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Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: CMS-9989-P – Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Proposed Rule

To Whom It May Concern:

These comments are submitted to the Department of Health and Human Services (HHS) on behalf of the Small Business Coalition for Affordable Healthcare (the Coalition), pursuant to Proposed Rule CMS-9989-P on the Establishment of Exchanges and Qualified Health Plans (the Proposed Rule) published in the Federal Register on July 15, 2011.

Representing more than 150 of the country's largest, oldest and most respected small business associations, the Coalition has spent more than a decade working to increase access to and affordability of private health insurance. The Coalition's membership is diverse and includes small business organizations in the agricultural, automotive, construction, food services, floral, lodging, manufacturing, wholesale, retail, rental, entertainment, and houseware communities. As part of the nation's leading small business coalition, our members actively participated in the healthcare debate and advocated for solutions that would promote choice, enhance competition for private insurance and increase the overall affordability of health insurance for our country's job creators: America's small businesses.

General Comments on CMS-9989-P

The Proposed Rule lays out requirements for States to establish Exchanges, requirements for qualified health plans (QHPs) to offer coverage within Exchanges, and, most importantly for the Coalition, it "provides basic standards that employers must meet to participate in the Small Business Health Options Program (SHOP)." Complying with these basic standards is a great interest for business owners, particularly the small business owners the Coalition represents.

The Coalition appreciates the opportunity to comment and will focus comments on particular sections in order to assist with full consideration of the impact on the small business community.

In general, the Coalition wants to emphasize the importance of ensuring flexibility and simplicity in the SHOP so small businesses may easily participate in a manner that works best for employers and employees. It is also critically important that States and HHS ensure the stability of each State's Exchange and SHOP in terms of their financing and infrastructure so that, as Exchanges grow over time, they remain financially viable and able to meet the needs of all participants.

Unfortunately, "this Proposed Rule does not address all Exchange provisions in the Affordable Care Act." Perhaps most glaringly, this rule does not define minimum essential health benefits, actuarial value, and other benefit designs that will determine whether small businesses will be able to begin or continue to offer flexible, affordable health insurance to their employees. Architects of the law emphasize that coverage must be affordable, and urge striking a balance "between our desire to make insurance as generous as possible and a desire to make the [EHB] mandate both moral and feasible by making health insurance affordable."¹ The Institute of Medicine (IOM) estimates 68 million individuals will obtain insurance that must satisfy the essential health benefits requirements.² Many small businesses are still attempting to figure out how the new law will impact their ability to offer health insurance to their employees. It is extremely difficult for small businesses to track and comprehend multiple, incomplete proposed rules. They often lack the in-house expertise and resources to comply with numerous, complicated regulatory changes.

§155.105 Approval of a State Exchange.

(a) State Exchange approval requirement.

The Coalition appreciates that HHS recognizes the "tight implementation timelines authorized under the Affordable Care Act" for States to establish Exchanges. The Coalition believes it is important that the Exchanges accomplish the policy goals of providing "Americans competition, choice, and clout," and of functioning correctly in order to enroll individuals and small businesses efficiently and with minimal administrative burden or complications. These policy goals of the Exchange should be prioritized over the deadline goals of the Proposed Rule. Additionally, "the intent of the Proposed Rule is to afford States substantial discretion in the design and operation of an Exchange."

In order to achieve the policy goal and intent of the Proposed Rule, the Coalition recommends HHS carefully examine the Exchange implementation timetable and weigh whether States can accomplish policy goals in the tight timeline. Small businesses face an uncertain future regarding whether the law will be judicially altered; whether States will have the legislative

¹ Ulmer, Cheryl, et al., *Perspectives on Essential Health Benefits*, Rep. (Washington, D.C.: National Academies, 2011) 43.

² Ulmer, Cheryl, et al., *Essential Health Benefits: Balancing Coverage and Cost*, Rep. (Washington, D.C.: National Academies, 2011) S-1.

timing and economic ability to establish and sustain the Exchanges; and whether further regulatory deadlines will be missed or delayed. If implemented poorly or underfunded, Exchanges could potentially collapse under their own weight and leave small businesses with an even more severely disrupted small group health insurance market than that which exists today. Exchanges must be established and stable before small businesses consider altering the way they provide health insurance to employees.

§155.110 Entities eligible to carry out Exchange functions.

(c) Governing board structure.

