



September 22, 2017

Submitted Electronically via Email: StateInnovationWaivers@cms.hhs.gov

Hon. Thomas E. Price, MD
Secretary
United States Department of Health & Human Services
200 Independence Avenue, SE
Washington, D.C.20201

RE: Comments on the State of Oklahoma's Application for a State Innovation Waiver Under Section 1332 of the Patient Protection and Affordable Care Act

Dear Secretary Price:

The Self-Insurance Institute of America, Inc. ("SIIA") respectfully submits these comments in response to the State of Oklahoma's application for a State Innovation Waiver under Section 1332 of the Patient Protection and Affordable Care Act ("ACA"). While SIIA is not opposed to Oklahoma's Section 1332 Waiver request in general, SIIA believes the Department of Health and Human Services ("HHS") should require Oklahoma to modify its application and remove the proposed assessment on self-insured health plans that purchase "stop-loss" insurance coverage (an assessment intended to fund the Oklahoma Individual Health Insurance Market Stabilization Program ("OMSP")).

SIIA is a member-based association dedicated to protecting and promoting the self-insurance and alternative risk transfer industry, both domestically and internationally. SIIA's membership includes: self-insured employers; excess, stop-loss and reinsurance carriers; captive insurance benefit managers; risk retention groups; and third-party administrators.

The ACA Unfairly Burdened Employers and Employee Organizations by Imposing an Assessment on Self-Insured Group Health Plans to Fund the "Transitional Reinsurance Program"

As you know, the ACA created the "transitional reinsurance program," a 3-year program under which HHS made payments to certain health insurance carriers selling ACA-compliant "individual" market health plans. Funding for the transitional reinsurance program was derived from an assessment imposed on (1) health insurance carriers selling ACA-compliant "individual" market health plans *and* (2) third-party administrators on behalf of self-insured group health plans (which

was later interpreted by HHS to mean employers and employee organizations sponsoring a self-insured plan).

It is important to emphasize that sponsors of self-insured group health plans were *not* eligible to receive any payments under the ACA’s transitional reinsurance program. Yet, these self-insured plan sponsors were burdened by a new – and *significant* – financial obligation to fund a program that provided them no direct or indirect benefit. In short, sponsors of a self-insured group health plan were used as a “piggy-bank” to pay for a mandated-program that only provided aid to fully-insured carriers, and in no way helped these self-insured plan sponsors to reduce their health costs. In fact, costs for the plan sponsor increased and/or costs were often passed through to individuals covered under the self-insured plan.

Put simply, the transitional reinsurance program’s assessment on sponsors of self-insured group health plans is bad precedent. As a result, HHS should not permit States – through a Section 1332 Waiver – to follow such bad precedent and similarly tap self-insured group health plans as a funding source for, among other things, a State-sponsored reinsurance program. The outcome will simply be higher costs for the sponsor and/or increased costs for the consumer.

Oklahoma’s Section 1332 Proposed Assessment Will Adversely Impact Small- and Mid-Sized Employers Choosing to Sponsor a Self-Insured Health Plan

As set forth in Oklahoma’s Section 1332 application, “ERISA plans” (i.e., self-insured health plans) purchasing “stop-loss” insurance coverage shall be assessed a per-member-pre-month fee. The application also indicates that self-insured health plans *not* purchasing stop-loss coverage shall be exempted from paying the assessment, thus unduly burdening small- and medium-sized businesses who can least afford to incur additional costs.

To clarify, stop-loss insurance coverage is *not* health insurance coverage. More specifically, stop-loss insurance does *not* provide insurance coverage to an individual covered by a health plan, nor does stop-loss pay health care providers. Rather, stop-loss insurance is a product that a sponsor of a self-insured health plan obtains to provide a financial backstop guarding against catastrophic health care claims. The coverage provides a reimbursement mechanism between the insurance carrier selling the stop-loss coverage and the self-insured plan sponsor for claims exceeding pre-determined levels, known as “attachments points.”

