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OFFICE OF PERSONNEL MANAGEMENT
5 CFR Part 890
RIN 3206–AM85

Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits (FEHB) Program regulations regarding coverage for Members of Congress and congressional staff.

DATES: Effective Date: October 2, 2013.

FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger at (202) 606–0004.

SUPPLEMENTARY INFORMATION: This final rule amends Federal Employees Health Benefits (FEHB) Program regulations to comply with Section 1312 of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act).

On August 8, 2013, the Office of Personnel Management (OPM) published a proposed rule inviting comments on amendments to the FEHB Program regulations. The 30-day comment period ended on September 9, 2013. In response to this proposed rule, OPM received nearly 60,000 comments. The comments are summarized and discussed below. OPM will provide additional guidance as deemed necessary.

Comments on Section 1251(a) of the Affordable Care Act

Several commenters requested that OPM review Section 1251(a) of the Affordable Care Act, which provides continuity of coverage for individuals covered under a group health plan. These commenters suggested that Section 1251(a) provides grounds for “grandfathering” current FEHB-eligible Members of Congress and congressional staff members into their current coverage and applying the requirements of Section 1312 only to Members of Congress and congressional staff hired on or after January 1, 2014.

OPM is not amending the rule in response to these comments. While OPM acknowledges that, in general, the Affordable Care Act did not intend to disrupt existing health insurance coverage, in this context, the Act included clear and unambiguous language providing that all Members of Congress and congressional staff employed by the official office of a Member of Congress be subject to the terms of Section 1312 regardless of their dates of employment. Thus, the final rule implements Section 1312 of the Affordable Care Act as written.

Comments About the Method by Which Congressional Staff Are Designated as Covered by § 1312 of the Affordable Care Act

OPM received several comments related to health care coverage for congressional staff and how staff will be designated for the purpose of determining which individuals are required to purchase their health insurance coverage from an Exchange. OPM has not amended the final rule on the basis of these comments. OPM continues to believe that individual Members or their designees are in the best position to determine which staff work in the official office of each Member. Accordingly, OPM will leave those determinations to the Members or their designees, and will not interfere in the process by which a Member of Congress may work with the House and Senate Administrative Offices to determine which of their staff are eligible for a Government contribution towards a health benefits plan purchased through an appropriate Small Business Health Options Program (SHOP) as determined by the Director.

Nothing in this regulation limits a Member’s authority to delegate to the House or Senate Administrative Offices the Member’s decision about the proper designation of his or her staff. The final rule has been amended to provide an extension for staff designations affecting plan year 2014 only. Designations for individuals hired throughout the plan year should be made at the time of hire.

Comments on Incorporating Exchange Plans Under the § 8901(6) Definition of “Health Benefit Plan Under This Chapter”

Some commenters questioned OPM’s decision to incorporate Exchange qualified health plans into the Section 8901(6) definition of a health benefits plan. OPM maintains its position that, because the Affordable Care Act did not alter the definition of “health benefits plan” under 5 U.S.C. 8901(6) and because the statutory definition of “health benefits plan” would otherwise apply to an Exchange qualified health plan, this regulation is an appropriate exercise of OPM’s interpretive authority under Chapter 89.

OPM has been provided the statutory authority to administer health benefits to Federal employees (as defined in 5 U.S.C. 8901(1)). Because Section 1312 of the Affordable Care Act did not remove Members of Congress or congressional staff from the Chapter 89 definition of “employee,” it is within OPM’s interpretive authority under Chapter 89 to clarify that a Government contribution may be provided to, and to establish the means for a Government contribution towards health benefits for, Members of Congress and congressional staff, just as we do for other Federal employees.

