP products. The IDM will make all determinations of inapplicability in writing.

An apparent conflict between an OPM standard and a State standard may arise in one of two ways. Under the first scenario, OPM's IDM will make an explicit determination of State standard inapplicability in a written initial decision and inform the State of the option to enter the MSP Program Dispute Resolution Process.

Any explicit determination of inapplicability will be explained in an MSP Program Administration Letter, which will be sent to the State and published on the OPM website. The Administration Letter will explain the relevant MSP Program policy and how that policy is being operationalized. The Administration Letter will specify whether it is applicable to all States or select States. The IDM will sign the Administration Letter.

The second way a conflict may arise is if a State finds that OPM has made a determination or taken an action that has the effect of rendering a State standard inapplicable. In this situation, the State must inform OPM of the impact of its action on the State standard in a manner that results in a formal initial decision regarding inapplicability by OPM's IDM. The mechanism for accomplishing this is the Case Intake Process described later in this Administration Letter. Where there is an actual dispute between the State and OPM, that process will produce either 1)

an initial written decision from OPM that the State standard does not apply to MSP issuers or products, or 2) written confirmation for the State that the State standard does apply.

A written initial decision is a prerequisite to entering the Dispute Resolution Process. Any determination that a State standard is inapplicable will be limited to the State or States identified in the written initial decision. OPM recognizes that some State standards are based on Model Acts, and that laws of multiple States may contain the same or similar language. However, we also realize that the facts and circumstances that give rise to a determination of inapplicability may vary from one State to another. In thoroughly considering the unique facts and circumstances in the affected State or States, OPM will evaluate a State's law carefully and will consult with appropriate State regulatory agencies, including its Exchange in the event that the State standard affects QHP standards. OPM will refer to previous relevant determinations when assessing the applicability of a State standard, but will not automatically apply a determination of inapplicability to the laws of more than one State. Thus, a previous final OPM decision finding a State standard in one dispute to be inapplicable to MSP issuers and products will not control OPM's determination in a similar dispute in a different State.

Requirements for Entering the Dispute Resolution Process

The MSP Program Dispute Resolution Process for States will be available as of the date of publication of this letter, so long as MSP coverage is in effect. OPM is in the process of creating an online tool ("Dispute Resolution Portal") for States to submit requests to participate in the MSP Program Dispute Resolution Process. As a prerequisite to entering the Dispute Resolution Process, a State official must register as a State Dispute Agent, submit the Case Intake form, and, if OPM determines the proposed dispute is appropriate for the Dispute Resolution Process, submit a Request for Dispute Resolution with evidence.

Registration as a State Dispute Agent is limited to those State officials who are authorized to initiate a dispute – that is, those persons vested with the authority under State law to initiate a lawsuit on behalf of the State. For example, a State's Attorney General, the Executive Director of a State's Health Insurance Marketplace, or a State's Insurance Commissioner may possess this authority. These State officials may delegate the authority to other State officials if permitted by State law. By receiving a delegation of authority, other State officials may request reconsideration of an initial decision by OPM through the Dispute Resolution Process. State officials must submit proof of authority or delegation before their registration will be approved.

Once the registration is approved, the State official is known as a State Dispute Agent. There can be more than one State Dispute Agent per State, but only one State Dispute Agent may be assigned to a case. A State Dispute Agent will be able to initiate cases, manage and monitor existing cases, view previous cases, and manage his or her account. The State Dispute Agent is expected to keep OPM informed of any relevant changes to his or her contact information. The State Dispute Agent must update registration information as needed. For example, if the State official who delegated authority to the State Dispute Agent changes, a delegation of authority from the new State official should be uploaded. Failure to keep information up-to-date may cause a lapse in the State Dispute Agent's access to the Dispute Resolution Process.