HHS invites comments on the types of representatives that should be on Exchange governing boards to ensure that consumer interests are well-represented and that the Exchange board, as a whole, has the necessary technical expertise to ensure successful operations. The Coalition agrees that expertise on providing affordable, flexible healthcare options should be a priority.

The Coalition previously commented, “the Administration must take action to ensure that any Exchange board consist of a professionally and geographically diverse group that includes employees, small businesses and the self-employed, health insurance regulators, and others with appropriate expertise.” Small business owners have extensive experience in purchasing health plans and providing health insurance to employees in the individual and small group markets.

The Coalition recommends small business owners have substantial representation on any SHOP governance board because small business models vary significantly. Further, if a State elects to merge its individual Exchange and SHOP governing boards, small business owners should have representation on that merged Exchange governance board.

(f) HHS review.

HHS requests comments on the recommended frequency of reviewing Exchange accountability structure and governance principles. For the first two-to-three years of an Exchange’s existence, reviews of its accountability structure should be conducted annually, with subsequent reviews on a less frequent basis. Review of governance principles should occur less frequently so the governing board is not subject to constantly changing principles.

§155.130 Stakeholder consultation.

HHS proposes that an Exchange consult on an ongoing basis with key stakeholders, such as small businesses and self-employed individuals. The Coalition appreciates the inclusion of stakeholder consultation in the statute and the Proposed Rule reiterates the importance of frequent consultation with small businesses as they establish their programs and throughout ongoing operations.

The Coalition has a diverse membership representing many industries. As the table below demonstrates, offering rates are also very different between industries. Consulting with small business owners from multiple industries will be critical to the successful development and ongoing operations of Exchanges.

Percentage of Private Sector Establishments Offering Health Insurance to Employees, 2009 by firm size and industry group³						
Industry Group	All Firms	Less than 10 Employees	10-24 Employees	25-99 Employees	100-999 Employees	1,000 or More Employees
Agriculture, fishing, forestry	26.4	20.6	39.1	83.1	68.2	100.0
Mining & manufacturing	67.7	43.0	79.2	90.4	97.9	99.8
Construction	42.3	31.1	73.5	87.8	87.8	100.0
Utilities and transportation	57.1	26.7	67.8	84.5	94.2	99.3
Wholesale trade	66.6	44.9	81.8	90.2	98.5	99.0
Financial services and real estate	67.8	39.0	75.7	90.0	97.4	98.5
Retail trade	59.1	25.5	60.4	84.7	93.0	99.6
Professional services	58.8	40.7	72.3	88.1	97.8	99.4
Other services	45.4	28.1	43.4	65.2	86.1	99.4

§155.160 Financial support for continued operations.

(b) Funding for ongoing operations.

In paragraph (b)(1), HHS proposes to codify the statutory flexibility in section 1311(d)(5)(A) of the law that allows a State Exchange to fund its ongoing operations by charging user fees or assessments on participating issuers. The Coalition worries that user fees or assessments on participating issuers will be passed along to small businesses and individuals in the form of higher premiums. The Joint Committee on Taxation (JCT) described a similar situation regarding the section 9010 of the law that assesses an annual fee on health insurance providers, “we expect a very large portion of the insurance industry fee to be passed forward to purchasers of insurance in the form of higher premiums.”⁴ Any further user fees or assessments will only exacerbate this problem and increase the price of insurance for small businesses, contrary to the goal of healthcare reform.

In paragraph (b)(2), HHS proposes that States may use other forms of funding for Exchange operations. The Coalition cautions against user fees applied to small businesses and individuals who participate in the individual Exchange and SHOP. The burden ought not fall on the small business community, the population that Exchanges intend to assist.

³ Agency for Healthcare Research and Quality, Center for Financial, Access and Cost Trends, 2009 Medical Expenditure Panel Survey – Insurance Component, Table I.A.2.

⁴ Barthold, Thomas A. Letter to Honorable Jon Kyl, June 3, 2011.

§155.210 Navigator program standards.

(b) Entities eligible to be a Navigator.

HHS proposes standards for the Navigator program required for each Exchange. The Navigator standards apply to both the individual Exchange and the SHOP. The Coalition appreciates eligibility of small business associations for Navigator grants to assist small businesses with enrollment.

(e) Funding for Navigator grants.

In paragraph (e), HHS codifies the statutory restriction from section 1311(i)(5) of the law that the Exchanges are prohibited from supporting the Navigator program with Federal funds. The Coalition believes funding for the Navigator program should not be borne by small businesses.

