April 1, 2013

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

Attention: CMS-9964-P2
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

RE: Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program – Proposed Rule

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the Proposed Rule regarding the Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program ("Proposed Rule"), which was published in the Federal Register on March 11, 2013.[1] This Proposed Rule was issued by the Department of Health and Human Services ("HHS") on the same day as two other related regulations: (1) the Final Rule regarding the HHS Notice of Benefit and Payment Parameters for 2014 ("Final Rule")[2] and (2) an Interim Final Rule requesting comments regarding the Amendments to the HHS Notice of Benefit and Payment Parameters for 2014 ("IFR").[3] The Proposed Rule would implement provisions of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 ("PPACA") related to the Small Business Health Options Program ("SHOP"). Specifically, the summary states that "this Proposed Rule would amend existing regulations regarding triggering events and special enrollment periods for qualified employees

[1] Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 15,553-15,558 (March 11, 2013) (to be codified at 45 CFR pts 155 and 156) [hereinafter referred to as "Proposed Rule"].
[2] HHS Notice of Benefit and Payment Parameters for 2014, Final Rule, 78 Fed. Reg. 15,410-15,541(March 11, 2013) (to be codified at 45 CFR pts 153, 155, 156, 157 and 158) [hereinafter referred to as "Final Rule"].
[3] Amendments to the HHS Notice of Benefit and Payment Parameters for 2014, Interim Final Rule with Comment, 78 Fed. Reg. 15,541-15,552 (March 11, 2013) (to be codified at 45 CFR pts 153 and 156) [hereinafter referred to as "Interim Final Rule" or "IFR"].

and their dependants and implement a transitional policy regarding employees' choice of qualified health plans ("QHPS") in the SHOP."[4]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 States. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide spectrum of business type and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. These comments have been developed with the input of member companies with an interest in improving the health care system.

OVERVIEW

First and foremost, the Chamber remains hopeful that SHOPs will offer small businesses a new avenue to access, compare, and ultimately provide employer-sponsored coverage to their employees. If restrictions are placed on employers, or options are taken away from them, this new conduit through which small businesses may offer employer-sponsored coverage will be of little or no value to employers, or by extension, their employees. In addition to these policy concerns, we also believe the restrictions as to how an employer offers coverage through a SHOP, regardless of the exchange model, violates the PPACA.

Secondly, we urge the Administration to remain mindful of the importance of public comment and make every attempt to reduce confusion. This confusion will not only limit the ability of the public to understand the rules as issued, but will also limit the ability of interested stakeholders to provide constructive feedback to HHS.

I. EMPLOYER FLEXIBILITY IS CRITICAL IN SHOP

a. SHOP coverage is employer-sponsored coverage

As we highlighted generally in the comment letter we filed on October 31, 2011, in response to the Proposed Rule on the Establishment of Exchanges and Quality Health Plans,[5] the Chamber has tremendous concerns with the proposal to usurp the ability of employers to select the health plan options that they offer employees as employer-sponsored coverage through a SHOP. The Administration has consistently asserted that the PPACA will build on the ***existing*** employer-sponsored health system and that Exchanges and SHOPs will create a ***new*** marketplace

[4] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter referred to as "PPACA"].

[5] U.S. Chamber of Commerce Comments on Proposed Rules Regarding the Establishment of Exchanges and QHPS under the Patient Protection and Affordable Care Act,76 Fed. Reg. 41,866-41,927 (July 15, 2011) (to be codified at 45 C.F.R. pts. 155 and 156) on pages 14-16.

that will *expand* access to meaningful coverage in the small group health insurance market. These new marketplaces were not billed as dismantling the existing employer-sponsored system and restructuring the way employers must offer coverage. We believe that as employers assess whether or not to offer coverage to their employees, the more flexibility that they have in deciding how and what to offer, within the confines of the law, the more likely employers will continue to offer health care coverage.

