Round III: Status of Health Insurance Exchanges in Michigan
Priority Health HMO Plan Continues to serve as the State's EHB-Benchmark Plan[1]

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[1] This publication is intended to serve as a preliminary research tool for attorneys. It is not intended to be used as the sole basis for making critical business or legal decisions. This document does not constitute, and should not be relied upon, as legal advice.

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A. Introduction

The 2010 Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), as amended, established health insurance exchanges ("Exchange(s)") to help promote the extension of health coverage to over 30 million uninsured Americans. The ACA requires all non-grandfathered health insurance plans in the individual and small group markets to provide benefits in a minimum set of ten different designated essential health benefit ("EHB") categories by January 1, 2014.[1]

In August 2012, Governor Rick Snyder initiated efforts to form a state-federal partnership as Michigan's Exchange. Governor Snyder advocated a partnership with the federal government due to Michigan legislative opposition to the implementation of Exchanges and Michigan's inability to meet the federal timetable for state-only implementation. A state that opts for a partnership Exchange can operate plan management functions, consumer assistance functions, or both. The state can also elect to perform Medicaid and Children's Health Insurance Program eligibility determinations or rely on the federal government to make those determinations.[2]

The Michigan Department of Insurance and Financial Services ("DIFS," formerly "OFIR") presented Michigan's Essential Health Benefits Benchmark Plan: Executive Report ("Report").[3] The Report contained OFIR's recommendations to the Governor as to the selection of an EHB-benchmark plan. OFIR recommended that "the Priority Health HMO plan be selected as Michigan's benchmark plan. This plan is the lowest-cost benchmark plan option, which will provide an excellent framework for all individual and small group plans offered in Michigan after January 1, 2014. In addition, OFIR recommend[ed] that the FEDVIP pediatric vision plan and the MI Child dental plan be selected to supplement the Priority Health HMO benchmark plan."[4]

Since 2012, significant federal regulatory updates have served to encourage several states in updating their EHB-benchmark plans to fill gaps in coverage and respond to changes in the medical field.

B. Federal Guidelines & Statutes on Exchanges

Generally, Exchanges are "state or federally run websites that allow consumers to choose a health plan, as well as to compare benefits and costs of each plan. Some states will allow all insurers to participate; others have asked insurers to bid to participate; and some states are creating a list of requirements insurers must meet to participate."[5] Exchanges permit individuals and small employers to comparison shop for the best plan to meet their needs. Exchanges streamline the process for individuals and small employers to obtain affordable health care insurance based on a user-friendly, easy one-stop information center.

Section 1311 of the ACA identifies the specific EHB categories that must be provided by each plan (whether within or outside of the Exchange):

(1) ambulatory patient services;
(2) emergency services;
(3) hospitalization;
(4) maternity and newborn care;
(5) mental health and substance use disorder services (including behavioral health treatment;
(6) prescription drugs;
(7) rehabilitative and habilitative services and devices;
(8) laboratory services;
(9) preventive and wellness services and chronic disease management, and
(10) pediatric services (including oral and vision care).[6]

Each state is required to select an EHB-benchmark plan to serve as a reference for all other individual and small group market plans to follow. A benchmark plan will identify both the scope of services and the limits under a "typical employer plan" in the State as required by the ACA.[7]

Procedurally, benchmark plans will establish EHBs for benefit years beginning in 2014 and 2015.[8] The benchmark plan selection process will be reevaluated by the HHS for the benefit year of 2016 and all years thereafter.[9]

New standards were established for plan years 2020 and beyond in the Final 2019 HHS Notice of Benefits and Payment Parameters ("Final 2019 HHS Rules"), which provide greater flexibility to states when updating and selecting their EHB-benchmark plans.[10] Previously, when adding benefits to their coverage, states would risk triggering the ACA provision requiring them to pay any additional premium costs associated with those added benefits. This additional cost would apply when benefits were added through either a legislative or regulatory avenue separate from the EHB-benchmark place selection process. CMS now permits three new methods for EHB-benchmark plan selection:

- **Option 1:** Selecting the EHB-benchmark plan that another State used for the 2017 plan year.
- **Option 2:** Replacing one or more categories of EHBs […] in the State's EHB-benchmark plan used for the 2017 plan year with the same category or categories of EHB from the EHB-benchmark plan that another State used for the 2017 plan year.
- **Option 3:** Otherwise selecting a set of benefits that would become the State's EHB-benchmark plan.[11]

These new methods of selection help loosen the rules governing updates to EHB-benchmark plans by allowing states to avoid paying additional premium costs associated with newly added benefits. However, the state benchmark updates must also pass two tests as measured by objective actuarial reports. First, the scope of benefits provided by the benchmark plan must be "equal to, or greater than, […] the scope of benefits provided under a typical employer plan."[12] Second, the benchmark plan cannot "exceed the generosity" of either the "State's EHB-benchmark plan used for the 2017 plan year," or "[a]ny of the State's base-benchmark plan options for the

