MERCATUS CENTER
George Mason University
Bridging the gap between academic ideas and real-world problems

PUBLIC INTEREST COMMENT

PATIENT PROTECTION AND AFFORDABLE CARE ACT; ESTABLISHMENT OF THE MULTI-STATE PLAN PROGRAM FOR THE AFFORDABLE INSURANCE EXCHANGES

Docket No. OPM-2014-0012-0001

Neil Meredith, Assistant Professor of Economics, West Texas A&M University

Comment period closes: December 24, 2014
Submitted December 22, 2014
Office of Personnel Management, RIN: 3206-AN12

INTRODUCTION

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess rulemaking proposals and their effects on the economic opportunities and social well-being available to all members of American society.

This comment considers, from an economic perspective, the potential impact of the Office of Personnel Management's (OPM) proposed rule change to the Multi-State Plan (MSP) Program for the affordable insurance exchanges created in all 50 states and the District of Columbia as part of the Patient Protection and Affordable Care Act of 2010 (ACA). More specifically, the comment examines whether the amendments will help meet the objectives to enhance competition that benefits all consumers, yield at least two high-quality options of health insurance coverage on all exchanges, and facilitate a fair environment between MSP issuers and non-MSP issuers in coordination with states and the Department of Health and Human Services (HHS). In some cases, the suggested rule change may benefit from further consideration and careful assessment to more thoroughly evaluate the impact on interested parties.

BACKGROUND AND SUMMARY OF RULE CHANGE

The proposed rule is presented by OPM, which is charged with administering the MSP program as part of the ACA and seeks to make a number of changes in addition to appealing for comments on various initiatives.[1] The

1. Office of Personnel Management, Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 79 Fed. Reg. 226 (Nov. 24, 2014), 69803, http://www.gpo.gov/fdsys/pkg/FR-2014-11-24/pdf/2014-27793.pdf.

For more information, contact:
Robin Bowen, (703) 993-8582, rbowen@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

purpose of the rule is to help increase competition within the health insurance industry through health insurance exchanges. The following are some of the proposed changes or areas where comments are sought:

1. Editing and seeking comments on the term "group of issuers," where the current definition is "(1) A group of health insurance issuers who are affiliated either by common ownership and control or by common use of a nationally licensed service mark; or (2) an affiliation of health insurers and an entity that is not an issuer but owns a nationally licensed service mark."[2]

2. Finding ways to increase health insurance issuer participation to strengthen competition while simultaneously meeting consumer demands to offer coverage throughout an entire state.

3. Putting together a MSP Program Advisory Board to make suggestions regarding experiences of the MSP program. OPM suggests that enrollees or representatives of enrollees in the MSP program should constitute a significant share of the members of the board.

4. Seeking ideas for how OPM can promote faster participation by MSP issuers on exchanges where competition is lacking.

5. Modifying the goal that an MSP issuer must propose how to deliver coverage statewide. Instead, OPM seeks to flexibly negotiate with issuers to figure out the coverage area for an issuer.

6. Reevaluating whether mandatory participation on the small business health options program should be part of the MSP program.

7. Changing the process by which the package of benefits is chosen to be less rigid to help draw new issuers to the MSP program to further the goal of expanding competition on the exchanges.

Additionally, OPM has argued that a regulatory impact analysis is partly unnecessary because it does not expect an economic impact of $100 million per year or more for the proposed rule change. OPM also claims that a regulatory flexibility analysis is not needed from the proposed rule change because it will not impact a substantial number of small health insurers with receipts totaling less than $7.0 million per year.

ANALYSIS

According to OPM, the purpose of the proposed rule is to further explain OPM's direction in meeting the requirements of the MSP program concerning health issuers that establish an MSP option with OPM. As a large part of that process, OPM seeks to increase competition within the health insurance industry through additional MSP options on health insurance exchanges. The objectives OPM wants to meet through the MSP program are: benefiting all consumers through enhanced competition, providing two or more options of high-quality health insurance coverage, and establishing a setting where MSP issuers and non-MSP issuers compete on a level playing field in the health insurance exchanges of all 50 states and the District of Columbia. To accomplish its tasks, OPM intends to use its more than 50 years of experience managing the Federal Employees Health Benefits Program (FEHBP).[3] OPM highlights that in 2015 the MSP program is scheduled to expand from 31 to 36 exchanges, 1 to 2 issuers, and more than 150 plan options to more than 200 plan options.[4]