Under the existing employer-sponsored system, employers choose how and what they will offer in terms of health coverage options to their employees. For example, employers may offer a wide variety of different coverage options with varying plan designs to employees, or alternatively, limit the employees' coverage options to a single plan, or perhaps offer several options somewhere in between these two approaches. In the existing system, this decision is entirely up to the employer and for good reason. Some employers, based on their workforce, may be committed to offering a health plan with a certain chronic disease management program or diabetes prevention program to best suit the needs of their workforce's demographic. Alternatively, an employer may want to encourage employees to use high-value providers by choosing a plan that has a value-based insurance design. Or an employer may believe that because of a varied employee population, employee plan choice is critical and will better satisfy the needs of its diverse workforce. Either way, the employer is the one negotiating, subsidizing, and facilitating health coverage that is ultimately sponsored by the employer. When an employer offers employer sponsored health care coverage, it is a benefit that is part of an overall employment package and constitutes a type of compensation offered by the business to its workers. To take this flexibility away, will significantly change the employer-sponsored system in a way that will discourage employers from offering coverage.

We believe that the goal of these new small business marketplaces is and should be to provide employers greater access to affordable coverage options as well as access to readily available critical price and quality information. We cite the statute's initial definition of the SHOPs in Section 1311(b)(1) and focus on the language that indicates these SHOPs are designed to assist employers – not to curtail or prescribe the method or specific plans an employer must follow or offer to its employees.

> (b) American Health Benefit Exchanges
>
> (1) IN GENERAL: Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an ''Exchange'') for the State that—
>
> (A) facilitates the purchase of qualified health plans;
>
> (B) provides for the establishment of a Small Business Health Options Program (in this title referred to as a ''SHOP Exchange'') that is *designed to assist qualified employers* in the State who are small employers in *facilitating the enrollment of their employees* in qualified health plans offered in the small group market in the State;[6]

[6] PPACA, §1311 (b)

By providing these two very valued resources, SHOPs will facilitate meaningful plan comparisons to enable small businesses to make optimal choices regarding the coverage to offer to their employees. We urge HHS to revise the Proposed Rule to reflect the goals of these marketplaces and the promise to build on the existing employer-sponsored system by allowing employers the flexibility to choose how, and what plan options, to offer their employees as employer sponsored coverage through the SHOP.

b. Employers should have the choice to adopt a defined contribution approach

The Chamber believes that employers should have the flexibility to choose to offer employer sponsored coverage via a "defined contribution" model regardless of whether the SHOP is operating in a state as part of a Federally-facilitated exchange model, a state-partnership exchange, or a state-based exchange. While we do believe that the option for an employer to use a defined contribution model may promote employee choice and empower employees to be efficient purchasers of health insurance coverage, we believe – as employer-sponsored coverage has traditionally been structured – this choice must be left to the employer. A defined contribution model must be a coverage option that the employer can select when choosing how to provide employer-sponsored coverage and not one that is essentially required in order for an employer to offer coverage through a SHOP.

If, as the Proposed Rule suggests, for plan years beginning on or after January 1, 2015, an employer offering coverage through a state-based SHOP may only have the ability to allow employees to enroll in any qualified health plans within a certain coverage level,[7] the SHOP is effectively forcing employers to provide coverage via a defined contribution model. Since employees may enroll in different plans through various different issuers, the employer will be forced to set a defined contribution amount to give each employee since premiums will become individualized and will vary depending on the plan, the issuer, the employee's age, and which employees enroll in each plan. If premiums increase for an employee who is technically still obtaining employer-sponsored coverage, the employer is likely to be blamed. While we believe there are merits to defined contribution, we do not believe that employers should be forced to offer employer-sponsored coverage via a defined contribution as a participation requirement for providing health care coverage through this marketplace.

c. PPACA does not stipulate that the two possible employer offering scenarios are exhaustive or mandated

Not only do we believe that this flexibility is necessary to preserve employer-sponsored coverage and maximize the success of SHOPs regardless of the model selected by the state, we also believe that the statutory language permits this flexibility. Section 1312 of PPACA, titled "Consumer Choice" outlines two *possible* ways that a qualified employer *may* offer coverage through the SHOP: employer may specify a level of coverage; employer may elect to make full-

[7] Proposed Rule, 78 Fed. Reg, at 15,557 (to be codified at §155.705(b)(3)(ii)).

time employees eligible for one or more qualified health plans ("QHPs"). The statute does not indicate that these are the only two options or that a SHOP must offer both these specific two options to employers who are considering offering coverage to their employees through a SHOP.