In order to initiate the Dispute Resolution Process, the State Dispute Agent must first submit an intake form for OPM to review. The purpose of this step is to collect brief, basic information to ensure that the proposed dispute is appropriate for the process. For example, a dispute may not be appropriate because the topic may have already been clarified in a prior MSP Program Administration Letter, or it may be the subject of a proposed rule that is open for comments and not yet finalized. By implementing this preliminary step, we hope to prevent the State and OPM from gathering and evaluating evidence unnecessarily.

Case Intake and Preliminary Screening of Potential Disputes

OPM has designed a Case Intake Process to establish whether a dispute exists that is appropriate for resolution through the Dispute Resolution Process. If necessary, the Case Intake Process will facilitate the issuance of an initial decision, such as where OPM has taken an action or made a determination that the State wishes to dispute, but where OPM was not previously aware of the impact on the applicability of a State standard.

The State Dispute Agent may use the Case Intake form to identify a situation where an OPM standard has the effect of rendering a State standard inapplicable but where there is no explicit determination by OPM. In this case, OPM's IDM will review the information submitted through the intake process. OPM's IDM will then issue a written decision indicating 1) that the State standard is inapplicable and the issue is appropriate for the Dispute Resolution Process, 2) that the State standard does apply to MSP issuers and products, or 3) that the matter is otherwise not appropriate for the Dispute Resolution Process. If OPM determines that the issue does render the State standard inapplicable, the IDM will issue an initial decision and the State Dispute Agent will be invited to enter the Dispute Resolution Process. A notification containing further instructions will be sent to the State Dispute Agent.

The Case Intake form asks the State Dispute Agent to submit: 1) the State standard that is the source of the dispute; 2) the corresponding Federal law, rule or standard applicable to MSP products or MSP issuers; 3) an explanation of how the two standards conflict; and 4) a brief description of the OPM standard's impact. At any time, the State Dispute Agent can save the intake form and return to submit it at a later time.

When the intake form is submitted, the relevant staff member at OPM assigned as the primary contact for the State (OPM State Officer) will review it in consultation with the Assistant Director for NHO or other appropriate OPM management officials. If needed, the OPM State Officer may request more information from the State Dispute Agent. Once the review is complete, a notification that the review is complete and the result of that review will be sent to the State Dispute Agent.

If OPM determines that the issue is inappropriate for the Dispute Resolution Process, OPM will explain the reasons for that determination, which may include: 1) the State Dispute Agent has not properly completed the form; 2) the State standard should apply and, therefore, no conflict exists; 3) the State already has an active case in the process on the same issue; 4) the issue does not concern a State standard; 5) the issue does not concern an OPM standard or implementation of an OPM standard; or 6) the State does not currently have an MSP product approved for sale in its

insurance markets. A determination that the issue is not appropriate for the process is a procedural evaluation, not a substantive one.

A rejection does not prevent the State Dispute Agent from attempting to start a new case on the same topic. However, the State Dispute Agent will need to complete a new intake form and receive a new case number. Old cases will be available to view even if determined to be inappropriate for the Dispute Resolution Process at that time. The State Dispute Agent may use information from earlier cases to assist, as needed, with new cases.

Request for Dispute Resolution

Once the intake form is accepted, the State Dispute Agent will be invited to submit a Request for Dispute Resolution. The Request for Dispute Resolution is a more detailed submission intended to collect the types of information and evidence necessary to determine what standard should apply under Federal statute and the MSP Program regulation. The request will include standard questions that every State Dispute Agent will be asked upon entering the Dispute Resolution Process, and it may ask the State Dispute Agent for additional information or evidence that is relevant to the specific topic of the dispute. The Request for Dispute Resolution must include OPM's written initial decision on the matter.

Information entered into the intake form will be transferred over to the Request for Dispute Resolution form. The State Dispute Agent will also see any other relevant MSP Program Administration Letters that the OPM State Officer attached to the case. The State Dispute Agent can also expand the description of the impact that was entered into the intake form and attach documentary evidence of the impact.