In most if not all cases, small- and mid-sized employers sponsoring a self-insured health plan purchase stop-loss coverage as a risk mitigation tool. While large employers may purchase stop-loss coverage for financial protection, that is not always the case as they are more financially capable of handling unexpected, catastrophic claims. However, without stop-loss insurance, most small- and mid-sized employers would not be able to sponsor a self-insured health plan at all.

As a result, imposing an assessment on a self-insured health plan purchasing stop-loss coverage may force self-insured small- and mid-sized employers to discontinue their health plan. Such actions are contrary to public policy and the Federal government’s desire to provide “choice” when it comes to health insurance coverage (e.g., in the case of an employer or employee

organization, the ability to “choose” whether a fully-insured or self-insured health plan is the right type of health coverage for their business model and their employee population).

Even in cases where the sponsor of a self-insured plan purchasing stop-loss continues to offer health coverage, any assessment will simply increase costs for the plan sponsor and/or individuals covered under the plan. Most importantly, because larger employers may not need stop-loss coverage, the assessment burdens will fall disproportionately on small- and mid-sized employers who, as stated, are the types of organizations that purchase stop-loss coverage when sponsoring a self-insured plan and can least afford an additional financial burden.

State Assessments Imposed on Self-Insured Health Plans Could Be Pre-Empted by the Employee Retirement Income Security Act of 1974

SIIA recognizes that HHS does not have jurisdiction over the Employee Retirement Income Security Act (“ERISA”), however, State assessments imposed on self-insured health plans may be pre-empted by ERISA. It is important to point out that the Department of Labor (“DOL”) – which is the agency primarily tasked with administration of ERISA – takes the view that a State law regulating stop-loss insurance coverage is not pre-empted by ERISA (see DOL Technical Release 2014-01). However, the DOL has not opined on whether a State assessment imposed on a self-insured plan purchasing stop-loss coverage is pre-empted by ERISA.

SIIA recently asked a Federal court to determine whether a State law imposing a tax on health claims paid by a self-insured health plan was pre-empted by ERISA (see *Self-Insurance Institute of America, Inv. V. Snyder*). While the 6th Circuit Court of Appeals concluded that the State tax at issue was not pre-empted by ERISA, SIIA continues to believe that ERISA pre-emption does apply in cases of a State tax – or assessment – on a self-insured plan. Although the Supreme Court recently denied a writ of certiorari to uphold or over-turn the 6th Circuit’s decision (*Self-Insurance Institute of America Inc. v. Rick Snyder, et al., No. 16-593, U.S. Sup.*), SIIA is prepared to file an ERISA pre-emption claim against an assessment that may arise in a State outside of the 6th Circuit.

It is important to note that in *Gobeille vs. Liberty Mutual*, the Supreme Court decidedly favored ERISA pre-emption of State laws that impact a self-insured plan’s reporting and record-keeping responsibilities. In *Gobeille*, the majority of the Court indicated that pre-emption of a State law is necessary to prevent multiple jurisdictions from imposing differing regulations on self-insured plans. SIIA believes that a State assessment on a self-insured plan purchasing stop-loss coverage would similarly impact the plan’s reporting and record-keeping responsibilities, and we further believe that it would be contrary to ERISA’s purpose of providing uniformity if multiple jurisdictions were to enact similar State assessments on self-insured plans. As such, HHS should require Oklahoma to modify its application and remove the proposed assessment on self-insured plans.

Thank you in advance for considering these comments. Please do not hesitate to contact me if you have questions, or if members of SIIA can serve as a resource on these very important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Ferguson", with a long horizontal flourish extending to the right.

Mike Ferguson
President and Chief Executive Officer
Self-Insurance Institute of America, Inc.



September 22, 2017

Re: Oklahoma Section 1332 State Innovative Waiver

The Cystic Fibrosis Foundation, which supports the research and development of cystic fibrosis (CF) therapies and represents people with CF in efforts to gain access to quality specialized health care, appreciates the opportunity to comment on Oklahoma's 1332 State Innovation Waiver to operate a reinsurance program.