> §1312 Consumer Choice
> (a) Choice
> (1) QUALIFIED INDIVIDUALS.—A qualified individual may enroll in any qualified health plan available to such individual and *for which such individual is eligible.*
> (2) QUALIFIED EMPLOYERS.—
> (A) EMPLOYER MAY SPECIFY LEVEL.—A qualified employer *may* provide support for coverage of employees under a qualified health plan by selecting any level of coverage under section 1302(d) to be made available to employees through an Exchange.
> (B) EMPLOYEE *MAY* CHOOSE PLANS WITHIN A LEVEL.—Each employee *of a qualified employer that elects a level of coverage under subparagraph (A)* may choose to enroll in a qualified health plan that offers coverage at that level.[8]

Additionally, §1312 (f)(2), which defines a qualified employer, states that a "qualified employer" ***may*** purchase coverage for employees through the SHOP. The statute explicitly states: "The term 'qualified employer' means a small employer that elects to make all full-time employees of such employer eligible for one or more qualified health plans ["QHPs"] offered in the small group market through an Exchange that offers qualified health plan."[9] The statute clearly permits an employer to elect to make employees eligible for one or more health plans – it does not say one metal level, nor does it specifically state that these are the only two options as improperly suggested in the Proposed Rule.

These two subsections of §1312 outline two possible ways that an employer may offer coverage to its employees: (1) an employer may offer a level of coverage in which an employee may elect to enroll in any plan at that level (via §1312 (a)); (2) an employer may offer one or more qualified plans (via §1312(f)(2)). There is no language to indicate that these are the only two options. There is no "either" "or" language to indicate that these are the only possibilities. Instead, the administration in promising both during the legislative debate and after enactment to build on the employer sponsored system and permit states' flexibility must grant employers the flexibility the statute allows. Clearly, the statute offers these two possibilities as options, but nothing in the language indicates that these two possibilities are exhaustive.

Therefore, the Chamber strongly urges that the Proposed Rule's transition period that provides flexibility beyond the Final Rule for 2014 and SHOPs in a state that adopts a federally-facilitated model be extended and expanded. While the Chamber recognizes generally that the additional options for offering health coverage through a SHOP are intended to provide flexibility and promote employee choice among plans, the manner in which HHS proposes to implement this

[8] PPACA, §1312 (a)
[9] PPACA, §1312(f)(2)(A).

policy infringes upon the cornerstone of the voluntary employer-sponsored health system – *employer* choice. While we favor employee choice and support a policy that allows employees to shop among a wide range of plans, it must be the employer that chooses whether employees may choose any qualified health plan at a specific level. This is further supported by the statutory language in the consumer choice subsection which specifically states that an employee may choose a QHP within a level when that employee's qualified employer elects to offer coverage in that manner.[10]

Further, there is no statutory language that requires, or even suggests, that flexibility for small business must or should be limited. We question the Administration's narrow interpretation that the statute's provisions are somehow exhaustive as to how employers may offer coverage through the SHOP, regardless of the exchange model that the state elects. While we appreciate the additional year of flexibility that the Proposed Rule suggests for the FF-SHOP, we believe that this flexibility should be extended in both time and scope to maximize the successes of the SHOPs around the country.

II. REDUCE REGULATORY CONFUSION

a. Procedural

Procedurally, the issuance of three interrelated regulations on the same date, which together total roughly 150 pages, only exacerbates the confusion as to how the three rules interrelate. It is not clear that: the Final Rule will stand as is if nothing is done on; the Proposed Rule is a possible amendment to the Final Rule, and; only if the Proposed Rule is finalized would a transition period in 2014 exist. Instead, it is perplexing that in order to find the full text of §155.705, a reader must flip from page 15,534 of the Final Rule to page 15,557 of the Proposed Rule. The Final Rule begins with §155.705(b)(3), while the Proposed Rule includes a prior section §155.705 (b)(2) which is not in the Final Rule. Meanwhile, both the Proposed Rule and the Final Rule include §155.705(b)(3)(i) – (ii), but the Proposed Rule elaborates by including additional subsections §155.705 (b)(3)(iii) and (iv) as well as §155.705(b)(4)(i) and (ii).