Comments on Government Contributions

Numerous commenters questioned OPM’s proposal to extend a Government contribution for Members of Congress and congressional staff purchasing health plans through the individual market Exchanges. Many commenters expressed their view that a Government contribution is antithetical to the intent of Section 1312 of the Affordable Care Act, which they interpret to require Members of Congress and congressional staff to purchase the same health insurance available to private citizens on the Exchanges. Commenters asserted that Members of Congress and congressional staff should be subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility for
premiums and income restrictions for premium assistance. As described in the proposed rule, because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate that the provisions that authorize an employer contribution for “health benefits plans under this chapter” includes health benefits plans fitting within the definition set forth in Section 8901(6). Nothing in this rule or the law prevents a Member of Congress or designated congressional staff from declining a Government contribution for himself or herself by choosing a different option for his/her health insurance coverage. The proposed rule was silent on whether eligible individuals would select qualified health plans through an Exchange in the individual or small group market by way of the SHOP. Because a Government contribution is, in essence, an employer contribution, the final rule clarifies that Members of Congress and designated congressional staff must enroll in an appropriate SHOP as determined by the Director in order to receive a Government contribution. SHOPs are designed to provide employer-sponsored group health benefits and are, therefore, the appropriate environment in which to provide an employer contribution to Members of Congress and congressional staff. Further, this ensures that Members of Congress and congressional staff do not have additional choices in the individual market with a Government contribution that other individuals lack. Given the location of Congress in the District of Columbia, OPM has determined that the DC SHOP, known as the DC Health Link Small Business Market administered by the DC Health Benefit Exchange Authority, is the appropriate SHOP from which Members of Congress and designated congressional staff will purchase health insurance in order to receive a Government contribution. OPM intends to work with the DC Health Benefits Exchange to implement this rule. Nothing in the final rule limits an individual from purchasing health insurance through other methods including the individual market Exchanges. Members of Congress and designated congressional staff are subject to the same requirements as citizens purchasing insurance on the Exchanges, including individual responsibility. Access to the Government contribution through the SHOP limits their eligibility for premium tax credits available through the individual market Exchanges. OPM was also asked to provide additional details on how the Government contribution will be calculated. The formula for Government contributions is set forth in 5 U.S.C. Section 8906. Comments on Retirement Numerous commenters have urged OPM to reconsider its position that Section 1312 affects annuitant health insurance benefits. Section 1312 only addresses the health benefits plans that the Federal Government may offer Members of Congress and congressional staff employed by the official office of a Member of Congress while they are employed in those positions. This provision neither amended any of the sections of Chapter 89 relating to annuitant health benefits nor otherwise indicated that the provision applies to annuitants. Because we agree with the central premise of these comments, we have deleted the proposed language in Section 890.501(b)(1) and (2) referring to annuitants. We make this change for the additional reason that, otherwise, Members of Congress and congressional staff would have broader health insurance options in the Exchange in retirement than are available to other Federal annuitants. Members of Congress and congressional staff will be subject to the same rules of participation in the FEHB Program in retirement as other Federal annuitants. During the comment period, OPM was asked to clarify the effect of this regulation on current congressional retirees. Under the final rule, congressional retirees who are currently enrolled in plans contracted for and approved by OPM will not be affected and will continue enrollment in their current plans. In addition, OPM was asked if time covered under a plan purchased through the appropriate SHOP with a Government contribution would count towards the 5-year requirement to carry coverage into retirement. Time spent under a plan purchased on the appropriate SHOP as determined by the Director and purchased pursuant to Section 1312 of the Affordable Care Act will count towards the time requirement outlined in Chapter 89 Section 8905(b). OPM was also asked to clarify the impact of this regulation on reemployed annuitants. This final rule does nothing to affect the choices available to a reemployed annuitant. As a general matter, upon reemployment an annuitant participating in the FEHB Program may either to continue that coverage without premium conversion through OPM or to have his/her enrollment transferred to his/her employing office. Coverage of Abortion Services OPM received over 59,000 comments regarding coverage of abortion services for Members of Congress and congressional staff. More than 51,000 of these requested that plans available to Members of Congress and congressional staff include abortion services. Current law prohibits the use of Federal funds to pay for abortions, except in the case of rape, incest, or when the life of the woman is endangered, and the Smith Amendment in particular makes no funds available “to pay for abortions or administrative expenses in connection with health plans under the FEHBP which provides any benefits or coverage for abortions.” Neither the proposed nor final regulation alters these prohibitions. Under OPM’s final rule, no Federal funds, including administrative funds, will be used to cover abortions or other Federal annuitants. Unlike the health plans for which OPM contracts pursuant to 5 U.S.C. 8902, 8903 and 8903a, OPM does not administer the terms of the health benefits plans offered on an Exchange. Consequently, while plans with such coverage may be offered on an Exchange, OPM can and will take appropriate administrative steps to ensure that the cost of any such coverage purchased by a Member of Congress or a congressional staffer from a designated SHOP is accounted for and paid by the individual rather than from the Government contribution, consistent with the general prohibition on Federal funds being used for this purpose. Comments on Effective and Termination Dates OPM was asked to clarify the termination date for current FEHB plan coverage. Current FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress will terminate at midnight on December 31, 2013. Members of Congress and designated congressional staff who choose to purchase health insurance through the appropriate SHOP as determined by the Director may do so with an effective date of January 1, 2014. OPM will provide additional guidance regarding effective and termination dates as deemed necessary. Comments on Eligibility for Other Federal Benefits OPM received one comment requesting clarification on the eligibility of Members of Congress and
congressional staff to participate in other Federal benefits programs administered by OPM. Section 1312 and this rule only pertain to Members’ or congressional staff’s health benefits plans.

