September 22, 2017

Centers for Medicare & Medicaid Services
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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

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[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.