

MEMORANDUM

TO: Kate Harris, Director of Policy and External Affairs

CC: Alan Schmitz, General Counsel
Molly McClurg, Esq., Appeals and Compliance Attorney

FROM: Beth Deines, Esq., Appeals and Compliance Attorney

DATE: October 19, 2017

RE: Certification Authority of Connect for Health Colorado

Questions Presented

- I. Does Connect for Health Colorado have the authority to certify the plans that will be sold through its Marketplace?
- II. Does the act of exercising certification authority, alone, constitute active purchasing within the health insurance market?

Brief Answer

- I. Yes. Under federal regulations, state law, and Connect for Health Colorado's Memorandum of Understanding (MoU) with Colorado's Division of Insurance (DOI), Connect for Health Colorado has the authority to decide which plans will be certified for sale through its Marketplace.
- II. No. Active purchasing is generally considered to be a group of activities which are rooted in an Exchange leveraging its assets to decrease product costs, increase product quality, and heavily monitor and manage offerings within the insurance market. Exercising a statutory authority to certify plans, alone, is not enough to constitute active purchasing.

Background

In previous years, Connect for Health Colorado has exercised its certification authority by tacit or implied certification, effectively passing through all plans the Division of Insurance has certified as Affordable Care Act-compliant, and allowing all such plans to be sold on the Exchange. This decision was likely intended to allow maximum breadth of choice for consumers. Connect for Health Colorado is now poised to begin our fifth Open Enrollment Period. Lessons learned from previous years will help to guide the organization as it continues to administer the Exchange in Colorado. As Connect for Health Colorado grows and changes, the organization may seek to exercise its certification authority in an alternate form to improve access, affordability, and choice for Coloradans.

Authority

45 CFR Subpart K – Exchange Functions: Certification of Qualified Health Plans

§ 155.1000 Certification standards for QHPs.

(b) *General requirement.* The Exchange must offer only health plans which have in effect a certification issued or are recognized as plans deemed certified for participation in an Exchange as a QHP, unless specifically provided for otherwise.

(c) *General certification criteria.* The Exchange may certify a health plan as a QHP in the Exchange if—

(1) The health insurance issuer provides evidence during the certification process in §155.1010 that it complies with the minimum certification requirements outlined in subpart C of part 156, as applicable; and

(2) The Exchange determines that making the health plan available is in the interest of the qualified individuals and qualified employers, except that the Exchange must not exclude a health plan—

(i) On the basis that such plan is a fee-for-service plan;

(ii) Through the imposition of premium price controls; or

(iii) On the basis that the health plan provides treatments necessary to prevent patients' deaths in circumstances the Exchange determines are inappropriate or too costly.

45 CFR Subpart C – Qualified Health Plan Minimum Certification Standards

§ 156.200 QHP issuer participation standards.

(b) *QHP issuer requirement.* A QHP issuer must –

(2) Comply with Exchange processes, procedures, and requirements set forth in accordance with subpart K of part 155[.]

Memorandum of Understanding Between the Colorado Health Benefit Exchange and the Department of Regulatory Agencies, Division of Insurance

The Memorandum of Understanding (MoU) states that Connect for Health Colorado (C4HCO) will certify issuers to sell QHPs through C4HCO.

C.R.S. 10-3-105. Certificate of authority to do business.

A certificate of authority to do business is issued by the insurance commissioner and authorizes insurance companies to do business in the State.

C.R.S. 10-22-104

The exchange shall foster a competitive marketplace for insurance and shall not solicit bids or engage in the active purchasing of insurance. All carriers authorized to conduct business in this state may be eligible to participate in the exchange.

Analysis

Certification Authority. Under 45 CFR § 155.1000(b), an Exchange may only sell plans that have been certified by the Exchange as a Qualified Health Plan (QHP) for participation in the Exchange.¹ This certification authority is not the same as the certification authority possessed by the Division of Insurance (DOI) at C.R.S. 10-3-105. Under C.R.S. 10-3-105, the commissioner is charged with certifying issuers who do business in the state of Colorado.² This includes issuers who sell both ACA-compliant and non-compliant plans in addition to on- and off-Exchange plans. Connect for Health Colorado’s certification authority only encompasses a subset of those plans. That subset of plans is comprised of the ACA-compliant, on-Exchange plans that Connect for Health Colorado believes are in the best interests of qualified individuals and qualified employers. In other words, the commissioner must certify all plans sold in Colorado, but not all plans sold in Colorado must be sold on the Exchange. Of the plans sold in Colorado, plans which may be sold on the Exchange are given an additional certification by Connect for Health Colorado that allows those plans to be sold on the Exchange.

Under 45 CFR § 155.1000(c), the Exchange has the option to certify or not certify plans for sale on the Exchange based on certain minimum standards.³ The Exchange “may certify” a plan as a QHP if it meets the Essential Health Benefit (EHB) requirements within the Affordable Care Act.⁴ In addition to requirements for EHBs, at the Exchange’s discretion, it may certify a plan if it determines that offering the plan through the Exchange is in the best interests of qualified individuals and qualified employers.⁵ If

¹ 45 CFR § 155.1000(b) and (c).

² CRS §10-3-105.

³ 45 CFR § 155.1000(c)(1) and (2).

⁴ 45 CFR § 155.1000(c)(1).

⁵ 45 CFR § 155.1000(c)(2).

Exchange leadership decides that a plan's participation on the Exchange is not in the interests of consumers and business owners, the Exchange can reject the plan from participating.⁶

C.R.S. 10-22-104 states that carriers authorized to conduct business in Colorado by the DOI may be eligible to participate in the Exchange.⁷ The "may" contained within the above language suggests that an authorized carrier's participation on the Exchange is optional and possibly subject to additional criteria, such as the Exchange's certification authority.

Under the current Memorandum of Understanding (MoU) between the Division of Insurance (DOI) and Connect for Health Colorado, Connect for Health Colorado will certify issuers to sell QHPs through Connect for Health Colorado.⁸

Active Purchasing. Under 10-22-104, Connect for Health Colorado shall not solicit bids nor engage in the active purchasing of insurance.⁹ Active purchasing is a spectrum which encompasses an array of activities that can be leveraged to manage competition and reach the outcomes of higher-quality, lower-cost insurance.¹⁰ In contrast, the Exchange's performance of its statutory authority to certify plans is a single action that falls short of the more extensive behavior involved in active purchasing.

Conclusion

Connect for Health Colorado has the authority to certify plans to be sold through its Exchange. Exercise of this authority does not, without more, constitute active purchasing.

⁶ 45 CFR § 155.1000(e)(2).

⁷ CRS 10-22-104.

⁸ Attachment 1: Memorandum of Understanding Between the Colorado Health Benefit Exchange and the Department of Regulatory Agencies, Division of Insurance; Section III(b)(iii); November 2, 2014.

⁹ C.R.S. 10-22-104.

¹⁰ Active Purchasing for Health Insurance Exchanges: An Analysis of Options; Corlette, Sabrina and Volk, JoAnn; available at <http://www.rwjf.org/content/dam/farm/reports/reports/2011/rwjf70431>; last accessed 9/21/2017.