Comments About Insurance Coverage for Representatives of U.S. Territories

OPM received a comment from the representatives of U.S. Territories. Because these Members of Congress represent geographic areas where there may not be a health insurance Exchange, commenters expressed concern that these representatives would lose health coverage if removed from current FEHB plan eligibility. Three solutions were suggested: allow these Members and their staff to maintain current FEHB plan coverage, allow them to enroll in a DC-based or Federal Exchange, or allow them to enroll in a Federal Exchange established for territories for this purpose.

After reviewing these options, OPM has determined that, like other Members of Congress and congressional staff, representatives from the U.S. Territories and their staff who want to receive a Government contribution will enroll for coverage through the appropriate SHOP as determined by the Director.

Comments About the Affordable Care Act

OPM received several comments expressing opinions about the Affordable Care Act as a whole. Other comments more specifically addressed the requirement in Section 1312 to remove Members of Congress and congressional staff from current FEHB plan coverage. Some indicated that the decision to remove Members of Congress and congressional staff from current FEHB plan coverage would have detrimental effects to these individuals. Others felt that the provision should only apply to Members of Congress and not to congressional staff. Others indicated that Members of Congress should not be provided with employer-based health coverage at all. The majority of these comments have been addressed in the above discussion. The remaining comments regarding the Affordable Care Act are beyond the scope of this regulation and are not addressed.

Additional Comments

OPM received additional comments regarding coverage of pathology services, Health Reimbursement Arrangements, and employer shared responsibility. These comments have been deemed outside the scope of this regulation and are not addressed in the final rule. In addition, OPM received requests for operational details about the administration of benefits for Members of Congress and designated congressional staff. Most of these questions have been responded to in the final rule. In addition, OPM plans to provide operational guidance in future communications as deemed necessary.

In addition to the changes described above, the final rule includes non-substantive, editorial changes to improve clarity.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only involves the issue of where Members of Congress and certain congressional staff may purchase their health insurance, and does not otherwise alter the FEHB program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administration and general provisions, Health benefits plans, Enrollment, Temporary extension of coverage and conversion, Contributions and withholdings, Transfers from retired FEHB Program, Benefits in medically underserved areas, Benefits for former spouses, Limit on inpatient hospital charges, physician charges, and FEHB benefit payments, Administrative sanctions imposed against health care providers, Temporary continuation of coverage, Benefits for United States hostages in Iraq and Kuwait and United States hostages captured in Lebanon, Department of Defense Federal Employees Health Benefits Program demonstration project, Administrative practice and procedure, Employee benefit plans, Government employees, Reporting and recordkeeping requirements, Retirement.