2017 plan year."[13] Practically, these tests set forth the "floor" and "ceiling" permitted in EHB-benchmark plans respectively. Separately, states must also comply with template and documentation requirements when selecting and updating EHB-benchmark plans for plan years 2020 and beyond. More specifically, the state must submit (1) an EHB state confirmation template; (2) an actuarial certification/report; (3) an EHB-benchmark plan document; and (4) an EHB-benchmark summary chart template.[14]

In light of these added requirements, industry reports initially indicated that the new rules may tilt "the playing field toward less generous EHBs."[15] However, since the promulgation of the Final 2019 HHS Rules, CMS has approved several state plan changes, including Michigan's proposed changes to its EHB-benchmark plan for the 2022 plan year, as will be discussed in further detail below. Industry reports are now suggesting that the new benchmark selection process has potentially "created a safe harbor" when expanding benefits, at least in the short term.

C. Activity in Michigan

In 2012, the Governor followed DIFS's recommendation and selected the Priority Health HMO plan, as supplemented by the MIChild dental program and the Federal Employees Dental and Vision Insurance Program BlueVision, High Option, plan (collectively, the "Priority Health HMO plan"), to serve as Michigan's EHB-benchmark plan starting in 2014. The Priority Health HMO plan remains the "only plan to serve as the state EHB in the first 10 years of the ACA," as the Governor and DIFS have once again selected it for plan year 2022, which will be effective through plan year 2027.[16] In its executive report, DIFS "continues to believe that this plan provides comprehensive coverage at affordable rates and maintaining this plan as the basis for Michigan's EHB-benchmark plan provides continuity in the individual and small group markets."[17]

When submitting its 2022 plan, the state of Michigan opted to follow CMS's encouragement by selecting a set of benefits pursuant to Option 3 (as outlined above) to help combat the opioid crisis as it exists in Michigan. Substantively, DIFS started with Michigan's existing EHB-benchmark plan and added the following two benefits:

(1) Coverage of at least one intranasal spray opioid reversal agent when prescriptions of opioids are dosages of 50MME or higher.
(2) Removal of barriers to prescribing Buprenorphine or generic equivalent products for medication-assisted treatment of opioid use disorder.

Pursuant to federal regulation, DIFS opened these additional benefits for public comment from March 30, 2020 to April 24, 2020. Only three public comments were received, and all three were in support of the proposed changes.[18] CMS approved the added benefits later in August of 2020.[19]

D. Conclusion

Since the promulgation of the Final 2019 HHS Rules, five states have elected to update their EHB-benchmark plans, and all five state plans were approved by CMS. The long-term impact of these new rules will have to be assessed after more states attempt to update their EHB-benchmark plans.

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[1] 42 USC 18022(b)(1)(A) to (J).
[2] Greene, *Mich. Small-Business Group Presses for State-Run Health Exchange*, Crain's Business Detroit (September 6, 2012) available at <www.modernhealthcare.com/article/20120906/INFO/309069991> (accessed May 7, 2024).
[3] Michigan Office of Financial and Insurance Regulation (OFIR), *Michigan's Essential Health Benefits Benchmark Plan: Executive Report* (September 25, 2012), p. 3.
[4] *Id.* at 1.
[5] Kennedy, *States Try to Innovate with Health Exchanges*, USA Today (November 9, 2012) available at <https://www.usatoday.com/story/news/nation/2012/11/10/state-health-exchange-insurance/1677645/> (accessed May 7, 2024).
[6] 42 USC § 18022(b)(1)
[7] 42 USC § 18022(b)(2)(A).
[8] OFIR, *supra* note 3, at 3.
[9] *Id.*

[10] 45 CFR 156.111 (2022).
[11] 45 CFR 156.111(a).
[12] 45 CFR 156.111(b)(2)(i).
[13] 45 CFR 156.111(b)(ii).
[14] 45 CFR 156.111(e).
[15] Sabrina Corlette & Joel Ario, Princeton University, *Updating the Essential Health Benefit Benchmark Plan: An Unexpected Path to Fill Coverage Gaps?* <https://www.shvs.org/updating-the-essential-health-benefit-benchmark-plan-an-unexpected-path-to-fill-coverage-gaps/> (posted Sept. 11, 2020) (accessed May 7, 2024).
[16] Priority Health, *DIFS recommends Priority Health HMO plan continue as Michigan's EHB benchmark health insurance plan for 2022*, <https://www.priorityhealth.com/about-us/for-the-media/news-releases/difs-recommends-priority-health-hmo-plan-continue-asbenchmark#:~:text=The%20Michigan%20Department%20of%20Insurance,the%20state%20starting%20in%202022> (posted Sept. 21, 2021) (last accessed May 7, 2024).
[17]OFIR, *Michigan's Essential Health Benefits Benchmark Plan: Executive Report* (July 1, 2020) p. 1.
[18] *Id.* at p. 6.
[19] Centers for Medicare & Medicaid Services, *The Centers for Medicare & Medicaid Services (CMS) Approves New Essential Health Benefit Benchmarks for Michigan* (August 28, 2020).