The MSP program may lead to further consolidation through providing a competitive advantage to large insurers that already dominate the health insurance industry. More specifically, the MSP program requires that a given MSP must be available in all states and the District of Columbia within four years. Because large insurers are more likely to already have a national presence, the geographic requirement may provide a challenge that smaller

2. Ibid., 69804.
3. Office of Personnel Management, *Multi-State Plan Program and the Health Insurance Marketplace*, Consumer, "FAQs," accessed December 16, 2014, http://www.opm.gov/healthcare-insurance/multi-state-plan-program/consumer/#url=FAQs.
4. OPM, *Patient Protection and Affordable Care Act*, 69803, http://www.gpo.gov/fdsys/pkg/FR-2014-11-24/pdf/2014-27793.pdf.

insurers cannot surmount within four years. If the MSP program further concentrates the health insurance industry, then market power, which is the ability to set prices above a competitive level, may be exercised, resulting in higher prices. Research already shows that market power exists and is used within the health industry.[5] The MSP program could make that problem worse.

The MSP program may also provide a competitive advantage to nonprofit issuers. The program requires that two MSPs must be provided on every health insurance exchange. One of the two plans must originate from a nonprofit issuer. Essentially, a for-profit issuer is not permitted to participate in the MSP program on a given exchange until a nonprofit issuer is already offering an MSP on that exchange. Therefore, entry into the MSP program is made relatively harder for for-profit insurers. Taken together with previously mentioned challenges, increased competition within the new health exchanges may not arise from the MSP program. Appendix A discusses concerns stemming from the MSP program in greater detail.

To reduce the risk of the MSP program becoming anticompetitive, all carefully reviewed measures within OPM's purview should be taken to pursue additional competition within the MSP program. As one idea, OPM may consider evaluating the phase-in period to make entry into the MSP program easier. Currently, the director of OPM can enter into a contract with an insurer to offer a multistate plan if the insurer offers the plan in at least 60 percent of all the states in the first year, 70 percent in the second year, and 85 percent in the third year.[6] In the fourth year, the insurer is expected to offer coverage in 100 percent of the states and the District of Columbia. OPM could reach out to potential MSP issuers to see if amending the phase-in period would enable their participation in the program. Based on the results of OPM's inquiry, OPM could inform Congress and the president about whether an alternate phase-in schedule may yield additional competition.

To date, the MSP program and its provisions have lacked debate.[7] One analyst serving as a healthy policy advisor close to the discussions related to legislating the program noted that "there was not a lot of time for robust conversation."[8] In fact, the MSP program appears to have been written too fast and without the full analysis needed to ascertain the impact of a multistate health program.[9] Because the program is in its infancy, its administration and performance need input. The rule change indicates that OPM intends to include MSP enrollees or their representatives as a significant share of members on the MSP Program Advisory Board.[10] OPM should pursue this course of action with the intent of ensuring a strong consumer presence on the board to help boost competition while meeting consumer demands.

According to the rule change, OPM may begin assessing a user fee for MSP issuers as early as 2015.[11] OPM is also searching for ways to encourage quicker participation by MSP issuers on exchanges where competition is limited and ways to induce new issuers to join the MSP program and provide statewide coverage.[12] While OPM does not specify what constitutes limited competition, only one issuer, Blue Cross Blue Shield, currently participates in

---

5. Leemore S. Dafny, "Are Health Insurance Markets Competitive?," *American Economic Review* 100, no. 4 (2010): 1399–431; Laurie J. Bates, James I. Hilliard, and Rexford E. Santerre, "Do Health Insurers Possess Market Power?," *Southern Economic Journal* 78, no. 4 (2012): 1289–304; Leemore Dafny, Mark Duggan, and Subramaniam Ramanarayanan, "Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry" (NBER Working Paper no. 15434, National Bureau of Economic Research, Cambridge, MA, 2009); Leemore S. Dafny, Jonathan Gruber, and Christopher Ody, "More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces" (NBER Working Paper no. 20140, National Bureau of Economic Research, Cambridge MA, 2014).
6. The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, Section 1334 (e) (2010).
7. See abstract of Appendix A.
8. Sarah Kliff, "No, The Public Option Is Not Back From The Dead," Wonkblog, October 30, 2012, http://www.washingtonpost.com/blogs/wonkblog/wp/2012/10/30/no-the-public-option-has-not-returned-from-the-dead/.
9. See Mercatus Center, *Regulatory Report Card: Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges,* http://mercatus.org/reportcards/patient-protection-and-affordable-care-act-establishment-multi-state-plan-program. Retrieved December 17, 2014.
10. OPM, *Patient Protection and Affordable Care Act*, 69804.
11. Ibid., 69807.
12. Ibid., 69804–05.