Elaine Kaplan.

Acting Director.

Accordingly, OPM is amending chapter I, title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

§ 890.101 Definitions; time computations.

(a) * * * * Congressional staff member means an individual who is a full-time or part-time employee employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

* * * * * Member of Congress means a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico.

* * * * SHOP has the meaning given in 45 CFR 155.20.

§ 890.102 Coverage.

(b) * * * * * (c) * * * * (9) The following employees are not eligible to purchase a health benefit plan for which OPM contracts or which OPM approves under this paragraph (c), but may purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act): (i) A Member of Congress. (ii) A congressional staff member, if the individual is determined by the employing office of the Member of...
6. Amend §890.304 by revising paragraph (a)(1) and (a)(1) to read as follows:

§890.304 Termination of enrollment.
(a) * * *
   (1) * * *
   (ii) The last day of the pay period in which his or her employment status or the eligibility of his or her position changes so that he or she is excluded from enrollment.
   * * * * *

7. Amend §890.501 to add a new paragraph (h) to read as follows:

§890.501 Government contributions.
   * * * * *
   (h) The Government contribution for an employee who enrolls in a health benefit plan offered through an appropriate SHOP as determined by the Director pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act) shall be calculated in the same manner as for other employees.
   * * * * *

4. Amend §890.201 to add a new paragraph (d) to read as follows:

§890.201 Minimum standards for health benefit plans.
   (d) Nothing in this part shall limit or prevent a health insurance plan purchased through an appropriate SHOP as determined by the Director, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a “health benefit plan under this chapter” for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.
   * * * * *

5. Amend §890.303 by revising paragraph (b) to read as follows:

§890.303 Continuation of enrollment.
   * * * * *
   (b) Change of enrolled employees to certain excluded positions. Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employment in which they are excluded by §890.102(c), continue to be enrolled unless excluded by paragraphs (c)(4), (5), (6), (7), or (9) of §890.102.
   * * * * *
This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890
RIN 3206–AM85

Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to amend the Federal Employees Health Benefits (FEHB) Program regulations regarding coverage for Members of Congress and congressional staff.

DATES: OPM must receive comments on or before September 9, 2013.


FOR FURTHER INFORMATION CONTACT: Chelsea Ruediger at (202) 606–0004.

SUPPLEMENTARY INFORMATION: This proposed rule is intended to amend FEHB Program eligibility regulations to comply with section 1312 of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act). Subparagraph 1312(d)(3)(D) of the Affordable Care Act states that, “Notwithstanding any other provision of law . . . the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are—(I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).” The Act defines “Member of Congress” as any member of the House of Representatives or the Senate and “congressional staff” as all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

Currently, Members of Congress (including Delegates to the House of Representatives and the Resident Commissioner from Puerto Rico) and congressional employees (which include each Member’s respective personal staffs, staffs of House and Senate leadership committees, other committee staff and administrative office staff) meet the definition of employee in 5 U.S.C. 8901 of title 5 and are, therefore, eligible to enroll in the FEHB Program.

While the Affordable Care Act does not amend 5 U.S.C. 8901, the effect of the “notwithstanding clause” of section 1312 is to limit the ability of Members of Congress and congressional staff to purchase health benefits plans for which OPM may contract under chapter 89. Section 1312 specifies that “the only health plans that the Federal Government may make available” are those that are either “created under” the ACA, or “offered through an Exchange established under” the Act. The health benefits plans for which OPM can contract under chapter 89 are not “created under” the ACA, nor are they offered through the Exchanges.

Therefore, Members of Congress and congressional staff who are employed by the official office of a Member of Congress may no longer purchase the health benefits plans for which OPM contracts under chapter 89. As part of their service, they are limited to purchasing plans from Exchanges. This proposed rule implements this mandate.

