UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

MAR 13 2015

The Honorable David Vitter
Chairman
Committee on Small Business
and Entrepreneurship
United States Senate
516 Hart Senate Office Building
Washington, DC 20510

Dear Senator Vitter:

Thank you for your letter, dated February 13, 2015, regarding the Office of Personnel Management's (OPM) final rule[1] concerning health insurance coverage for Members of Congress and their official office staff. As you know, this final rule has been effective since October 2, 2013. As a result, Members of Congress and designated congressional staff have been enrolled in health benefits plans via DC Health Link since January 1, 2014. This letter provides you with the requested background information on OPM's decision-making process while drafting and implementing the final rule.

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (ACA) into law. Section 1312(d)(3)(D) of that law, which was included as an amendment sponsored by Senator Chuck Grassley, reads:

> MEMBERS OF CONGRESS IN THE EXCHANGE.—
> (i) REQUIREMENT.—Notwithstanding any other provision of law, after the effective date of this subtitle, 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).
> (ii) DEFINITIONS.—In this section:
> (I) MEMBER OF CONGRESS.—The term ''Member of Congress'' means any member of the House of Representatives or the Senate.
> (II) CONGRESSIONAL STAFF.—The term ''congressional staff'' means all full-time and part-time employees employed by the official office of a Member of Congress, whether in in Washington, DC or outside of Washington, DC.

[1] https://www.federalregister.gov/articles/2013/10/02/2013-23565/federal-employees-health-benefits-program-members-of-congress-and-congressional-staff

As you are aware, OPM contracts for health insurance plans on behalf of Federal employees, including those in the Legislative branch, under the authority provided in 5 U.S.C. Chapter 89. It is important to note that section 1312 of the ACA did not alter the definition of "employee"[2] as used in 5 U.S.C. 8901(1)(B) (C) or the definition of "health benefits plan"[3] under 5 U.S.C. 8901(6). Further, the definition utilized in the ACA for "congressional staff" includes the term "official office of a Member of Congress" but does not offer a definition of that term.

As the administrator for health benefits for Federal employees, OPM was cognizant of its requirement to implement section 1312 of the ACA. While a specific effective date for subparagraph 1312(d)(3)(D) was not included, OPM concluded that the most reasonable interpretation of the statute was that enrollment in OPM-contracted plans under chapter 89 of Title 5 would 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 ACA that Exchanges (also called Health Insurance Marketplaces) were scheduled to be available for providing health insurance coverage.

On August 8, 2013, OPM published a proposed rule[4] inviting comments on amendments to the Federal Employees Health Benefits (FEHB) Program regulations to implement this section of the ACA.

Members of Congress and Congressional Staff

Because, as mentioned above, no definition of "official office of a Member of Congress" was provided in section 1312, OPM requested comment on its proposed method for identifying which staff worked for the official office. The following analysis was provided in the proposed rule:

> 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

---

[2] 5 U.S.C. 8901(1) defines "employee" as including "a Member of Congress as defined by section 2106 of this title" and "a Congressional employee as defined by section 2107 of this title" among others. 5 U.S.C. section 2106 defines "Member of Congress" as "the Vice President, a member of the Senate or the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico." 5 U.S.C. 2107 defines "Congressional Employee" as: (1) an employee of either House of Congress, of a committee of either House, or of a joint committee of the two Houses; (2) an elected officer of either House who is not a Member of Congress; (3) the Legislative Counsel of either House and an employee of his office; (4) a member or employee of the Capitol Police; (5) an employee of a Member of Congress if the pay of the employee is paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; [(6) Repealed. Pub. L. 90–83, § 1(5)(A),Sept. 11, 1967, 81 Stat. 196.] (7) the Architect of the Capitol and an employee of the Architect of the Capitol; (8) an employee of the Botanic Garden; and (9) an employee of the Office of Congressional Accessibility Services.

[3] 5 U.S.C. 8901 (6) defines a "health benefits plan" to mean a group insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or similar group arrangement provided by a carrier for the purpose of providing, paying for, or reimbursing expenses for health services.

[4] https://www.federalregister.gov/articles/2013/08/08/2013-19222/federal-employees-health-benefits-program-members-of-congress-and-congressional-staff

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.

Clarification of Meaning of "Health Benefits Plan Under This Chapter" As Used in 5 U.S.C. 8905(b) and 5 U.S.C. 8906

The proposed rule provided that Members of Congress and congressional staff would select a plan from an Exchange established under the ACA. At this time, it had not yet been determined which Exchange would be the most appropriate option. OPM offered the following analysis in the proposed rule:

> 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.

As mentioned previously, the ACA did not remove Members of Congress and congressional staff from the definition of "employees" in 5 U.S.C. 8901. Under 5 U.S.C. 8906, employees are eligible for a Government contribution towards the cost of their health benefits.[5] In the proposed rule, OPM clarified that the term "health benefits plan" under 5 U.S.C. 8901 encompasses Exchange plans, and therefore the provision for a government contribution toward premium costs would apply to such Exchange plans.

[5] 5 U.S.C. 8906(b)(1) provides that except as provided in paragraphs (2), (3), and (4), the biweekly Government contribution for health benefits for an employee or annuitant enrolled in a health benefits plan under this chapter is adjusted to an amount equal to 72 percent of the weighted average under subsection (a)(1)(A) or (B), as applicable. For an employee, the adjustment begins on the first day of the employee's first pay period of each year. For an annuitant, the adjustment begins on the first day of the first period of each year for which an annuity payment is made.