Cystic fibrosis (CF) is a life-threatening genetic disease that affects 302 people in Oklahoma and 30,000 children and adults in the United States. CF causes the body to produce thick, sticky mucus that clogs the lungs and digestive system, which can lead to life-threatening infections. As a complex, multi-system condition, CF requires targeted, specialized treatment and medications.

People with CF benefit from marketplaces with plans that are both affordable and adequate. We support the state's efforts to use reinsurance or "invisible" high risk pools to stabilize the insurance market. Based on the experience of the federal reinsurance program under the Affordable Care Act and Maine's "invisible" high risk pool, we believe this is a model that can be used to slow premium growth and protect against risk selection. The American Academy of Actuaries estimated that the federal reinsurance program reduced premiums by 10 to 14 percent in the individual market in 2014.¹ An analysis of Maine's "invisible" high risk pool found that the program significantly reduced premiums in the state's individual market as well.² We support the state's creation of a reinsurance program that will make coverage more affordable for individuals in the state, including people with CF, and ensure adequate plan choice in the marketplaces.

While we believe reinsurance can help insurance markets function better, this program must be layered on top of additional protections for patients such as the prohibition on medical underwriting, ban on annual and lifetime coverage caps, guarantee of essential health benefits, and out-of-pocket maximums. Although not included in the state's final waiver application, we are concerned with suggestions outlined in the state's 1332 Task Force Concept Paper, which the state has expressed interest in implementing should it be given more federal flexibility to allow for larger reforms. From the proposals outlined in the 1332 Task Force Concept Paper, we are particularly concerned with the following suggestions:

Re-establishment of high risk pools

The concept paper states that with supportive federal funding, the state will evaluate the re-establishment of a high-risk pool for the purpose of providing coverage to two primary groups, one of which is for enrollees with high cost conditions and utilization. Prior to the Affordable Care Act, high risk pools did not meet the needs of most people with CF. High premiums, waiting periods, enrollment caps,

¹ American Academy of Actuaries. *Drivers of 2015 Health Insurance Premium Changes*. (Online). June 2014. Available: https://www.actuary.org/files/2015_Premiums_Drivers_Updated_060414.pdf

² Bagley, Nicholas et. Al. *Making Sense of "Invisible Risk Sharing"*. Brookings. (Online). April 2017. Available: <https://www.brookings.edu/blog/up-front/2017/04/12/making-sense-of-invisible-risk-sharing/>

coverage limits, and pre-existing condition benefit exclusions were some of the serious problems facing our community when getting coverage through a high risk pool.

Re-evaluation of essential health benefits package

The concept paper also states that Oklahoma plans to re-evaluate and reduce the essential health benefits package as required by the Affordable Care Act. People with CF rely on comprehensive health insurance to cover the specialized care and treatments they need to maintain their health and well-being, including coverage of prescription drugs, mental health, outpatient care, and hospitalizations. Eliminating the guarantee of essential health benefit coverage for individual insurance plans would segment the market into plans for sick people and plans for healthy people. This would make plans for people with CF more expensive and jeopardize their ability to access vital care.

Furthermore, should the state decide to weaken or eliminate its essential health benefit standards, it could effectively eliminate safeguards against annual and lifetime limits, as this protection is tied to the definition of essential health benefits. The prohibition on annual and lifetime benefit caps is critical to ensuring adequate health care for people with CF as health care costs can accumulate very quickly, making it easy to reach a coverage cap.

Premium subsidy structure

The 1332 task force suggested increasing the age rating variance and therefore, making changes to the premium subsidy calculations to include age. We urge the state to ensure that premium subsidies are based on income, not age. While people with CF continue to enjoy longer and healthier lives, approximately 75% of the population is under 30 years old; therefore, age should not be used as an indicator for health. We are concerned that tying premium subsidies to age instead of income could put adequate coverage financially out of reach for young people with CF. People with CF need plans that cover high-quality, specialized care at accredited cystic fibrosis care centers and provide access to life saving therapies. Plans are expensive and younger, low-income people with CF need adequate financial support to purchase a plan that will allow them to get the care they need.