Effective Date of Termination of Coverage

Though the Affordable Care Act does not provide a specific effective date for Subparagraph 1312(d)(3)(D), OPM has concluded that the most reasonable reading of the statute is that enrollment in FEHB contracted plans under chapter 89 of title 5 will no longer be available to Members of Congress and congressional staff who are employed by the official office of a Member of Congress as of January 1, 2014, the date under the Act that Exchanges (also called Health Insurance Marketplaces) established under the Affordable Care Act will be available for providing health insurance coverage.

Accordingly, we are proposing that FEHB health plan enrollment for Members of Congress and congressional staff employed by the official office of a Member of Congress terminate (with a 31-day extension of coverage and opportunity for conversion) on the first day of the last pay period in which they are eligible for FEHB. FEHB coverage will continue through the end of the pay period in which enrollment is terminated. Therefore, the termination of coverage will be effective at midnight on December 31, 2013.

Members of Congress and Congressional Staff

The proposed rule defines a “Member of Congress” as a member of the Senate or of the House of Representatives, a Delegate to the House of Representatives (which includes delegates from the District of Columbia and the territories), and the Resident Commissioner of Puerto Rico. Under the Affordable Care Act, territories are not required to establish an Exchange but may elect to do so. We seek comment on the health plans made available to Members of Congress who represent territories that do not establish Exchanges.

The proposed rule utilizes the statutory definition for congressional staff. Because there is no existing statutory or regulatory definition of “official office,” the proposed rule delegates to the employing office of the Member of Congress the determination as to whether an employed individual meets the statutory definition. OPM seeks comment on this proposal.

Based on research related to the administration of congressional staffing, including communication with the respective House and Senate administrative and disbursement offices, OPM has determined that Members’ offices are best equipped to make the determination as to whether an individual is employed by the “official office” of that Member. OPM’s understanding is that congressional staff often have allocated to them a percentage of work as personal staff and a percentage of work as committee or leadership committee staff. It also is
common for the percentage to change during the year. Moreover, staff are often unaware of these percentages or budgetary source of their compensation. OPM believes that allowing the employing office to make the determination as to whether particular individuals are employed by the "official office" is most appropriate, and will allow such determinations to be made by the office of the Member of Congress, which is their employer. As part of their responsibility to make this determination, the employing offices shall be the final authority with respect to the determination for each individual. Under these proposed regulations, OPM will not review or overturn these determinations. OPM seeks comment on this proposed approach.

The proposed rule provides that a designation as a congressional staff member who is employed by the official office of a Member of Congress will be an annual designation made prior to October of each year for the following year based on expected work. The designation must be made prior to October of the year before the coverage year to allow the individual to participate in either the appropriate Exchange open season in October or the FEHB Program open season in November for the following year.

The proposed rule also states that the designation will be effective for the entire FEHB Program plan year during which the staff member works for that Member of Congress. OPM believes that it would be unduly disruptive for an individual to move back and forth from Exchange coverage to FEHB Program coverage mid-year. In addition, due to the complexity of congressional staffing assignments, OPM's understanding is that payroll changes may be made without the congressional staff member being aware of these changes. Therefore, OPM has proposed that individuals maintain their designations for an entire year so long as they continue to be employed by the same Member of Congress. OPM seeks comment on the feasibility of this method.

Clarification of Meaning of "Health Benefit Plan Under This Chapter" As Used in 5 U.S.C. 8901(b) & (C) or the definition of "health benefits plan" under 5 U.S.C. 8901(b). Although, pursuant to its authority under chapter 89 of title 5, OPM will have no role in "contracting for" or "approving" health benefit plans that are offered through the Exchanges, there is no doubt that such plans fit within the definition of "health benefit plan" under 8901(b). This proposed regulation imposes no new requirements on qualified health plans or Exchanges.

Prior to the passage of the ACA, there was no need for OPM to clarify that the term "health benefits plan under this chapter" as used in section 8905(b) and 8906 included plans other than those health benefits plans for which OPM contracted or which OPM approved, pursuant to its authority under 5 U.S.C. 8902, 8903 and 8903a. Because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate to clarify that the provisions that authorize an employer contribution for "health benefits plans under this chapter," and authorize the continuation of such coverage into retirement, includes all health benefits plans fitting within the definition set forth in 8901(b). The revisions adopted here have no impact on the availability to Members of Congress and Congressional Staff Members of the contribution established in 5 U.S.C. 8906. Health benefit plans, as defined at 5 U.S.C. 8901(b), will encompass health benefit plans offered through an Exchange.