> 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(6). 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(6), will encompass health benefit plans offered through an Exchange.

The 30-day comment period for the proposed rule ended on September 9, 2013. OPM received approximately 60,000 comments[6] including comments that covered topics similar to those in your letter.

Incorporating Exchange Plans Under the 5 U.S.C. 8901 (6) Definition of "Health Benefits Plan"

On October 2, 2013, OPM issued a final rule.[7] This final rule clarified 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. The following explanation was provided:

> 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 Exchanges 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

[6] Public comments can be viewed at: http://www.regulations.gov/#!documentDetail;D=OPM-2013-0016-0001. Please note that while regulations.gov reports that 66,091 comments were received, the majority of these comments were duplicates. 211 unique comments are available for public view. When a comment was received multiple times, the number of duplicates is indicated on regulations.gov.

[7] https://www.federalregister.gov/articles/2013/10/02/2013-23565/federal-employees-health-benefits-program-members-of-congress-and-congressional-staff

> 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.

On September 30, 2013 the Department of Health and Human Services, Centers for Medicare & Medicaid Services released a memo indicating that offices of Members of Congress would be considered eligible employers for the purposes of enrolling in a SHOP. The memo reads:

> Consistent with the OPM rule, this guidance clarifies that offices of the Members of Congress are considered qualified employers eligible to offer coverage to Members and designated Congressional staff through the appropriate SHOP as determined by OPM. CMS clarifies that offices of the Members of Congress, as qualified employers, are eligible to participate in a SHOP regardless of the size and offering requirements set forth in the definition of "qualified employer" in the Exchange final rule, 1 provided that the office offers coverage to those full-time employees who are determined by statute to purchase health insurance from an Exchange for the purpose of the government contribution.[8]

In our final rule, OPM further clarified that the Government contribution is in no way equivalent to the premium tax credit available on the individual Exchange. The Government contribution is an employer contribution towards the cost of health benefits. Members of Congress and designated congressional staff who are eligible for affordable employer-sponsored coverage that provides minimum value, with a Government contribution, are rendered ineligible for premium tax credits via the individual Exchange just as are Americans across the country who are offered affordable health benefits via their employer.[9] No special treatment is extended to Members of Congress or designated congressional staff. The final rule provided the following details on this matter:

> 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.

Implementation

---

[8] The full memo is available at http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/members-of-congress-faq-9-30-2013.pdf

[9] Individuals, including Members of Congress and/or designated congressional staff, may be eligible for premium tax credits on the individual Exchange if the health benefits plans available to them via their employer are not considered "affordable" under the guidelines expressed in the ACA. "Employer coverage is considered affordable - as it relates to the premium tax credit - if the employee's share of the annual premium for the lowest priced self-only plan is no greater than 9.56% of annual household income. People offered employer-sponsored coverage that's affordable and provides minimum value aren't eligible for a premium tax credit." See https://www.healthcare.gov/glossary/affordable-coverage/ for more information.

Following the publication of the final rule, OPM released a set of Benefits Administration Letters (BAL) detailing steps for implementing the provisions of the rule. House and Senate Administrative Offices, as well as DC Health Link, were provided with copies of each BAL.

BAL 13-204(a) (dated November 4, 2013) provides step-by-step instructions including the process for designating congressional staff as working in the "official office," effective dates of coverage and termination for designated staff, coordination between the House and Senate Administrative Offices and DC Health Link, premium deductions, the application of the Government contribution, and other implementation details. This BAL reiterated OPM's determination that the SHOP Exchange operated by DC Health Link would administer health benefits for Members of Congress and designated congressional staff as follows:

> The Small Business Health Options Program (SHOP) was established by the Affordable Care Act and administers group health benefits to employees of qualified employers...
> 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 (DC SHOP) 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.

This BAL explicitly instructed the House and Senate Administrative Offices to create accounts via DC Health Link. These instructions read as follows:

> The Administrative Offices will create separate accounts on DC Health Link (www.DCHealthlink.com) for each Federal employer identification number. The Administrative Offices will select coverage effective dates of January 1, 2014 on DC Health Link and notify employees of their eligibility. This notification will be done through internal House and Senate systems.

In coordination with DC Health Link and OPM, the House and Senate Administrative Offices held the first open enrollment period for Members of Congress and designated congressional staff selecting a health benefits plan via the DC SHOP from November 11 until December 9, 2013. The first effective date of coverage for these employees was January 1, 2014. DC Health Link and the House and Senate Administrative Offices have been providing Members of Congress and designated congressional staff with health benefits plans via the DC SHOP since that time, consistent with OPM's final rule and subsequent guidance.

Attached are copies of comments that OPM received and considered as it developed its rule. Please note that these comments may contain names and identifying information of the commenters. OPM believes that maintaining the confidentiality of individual commenters helps to encourage robust public comment on its proposed rules. Accordingly, when releasing public

comments on an OPM-proposed rule in response to a request under the Freedom of Information Act, or discussing such comments in the Federal Register notice promulgating the final rule, OPM's usual protocol is not to publish the names of individual commenters.

OPM is not constrained from releasing identities of commenters in response to a request from a congressional committee. Nevertheless, OPM asks that these identities be maintained in strict confidence and that they not be released publicly.

We hope that this letter helps to clarify your questions about our decision-making process during the implementation of the final rule in question. If you need any further assistance in this matter, please do not hesitate to contact Ms. Angela Kouters, Director of Congressional, Legislative, and Intergovernmental Affairs at 202-606-1300.

Sincerely,

Katherine Archuleta
Director

Enclosures