The Cystic Fibrosis Foundation appreciates the opportunity to provide input on these important policy changes. As the health care landscape continues to evolve, we look forward to working with the state of Oklahoma to ensure high-quality, specialized CF care and improve the lives of all with cystic fibrosis. Please consider us a resource moving forward.

Sincerely,



Mary B. Dwight
Senior Vice President of Policy
& Patient Assistance Programs
Cystic Fibrosis Foundation



Lisa Feng, DrPH
Senior Director of Access Policy & Innovation
Cystic Fibrosis Foundation

September 22, 2017

Centers for Medicare & Medicaid Services
7500 Security Boulevard, Baltimore, MD 21244
StateInnovationWaivers@cms.hhs.gov

Re: Oklahoma Section 1332 Waiver Application

The undersigned submit the following comments regarding Oklahoma's Application for a 1332 Waiver under the rules established by the Affordable Care Act (ACA) and enforced by the Centers for Medicare and Medicaid Services (CMS).

Employers' Interest in Oklahoma's Section 1332 Waiver Application

The business community recognizes the importance of a stable individual insurance market and supports state efforts to increase flexibility, lower costs, and ensure that state residents can obtain affordable health insurance. However, employers already provide stable health care benefits to more than 177 million Americans—the largest source of health coverage in the country. In Oklahoma alone, almost half of the population receives health care coverage through an employer-sponsored plan.¹ Assessments on employer-sponsored insurance, such as the one proposed in Oklahoma's Section 1332 Waiver Application to fund a reinsurance program, penalize businesses that have been a source of quality, affordable health insurance since World War II. The result will be higher costs for employers and workers, reduced stability for some employer-sponsored plans, and administrative burdens that jeopardize the national uniformity of benefits administration for ERISA plans. **As such, CMS should approve Oklahoma's 1332 Waiver Application only if ERISA plans are completely exempted from the states individual market reinsurance program assessments and reporting.**

Comments

I. Oklahoma's Section 1332 Waiver application is preempted by ERISA and should be modified in order not to impact ERISA plans.

Pursuant to Oklahoma House Bill 2406, the waiver would place a per-member-per-month assessment on insurers and reinsurers to fund a reinsurance program in the state. The legislation defines "insurer" as "any individual, corporation, association, partnership, fraternal benefit society or any other entity engaged in the health insurance business, except insurance agents and brokers."² Additionally, the Waiver Application states that the assessment will be applied to ERISA plans that purchase stop-loss coverage.

The Employee Retirement Income Security Act (ERISA) preempts state laws that "relate to" employer-sponsored health plans.³ This preemption is applicable when a state law directly refers to ERISA plans or when it would impact ERISA plans either administratively or financially. Under the Oklahoma Waiver Application, both cases for preemption apply. The Application explicitly references ERISA plans that purchase stop-loss coverage, and it would place administrative and financial burdens on these plans in the form of paying for and complying with a new assessment. Congress created ERISA to keep employee benefit plans strong and to ensure that they are

¹ Health Insurance Coverage of the Total Population, The Henry J. Kaiser Family Foundation, 2015, <http://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&selectedRows=%7B%22states%22:%7B%22oklahoma%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

² Individual Health Insurance Market Stabilization Act, H.B. 2406, Okla. (2017), http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB2406%20ENR.PDF.

³ 29 U.S.C. § 1144(a), <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/pdf/USCODE-2011-title29-chap18.pdf>.

administered for the exclusive purpose of providing benefits to participants and their beneficiaries. In fact, using plan funds to pay for a reinsurance program that provides no benefit to plan participants would be a violation of ERISA. We understand the need for Oklahoma to fund its reinsurance program, but we urge CMS to remove ERISA plans from the proposed assessment and continue ERISA's protections of these plans.

II. Oklahoma's Section 1332 Waiver adopts flawed policy from the ACA.

In order to stabilize individual markets for health insurance in the early years of ACA implementation, the law included a temporary national reinsurance program that included fees assessed on self-insured plan sponsors. This 3-year program transferred funds from self-insured employer-sponsored plans into the individual market, providing no benefit to those employers or their plan beneficiaries. The result was higher costs to individuals and families enrolled in employer-sponsored plans in order to artificially lower costs for those on the individual market.