The revisions adopted here also will have no impact on the ability of Members of Congress and congressional staff who are employed by the official office of a Member of Congress to continue being enrolled in their existing health benefit plans when they become annuitants. Pursuant to 5 U.S.C. 8905(b), an annuitant who at the time he/she becomes an annuitant was enrolled in a health benefit plan under chapter 89 (which, by definition, would include a health benefit plan offered through an Exchange) may continue his/her enrollment in the health benefit plan offered through the Exchange under the conditions of eligibility prescribed by OPM in this part.

In order to establish that the contributions and withholdings will be appropriately accounted for pursuant to section 8909 of title 5, we have added new paragraph (h) to § 890.501. The two enrollment categories used by FEHB, self or self and family, are not generally applicable in an Exchange. In an Exchange, a family's premium will generally be based on the actual composition of the family (for example, one adult, two adults, one adult and two children, etc.). A state may also choose to establish family tiers that may differ from the two enrollment categories used by FEHB. Therefore, subparagraph (h)(1) reflects that OPM will apply the self and family contribution level to any Exchange enrollment category other than one adult/individual.

Subparagraph (h)(2) clarifies the accounting issue with respect to payments for health benefits plans under Exchanges.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only involves the issue of where Members of Congress and certain congressional staff may purchase their health insurance, and does not otherwise alter the FEHB program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administration and general provisions; Health benefits plans; Enrollment, Temporary extension of coverage and conversion; Contributions and withholdings; Transfers from retired FEHB Program; Benefits in medically underserved areas; Benefits for former spouses; Limit on inpatient hospital charges, physician charges, and FEHB benefit payments; Administrative sanctions imposed against health care providers; Temporary continuation of coverage; Benefits for United States hostages in Iraq and Kuwait and United States hostages captured in Lebanon; Department of Defense Federal Employees Health Benefits Program demonstration project; Administrative practice and procedure, Employee benefit plans, Government employees,
§ 890.201 Minimum standards for health benefits.

(a) * * *

(d) Nothing in this part shall limit or prevent a health insurance plan purchased through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), by an employee otherwise covered by 5 U.S.C. 8901(1)(B) and (C) from being considered a “health benefit plan under this chapter” for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

§ 890.303 Continuation of enrollment. 

(a) * * *

(b) Change of enrolled employees to certain excluded positions. Employees and annuitants enrolled under this part who move, without a break in service or after a separation of 3 days or less, to an employee otherwise covered by 5 U.S.C. 8905(b), shall be accounted for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906.

§ 890.304 Termination of enrollment.

(a) * * *

(iii) The last day of the pay period in which his employment status or the eligibility of his position changes so that he is excluded from enrollment.

* * * * *

6. Amend § 890.501 by adding paragraph (h) to read as follows:

§ 890.501 Government contributions.

(h)(1) The Government contribution for an employee who enrolls in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), or an annuitant whose enrollment in a health benefit plan offered through such an Exchange continues, pursuant to 5 U.S.C. 8905(b), shall be calculated in the same manner as for other employees and annuitants.

(2) Government contributions and employee withholdings for employees who enroll in a health benefit plan offered through an Exchange, pursuant to section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act or the Act), or annuitants whose enrollment in a health benefit plan offered through such an Exchange continues, pursuant to 5 U.S.C. 8905(b), shall be accounted for pursuant to 5 U.S.C. 8909 and such monies shall only be available for payment of premiums, and costs in accordance with 5 U.S.C. 8909(a)(2).