the MSP program.[13] MSP options are also only available on 31 exchanges, where 25 exchanges each provide five MSP options or fewer.[14]

One incentive that could boost competition and entries into the MSP program is a reduction in user fees for a given period of time. OPM currently estimates that user fees will amount to 0.2 percent or less of premiums.[15] OPM's own estimates indicate that 371,000 people are enrolled in a MSP plan and pay average monthly premiums of $350, which amounts to $4,200 per person annually.[16] Total user fees for the one issuer would amount to approximately $3,164,000 or less.[17] The economic incentive of reduced costs may make it easier for greater issuer involvement in the MSP program.

The MSP program currently requires that issuers provide a plan for offering coverage statewide.[18] This requirement makes it relatively easier for larger issuers to offer coverage through the MSP program, as they are more likely to have networks established for providing statewide coverage. Because mandating statewide coverage could be a barrier that prevents additional issuers from entering the MSP program and could disadvantage smaller issuers, OPM, as it already intends, should pursue more flexibility in negotiating coverage area for MSP issuers rather than mandating statewide coverage.[19]

Another good suggestion OPM made in the rule change is its plan to be flexible with the package of benefits it requires new MSP issuers to provide.[20] While OPM seeks some flexibility, MSPs must meet certain requirements:

> MSPs are "qualified health plans" that must meet statutory standards, such as (a) provision of the 10 categories of essential health benefits, (b) coverage of preventive services, (c) age rating and pre-existing condition restrictions, (d) guaranteed issue and renewability requirements, and other requirements outlined in Title I of the ACA. Moreover, to ensure a level playing field, the ACA requires that all private and multistate plans must be subject to the same federal and state laws governing specific insurance practices: (a) guaranteed renewal and rating, (b) pre-existing conditions and nondiscrimination, (c) quality improvement and reporting, (d) oversight to prevent fraud and abuse, and (e) solvency and financial requirements.[21]

The director of OPM is only able to permit flexibility with four specific items for new MSP issuers.[22] The items are the plans' provider network adequacy, medical-loss ratio of the plans, profit margin of the plans, and the premiums to be charged. All four elements may considerably influence affordability. Any flexibility in benefits that the director can pursue to make joining the MSP program easier while enhancing competition on the exchanges is recommended.

OPM also plans to edit the definition of group of issuers and seeks comments on the definition in an effort to attract additional issuers to the MSP program. Specifically, OPM proposes the following definition:

> (1) A group of health insurance issuers that are affiliated either by common ownership and control or by common use of a nationally licensed service mark; or (2) an affiliation of health insurers and an entity that is not an issuer but owns a nationally licensed service mark.[23]

---

13. While Blue Cross Blue Shield is currently the only issuer, OPM has announced that Consumer Operated and Oriented Plans will also offer MSP options next year. See OPM, "FAQs."
14. See US map in Appendix A. Only two MSP options currently exist on 14 of the exchanges. In 2015, MSP options will be available on 36 exchanges, where 22 exchanges each provide five MSP options or fewer. See OPM, "FAQs."
15. OPM, *Patient Protection and Affordable Care Act*, 69807.
16. Ibid., 69809.
17. This number is calculated as follows: 371,000 x 0.002 X $4,200 = $3,164,000.
18. Affordable Care Act, § 1334 (e).
19. OPM, *Patient Protection and Affordable Care Act*, 69805.
20. Ibid., 69806.
21. See Appendix A.
22. Affordable Care Act, § 1334(a)(4).
23. OPM, *Patient Protection and Affordable Care Act*, 69804.

The definition permits a flexible association of issuers of health insurance. Affiliation by ownership of a nationally licensed service mark or affiliation by common use of a nationally licensed service mark does not require that a group of issuers be owned by one sole entity. This definition allows multiple issuers to affiliate together and may effectively help create national groups that can offer multistate plans. As a recommendation, if the definition can be loosened to attract additional issuers while maintaining the charge of the law, then it should. OPM should make inquiries with potential issuers to see if an alternative definition would boost participation in the MSP program.