There is nothing in the summary to indicate that the Proposed Rule is amending the Final Rule issued the same day. Instead, the only reference is extremely obscure and states that "this proposed rule would amend *existing regulations* regarding trigger events and special enrollment periods."[11] (Emphasis added) A simple clarifying statement or site referencing which "existing regulations" and in particular which section specifically of the "existing regulations" may be amended would clarify this confusion, at least somewhat.

b. Substantive

Substantively, it is not clear in the Proposed Rule where a SHOP operating in a state that has elected the state-partnership approach would fall. Although the Proposed Rule indicates two

[10] PPACA, §1312 (a)
[11] Proposed Rule, 78 Fed. Reg. 15,553.

scenarios for SHOPs in states with a state-based exchange (one before 1/1/15 and one after) and another pair of scenarios for SHOPS in states where a federally-facilitated exchange is implemented for these same time periods, it is not clear what scenarios apply to a SHOP operating in a state with a state-partnership exchange. While this may have been clarified in previous exchange regulations, the distinction must be included in the Proposed Rule to reduce confusion.

c. Regulatory Cost/Benefit Analysis

The Chamber also has concerns regarding the confusing and incomplete regulatory cost benefit analysis of the Proposed Rule. HHS has determined that the cost is less than $100 million per year and therefore the Proposed Rule is exempt from the requirement under Executive Orders 12866 and 13463 to prepare a regulatory impact analysis. However, in support of its "belief that this Proposed Rule does not reach this economic threshold"[12] the Department limits its justification to only two aspects of the Proposed Rule: (1) the amendment to the duration of special enrollment periods, and (2) the addition of a triggering event that would create a special enrollment period.[13] While HHS may be correct in its belief that these two elements would not add new costs on issuers, employers, or enrollees, these are not the only elements of the Proposed Rule that have potential cost implications for employers.

We strongly support allowing employers to select to offer coverage to their employees through a defined contribution model. However, we are concerned that for plan years on or after January 1, 2015, since a SHOP is only required to allow employers to offer all plans within a certain level – this will mean that in some SHOPs, the only way for an employer to offer coverage through a SHOP would be through a defined contribution model. As discussed previously in this comment letter, this takes away the statutorily intended flexibility for the employer to choose whether or not to adopt a defined contribution model and imposes the defined contribution model as a one-size-fits-all solution. A defined contribution model will require employers to assume the additional cost of analyzing and predicting the choices that employees may make among the various QHPs at a single level of coverage (metal level) in order to determine a defined contribution rate that is both consistent with the variety of premium levels among the QHPs and with the employer's overall budget for providing subsidization of employee coverage. By mandating this model, the Proposed Rule imposes an additional level of complexity into the employer's calculation and decision making which would not necessarily exist for all employers if the Proposed Rule allowed employers to choose to adopt this defined contribution model or pursue an additional offering structure. By imposing this additional decision calculus on the employer, the Proposed Rule is imposing a potentially significant cost, because more complex decisions translate into more time by the owner/management of affected small businesses to gather and analyze pertinent information.

Therefore, the cost imposed by the Proposed Rule in this case depends on two critical parameters that the Department has not investigated, estimated or considered: (1) the number of employers who will be affected and the additional analysis time that will be required by the typical

[12] Proposed Rule, 78 Fed. Reg. at 15,555.
[13] Proposed Rule, 78 Fed. Reg. at 15,556.

employer to comply with the defined contribution mandate of SHOP participation. At $58.72 per hour compensation cost for an hour of private business executive management labor, according to the most recent BLS Employer Cost of Employee Compensation data, even a modest number of additional hours multiplied by just a fraction of the potentially eligible millions of small businesses would result in the Proposed Rule having cost in excess of $100 million in at least the initial year of operation. According to data published by the U.S. Small Business Administration Office of Advocacy, in 2008 there were 2.2 million firms with between 5 and 99 employees. In addition there were over 3.6 million businesses with fewer than 5 employees. AS a result, there are a number of routes that could lead to this being an economically significant regulation. For example, one addition hour of management time multiplied by 2 million affected entities equals $117 million, or 5 additional hours of management time multiplied by 500,000 affected entities equals $117 million. We do not know what the correct numbers are, but it appears that HHS doesn't either since no such estimates have been included in the justification published with the Proposed Rule.

Without a credible estimate regarding the number of employers who will be affected and of the time burden that will be imposed on each, HHS cannot say with credibility that the Proposed Rule is not economically significant. We urge HHS to reconsider this issue and either remove the burden-creating mandate for defined contributions or undertake the research necessary to establish a credible estimate of the number of employers who will be affected and the time burden that the requirement will impose.

CONCLUSION

We urge HHS to continue to work carefully, pragmatically and cooperatively with the numerous stakeholders and we look forward to continuing to work together in the future. In order to encourage employers to continue offering employer sponsored coverage, they must be given the flexibility permitted by the statute to choose which plan or plans and how to offer that coverage to their employees.

Sincerely,

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