[FR Doc. 2013–19222 Filed 8–7–13; 8:45 am]

BILLING CODE 6325–63–P
United States Senate
WASHINGTON, DC 20510
Sept. 9, 2013

Chelsea Ruediger,
Planning and Policy Analysis
U.S. Office of Personnel Management
1900 E St. NW
Washington, DC 20415

Re: Federal Employees Health Benefits Program: Members of Congress and Congressional Staff (RIN 3206-AM85)

Dear Ms. Ruediger:

On behalf of Senator Ron Johnson and several members of his staff, we are writing to offer our comments regarding the proposed rules issued by the Office of Personnel Management (OPM) relating to the Federal Employees Health Benefits Program (FEHBP) regulations regarding coverage for Members of Congress and certain congressional staff. The proposed rule permits the federal government to pay an employer contribution toward health insurance premiums for Members and staff when they purchase health insurance through an exchange as required by the Patient Protection and Affordable Care Act (ACA).

We submit this comment to OPM because the proposed rule is unlawful and it defeats the will and intent of Congress as expressed in the ACA and the statute creating the FEHBP.

OPM administers the FEHBP under Chapter 89 of Title 5 of the U.S. Code, and in that capacity OPM contracts with carriers to offer group health insurance to federal employees. OPM also determines the government and employee shares of the costs of such insurance and pays the government’s share. Nowhere is OPM given authority to pay for a federal employee’s health insurance (in whole or in part) that is not a group plan contracted for by OPM under Chapter 89. The Department of Health and Human Services (HHS) is responsible for implementing Section 1312(d)(3)(D) of the ACA, not OPM.

Section 1312(d)(3)(D) of the ACA provides that, as of Jan. 1, 2014, “the only health plans … available to Members of Congress and congressional staff … shall be health plans that are … created under [the ACA]; or offered through an Exchange established under [the ACA].” The individual plans purchased by Members and their staffs by statutory definition are not OPM-negotiated group plans. Furthermore, the rate and benefit requirements for exchange plans (in substantial part because they are individual plans, not group plans) are different from those specified for FEHBP plans. Thus, exchange plans likely will not meet the standards for participating in FEHBP.

1 Federal Employees Health Benefits Program: Members of Congress and Congressional Staff (RIN 3206-AM85)
As a result, the proposed rule exceeds the authority granted to the OPM, is inconsistent with the federal statute authorizing the OPM's operation, and is inconsistent with the ACA.

When Congress was debating the ACA, at least one proposed amendment was offered that would have allowed Members of Congress and their staffs to continue to receive the payments the proposed rule would now allow. That amendment stated: "Enrollment by Members of Congress and Congressional Employees. Notwithstanding any other provision of law, beginning July 1, 2013, Members of Congress and congressional employees would be required to use their employer contribution (adjusted for age rating) to purchase coverage through a state-based exchange, rather than using the traditional Federal Employees Health Benefits Plan (FEHBP)." But that amendment did not become part of the law. Thus, Congress considered but did not accept an amendment that would have produced exactly the result that OPM is now trying to create by rule.

When Congress passed the ACA, it resolved that Members of Congress and their staffs would not be eligible for FEHBP plans or the pre-tax employer contributions to their plans. It was the intent of Congress that Members and their staffs would access health care through either an ACA qualified exchange or the open market with after-tax dollars, qualifying or not qualifying for exchange subsidies like every other American who loses his or her employer coverage.

We understand the concerns that have been raised by many Members and their staffs with respect to the financial consequences of the provisions of the ACA that require them to purchase individual insurance through the exchanges. We are sympathetic to those concerns, but it is our belief that they need to be addressed in a straightforward manner by Congress. It is simply wrong for OPM to address the matter by issuing a regulation that is neither authorized by statute nor consistent with the plain meaning of the ACA. The program you have proposed is unlawful. It would require Members and their staffs to facilitate the improper expenditure of taxpayer funds. We do not want to participate in such a program, as the proposed regulation would require us to do. We urge you to reconsider.

Sincerely,

[Signature]
Senator Ron Johnson

Staff of Senator Ron Johnson:

[Signature]
Patrick McAllister
Policy Advisor

[Signature]
Brooke Ericson
Legislative Counsel