One provision OPM should reconsider is a regulatory impact analysis. A regulatory impact analysis is required for proposed rules where the economic impact could amount to $100 million or more per year.[24] The proposed rule indicates that an estimated 371,000 people are enrolled in a MSP plan with average monthly premiums of $350, which amounts to $4,200 annually.[25] Assuming OPM's claims are correct and that premiums remain constant, regulatory changes to increase the number of MSP options could induce 23,810 or more new enrollees (a 6.4 percent increase in enrollees) to enter the MSP program. An increase in enrollees of 23,810 or more would amount to $100 million or more in additional annual revenue for MSP issuers. Therefore, because it is possible that an economic impact of $100 million or more could happen, which would constitute a "significant regulatory action," Executive Order 12866 requires that OPM conduct a regulatory impact analysis.[26] According to the Office of Information and Regulatory Affairs, a regulatory impact analysis would provide " . . . a clear explanation of the need for the regulatory action, . . . a range of alternative regulatory approaches, including the option of not regulating, [and] . . . an estimate of the benefits and costs—both quantitative and qualitative—of the proposed regulatory action and its alternatives."[27]

As another measure OPM can undertake, the period for comments on the proposed rule should be extended from 30 days to 90 days. The health insurance industry in the United States is complicated, as evidenced by the length of the ACA and the multitude of changes it enacts. The complexity of the health insurance industry in which the MSP program exists warrants a longer period of time for review of the proposed rule. Finally, a longer period for comment would leave time for a regulatory impact analysis to be conducted, which would provide more information on the possible impact of the proposed rule.

SUMMARY AND RECOMMENDATIONS

OPM appears to have not fully considered the possible effects of the proposed rule. The following are specific recommendations concerning the proposed rule:

1. The most significant potential effect of the proposed rule is that an economic impact of $100 million or more per year could materialize. Therefore, it is advisable that a full regulatory impact analysis be performed.

2. OPM may benefit from allowing additional time for additional comments. A period of 60 additional days may permit a more thorough analysis of the proposed rule.

3. Change the phase-in period, the period of time by which an MSP must make coverage available on all exchanges in the 50 states and the District of Columbia, to reduce this barrier to entry into the MSP program. OPM could reach out to potential MSP issuers to see if amending the phase-in period would enable their participation in the program.

---

24. Exec. Order No. 12866, 58 Fed. Reg. 190 (Sept. 30, 1993), § 3(f), http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
25. OPM, *Patient Protection and Affordable Care Act*, 69809.
26. Exec. Order No. 12866, § 3(f)(1) defines significant regulatory action as "...any regulation that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."
27. Office of Information and Regulatory Affairs, *Regulatory Impact Analysis: A Primer*, http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

4. Encourage strong participation by MSP enrollees or their representatives on the MSP Program Advisory Board to increase competition through consumer advocacy. OPM appears to be pursuing a course of action commensurate with this recommendation by ensuring that a significant percentage of members on the MSP Program Advisory Board are MSP enrollees or their representatives.

5. Provide a reduction in user fees for a given period of time to promote faster participation by MSP issuers on exchanges where competition is lacking. The reduction in user fees could also be used to incentivize more issuers to enter the MSP program and deliver statewide coverage to consumers.

6. As OPM proposes, it should negotiate with issuers to determine the coverage area for an issuer rather than requiring that a coverage area must be statewide.

7. As OPM suggests, it should be more flexible regarding the package of benefits to bring new issuers to the MSP program in an effort to enhance competition on the exchanges.

8. OPM should edit and obtain comments on the definition of group of issuers in an effort to attract additional issuers to the MSP program, as the agency intends.

CONCLUSION

OPM's rule change puts forth a number of possible avenues of change in the MSP program. To fully address anti-competitive concerns, OPM needs to carefully assess the potential impact of the alterations it intends to carry out. The rule change would benefit from a longer period of comment, a complete regulatory impact analysis, an expanded phase-in period, an assignment of a substantial number of seats on the MSP Advisory Board to MSP consumers or their representatives, a temporary reduction in user fees to expand participation in the MSP program, flexible negotiations on benefits and coverage area, and a loosening of the definition of group of issuers. In essence, any changes that would make participation in the MSP program more attractive and easier should promote competition on the new exchanges. Additional information on the possible impact of any changes is also needed to fully assess the intended and unintended consequences of possible actions by OPM. Competition in the health care industry may be augmented if OPM's efforts result in the addition of several issuers. If not, the MSP program could be a vehicle for reinforcing concentration in the insurance industry.