Employers will no longer be subject to this fundamentally unfair assessment on the national level. It makes little sense for CMS to now authorize states to engage in the same flawed exercise, which has resulted in increased costs for significantly more consumers than those who benefitted from the program.

III. Oklahoma's Section 1332 Waiver may adversely impact the use of stop-loss coverage, as well as employer-sponsored coverage.

Oklahoma's proposed assessment for funding a reinsurance program would apply to ERISA plans that purchase stop-loss coverage, but not those that refrain from purchasing it. According to the Application, the state estimates that about 90% of ERISA plans in Oklahoma purchase this coverage. Stop-loss coverage provides protection to self-funded plans so that the plan sponsor does not face 100 percent of the liability for losses the plan might incur through participants' claims. In our experience, almost all self-funded plans make the responsible decision to purchase stop-loss coverage.

As the proposed assessment exempts those plans that do not purchase stop-loss coverage, it creates an incentive not to purchase the protection. Without stop-loss coverage, plan sponsors will be exposed to 100 percent of the plan's liabilities, which could result in higher premiums for plan participants. CMS should not promote policies that incentivize plans to forego stop-loss coverage.

Other employers may be unwilling to take on the risk associated with sponsoring a plan without stop-loss coverage, and as a result, may choose to discontinue offering coverage to employees and their families. This result is contrary to both the goals of the ACA, as well as to the rules governing the 1332 waiver process. CMS should not approve a 1332 waiver application that is likely to result in reduced employer coverage, as this could increase the number of uninsured, increase federal deficits by causing more individuals to become eligible for federal health insurance premium tax credits, and reduce the stability of a state's individual market by causing a sudden influx of plan participants not accounted for in actuarial models used to calculate premiums.

IV. Oklahoma's Section 1332 Waiver will increase premiums for individuals covered by employer-sponsored insurance and create an administrative burden for plan sponsors.

Oklahoma's Section 1332 Waiver Application acknowledges that, "It is possible that this [assessment] may be passed-through to employees in the form of slightly higher plan contributions or additional cost sharing requirements." Although the state estimates the assessment to be less than 1% of an average employer's premium costs, there is no way to guarantee that the amount will not be significantly more. Even a small per-member-per-month assessment can quickly add up to a substantial dollar amount, depending on the number of covered lives a particular plan sponsor has in the state. In order to offset that impact, many employers will need to increase the amount of an employee's contribution toward their health insurance premiums. Even a small amount passed on to

an employee through increased premiums could have a significant impact on some individuals, and it could cause some current plan beneficiaries to forego coverage or to take up coverage but forego needed care.

Next, Oklahoma's Section 1332 Waiver states that, "The additional administrative burden on health plans as a result of this waiver will be minimal." However, insurers and self-insured employers in Oklahoma will have to submit to the state information on their plan participants in order for the amount of the assessment to be calculated. This will be an additional requirement added to the litany of compliance burdens that plan sponsors already face, and for multi-state employers, will give rise to a patchwork of varying and conflicting state reporting requirements. The Supreme Court of the United States recently found in *Gobeille v. Liberty Mutual* that Vermont's health care claims database law was preempted from placing reporting requirements on ERISA plans. The reporting requirements pursuant to Oklahoma's reinsurance program will not be merely incidental, but will be a crucial part of planning and running the reinsurance program, and as such will likely be preempted by ERISA.

Conclusion

CMS should approve Oklahoma's Section 1332 Waiver Application only after modification that both removes ERISA plans from being subject to reinsurance assessments and reporting requirements and ensures that all relevant parties required to pay into the reinsurance pool are represented on the Board of Directors.

Thank you for this opportunity to comment, and please feel free to contact any of the undersigned organizations for further information.

Sincerely,

The ERISA Industry Committee
HR Policy Association
National Association of Wholesaler-Distributors
Self-Insurance Institute of America, Inc.