The Request for Dispute Resolution must include details about the State standard and how it is administered. In addition to the text of the State standard, the State must provide an explanation of how the standard applies to issuers and how the State has exercised its regulatory oversight to ensure issuers' compliance, as well as any written documents about the implementation of the standard. Such documents may include regulations, bulletins, guidance, internal policy manuals, standard operating procedures, and evidence of oversight and enforcement of the State standard. The State Dispute Agent can attach as many of these documents as he or she deems appropriate, recognizing that OPM will make its final decision based on the record before it.

OPM is also interested in how the conflict impacts consumers. The State Dispute Agent may submit attachments showing de-identified data on consumer complaints and may explain whether and how the OPM standard is adversely affecting consumers in the State. In addition, the State Dispute Agent may submit any other information or evidence relevant to the case. We do not envision that such other information should or would need to include a consumer's personally identifiable information (PII).

Once the Dispute Resolution Portal is complete, the Request for Dispute Resolution form can be saved online, and the State Dispute Agent can return to work on it. However, the State Dispute Agent must submit the Request for Dispute Resolution within 10 calendar days from the date it submitted the initial intake form in order to proceed with the dispute. If the State Dispute Agent

fails to do so, the form will be locked and the State Dispute Agent may request to have it unlocked at OPM's discretion; alternatively, the State Dispute Agent may initiate a new case.

Review Standards, Process, and Timeline

As stated in the MSP Program regulation, a State must demonstrate that the State standard rendered inapplicable by OPM's decision or action is not inconsistent with section 1334 of the Affordable Care Act or the MSP Program final rule, does not prevent the application of a requirement of part A of title XXVII of the PHS Act, and does not prevent the application of a requirement of title I of the Affordable Care Act. The Request for Dispute Resolution must include a statement explaining how the State standard meets those requirements.

Once the State Dispute Agent submits a Request for Dispute Resolution, the Dispute Resolution Process begins and, barring certain exceptions, must be completed within 60 calendar days. By mutual agreement, the time for a decision may be extended. The timeline may be extended through the Dispute Resolution Portal or by email, as long as mutual agreement is documented. The two parties will negotiate the length of the extension, and their agreement, or a rejection of the requested extension, will be documented.

At any time, the State Dispute Agent may submit additional relevant evidence to OPM. However, depending on the stage of the review process and the nature of the evidence, OPM may need additional time to adequately incorporate it into the review. In such a situation, the two parties would need to extend the timeline in order to allow for consideration of new evidence. Similarly, OPM may secure an external or independent review of the case or a specific portion of the case. In those circumstances, the State will be given an opportunity to review and respond to the findings. If the State would like to submit a response, the MSP Program regulation requires OPM to deliver a decision within 60 calendar days from submission of the response. Alternatively, the State Dispute Agent may forgo the opportunity to submit a formal response to the independent analysis and leave the timeline for a decision unchanged.

Final Agency Action

If a State chooses to enter the Dispute Resolution Process, a senior agency official who does not report to the IDM will appoint a review team to investigate the dispute and construct the administrative record. The review team will be a cross-functional team comprised of individuals who do not report directly to the IDM. The review team will include representatives from other components of OPM that do not report to the IDM and that are outside of NHO. The review team must include a representative from the Office of Planning and Policy Analysis and may also include any appropriate OPM employees who are subject matter experts.

The purpose of the OPM Review Team is to conduct a written review of the documents submitted by the State Dispute Agent and other relevant documents and communications as needed. Then, the OPM Review Team will submit a recommendation to the Final Decision Officer (FDO), who will make a final OPM decision. The Director of OPM will be the FDO.

The FDO will review the record, the recommendation, and any other documents necessary to come to a decision. As provided in 45 C.F.R. § 800.116(c)(4), upon completion of the Dispute Resolution Process, the written final OPM decision will constitute final agency action subject to review under the Administrative Procedure Act in a U.S. District Court.

If you have any questions about the information provided in this letter, please contact MSPPStateDRP@opm.gov.

Sincerely,

John O'Brien
Director of Healthcare and Insurance