



NY State of Health Comments on Changes to Basic Health Program Regulations

NY State of Health, the State's Official Health Plan Marketplace, is writing to comment on the notice of proposed rulemaking released by the Department of Health and Human Services (HHS), through the Centers for Medicare & Medicaid Services (CMS). As a state-based health insurance marketplace offering a Basic Health Program (BHP), NY State of Health is in support of the released proposal to allow states to temporarily suspend their BHP programs, while retaining accrued funds in the BHP Trust Fund. However, the State encourages CMS to allow for continued use of accrued Trust Fund dollars for the BHP-eligible population, as this population will continue to be served throughout the duration of the suspension. NY State of Health also supports offering notices in plain language and following the Public Health Emergency (PHE) Unwind, implementing a process for health service appeals within the Marketplace.

- **CMS proposes that states validate that the benefits, premiums, and cost-sharing for current BHP enrollees will be similar or substantially similar under an alternative coverage plan as it was under BHP.**

New York supports efforts to enforce a structure similar to the “affordability guardrail” under a section 1332 waiver to the Affordable Care Act to ensure consistency in benefits and costs for consumers. In order to minimize burden on both CMS and states applying for suspension, New York recommends that states be allowed to leverage relevant parts of their section 1332 waiver application and actuarial and economic analysis to provide the necessary supporting evidence for their BHP suspension applications since aspects of the 1332 application serve a similar purpose.

- **CMS proposes that under a suspended BHP, the eligibility criteria for the formerly BHP eligible population should not change such that eligibility would be more restrictive under the alternative coverage plan.**

New York strongly supports CMS' proposal to ensure formerly BHP eligible consumers are not subject to more restrictive eligibility rules under an alternative coverage plan while the BHP is suspended.

- **CMS proposes a maximum BHP suspension period of ten years.**

Given the complexity and scale of implementing program and eligibility changes that impact the entire BHP population and, in many cases, additional populations, New York recommends that CMS allows for suspension beyond ten years if the circumstances in states could reasonably justify longer suspension periods, subject to CMS approval.

- **CMS proposes that states continue to submit BHP Annual Reports for the duration of BHP suspension.**

To the extent that states will already be required to submit annual reports to CMS regarding section 1332 waiver implementation that contain similar elements, New York recommends that

states only be required to submit the sections of the BHP Annual Report pertaining to financial management and audit findings for the BHP suspension reporting.

- **CMS proposes that states may not use funds from the BHP trust fund toward the unwinding of the BHP program and transition to the new coverage program, including premiums, cost-sharing, additional benefits, and administrative expenses.**

Given the requirement that the premiums, cost-sharing, and benefits for current BHP consumers under alternative coverage be similar or substantially similar to the current BHP premium, cost-sharing, and benefits, and that BHP trust funds can be used for no other purpose during the suspension, absent other Congressional or Executive actions, New York recommends that states be able to use BHP trust funds for the duration of the suspension on, at a minimum, the same permissible uses were these consumers still within the BHP.

To grant the requested flexibility, CMS could use statutory authority for a "coordinated waiver process" provided by section 1332(a)(5). While BHP is not described by the statute as a waiver, in form and structure that is precisely what it is; a state may "waive" premium tax credits for eligible individuals and permit them to receive a different federal benefit. Thus, BHP may be considered a waiver, and a combined program may be considered a coordinated waiver. Indeed, the coordination between health programs is precisely the type of innovation this provision seeks to promote.

To support transition to a 1332 waiver, New York also recommends that a state may temporarily keep individuals in a BHP defined by Section 1331 of the Affordable Care Act, while accruing passthrough funding under section 1332 of the Affordable Care Act. There is generally broader authority for actions to smooth transitions in policy. For example, CMS regulations implementing the BHP already, at 42 CFR 600.145(e), provide for transitional measures that may depart from normal rules.

- **CMS proposes that a State that would like to suspend its BHP apply to do so 9 months in advance or within 30 days of finalizing the rule.**

New York appreciates the opportunity to work with CMS on the timing of submission of its suspension application as part of its 1332 waiver application that is currently under review.

- **CMS proposes that BHP enrollees should be able to appeal decisions about health service matters through the Exchange itself.**

New York supports consumer-friendly processes and recognizes the benefits of centralizing Exchange-related procedures, to the extent practicable. However, individual states have structured and operate Exchanges differently. We support providing individual states with the flexibility to establish or maintain health service appeals involving health plan issuers in designated agencies which, in the individual state, are appropriate and in the best position to serve the needs of consumers.

States should be permitted flexibility to establish the health service appeals process in a manner that takes individual states' needs into account. In New York, BHP enrollees currently appeal decisions about health service matters through the New York State Department of Financial Services ("DFS"), which has extensive experience with external appeals.

The process of operationalizing a new appeals process would require considerable time and resources, including staffing, training, and IT system development, to develop and/or procure. Individual states will be focused on Public Health Emergency (“PHE”) Unwind for approximately the next year, to maintain eligible consumers in coverage. As a result, to the extent that specific changes regarding health service appeals are required, we would recommend an extended timeframe for implementation (i.e., 3 to 5 years), to allow for the completion of the PHE Unwind and resumption of typical renewal / open enrollment cycles and minimize any negative impact on consumers.

New York is unsure of how the proposed change would impact the volume of appeals.

New York requests clarification on whether an appellant must exhaust utilization review and external appeals before filing a health service appeal through the proposed BHP appeal process.