§155.240 Payment of premiums.

HHS has requested comments regarding the establishment of appropriate federal regulatory standards in order to ensure fiduciary accountability in the case that an Exchange collects premiums. The SHOPS are required to collect and distribute premiums, which may potentially amount to millions of dollars. Therefore, it is important that SHOPS be held to fiduciary standards in order to ensure that funds are safeguarded and used appropriately. For example, SHOPS should be required to:

- Maintain accurate accounting of all premiums collected and paid and all operational and administrative expenses;
- Not divert or misuse any funds intended to be used to operate the Exchange; and
- Be held liable for any losses resulting from the breach of its fiduciary duties.

As a result, employers utilizing the SHOP who timely and properly transmit their premium payments to the SHOP must be deemed to have satisfied their responsibility for these funds. After that point, the SHOP should be responsible. However, the Coalition believes that HHS should not promulgate and impose Federal regulations in this area. Rather, HHS should defer to state insurance commissioners, who have particular knowledge of their local insurance markets and are better able to determine the standards that will ensure Exchanges are operable and accountable to small businesses and individuals.

§155.705 Functions of a SHOP.

(b) Unique functions of a SHOP.

The small business community is made up of an extraordinarily diverse range of business types and sizes. Firms within the Coalition are also diverse in their division of labor (e.g., full time, part time, seasonal) and the wages they pay to employees. The rate at which small employers offer coverage to their employees also varies significantly depending on the size of the employer and the industry. For example, among retail businesses, 25.5 percent of those with fewer than 10 employees offered coverage, 60.4 percent of those with 10-24 employees offered coverage and

84.7 percent of those with 25-99 employees offered coverage.⁵ Offer rates also vary geographically.⁶

With this diversity in mind, the Coalition appreciates the flexibility provided under the Proposed Rule with regard to SHOPS' ability to permit employers to choose from a range of options for offering coverage to their employees. In particular, the Coalition supports HHS' statutory interpretation to codify section 1312(a)(2)—to require that SHOPS allow qualified employers to select a level of coverage under which a qualified employee may choose an available plan. This option will allow employers to essentially offer a defined-contribution option and permit employees to choose the plan that best fits their individual needs.

The Coalition also supports SHOP Exchanges allowing a qualified employer to select a single QHP to offer to its employees. Under the present-day system, approximately 82 percent of small employers that choose to offer health coverage to their employees offer only one plan.⁷ The Coalition believes that this option should be preserved in order to keep these small businesses in the system, and their employees in the risk pool. Finally, the Coalition supports two of the additional options proposed by HHS: to allow employers to select specific levels from which an employee may choose a QHP and to allow employers to select specific QHPs from different levels of coverage from which an employee may choose.

However, although these options would be available if *Exchanges/SHOPS* choose to offer them, it is unclear in the Proposed Rule whether this flexibility would transfer to the employers using the SHOP. The Coalition believes that it must be the *employer* (who is electing to offer employees coverage through the SHOP) that still maintains the ability to choose which coverage option their employees may select from, not to the Exchange. Employers must have the flexibility to offer the range of coverage options that is most suitable for their needs and those of their employees and, therefore, we ask that HHS clarify that employers, not SHOPS, have the ability to define which coverage options their employees may select from within the SHOP.

Also in this section of the Proposed Rule, HHS has requested comments regarding whether, and how, minimum participation rules should apply to SHOPS. The Coalition does not believe that minimum participation rules should be uniformly imposed. Instead, if state insurance commissioners, who have unique knowledge of the insurance markets in their respective states, believe that a minimum participation rule is needed to ensure adequate risk pooling, then the SHOP may impose such a rule. From the perspective of small businesses, however, minimum participation rules are generally barriers to providing insurance to employees. A recent survey by the National Federation of Independent Business (NFIB) found that 37 percent of small employers who pay 90 percent or more of the total cost of their employees' health insurance premiums do so in order to ensure minimum employee participation, most likely in order to satisfy state requirements for minimum participation in the small group market. Furthermore, for

⁵ Agency for Healthcare Research and Quality, Center for Financial, Access and Cost Trends, 2009 Medical Expenditure Panel Survey – Insurance Component, Table I.A.2.

⁶ “Health Insurance in the Small Business Market: Availability, Coverage, and the Effect of Tax Incentives,” Small Business Administration Office of Advocacy, September 2011.

⁷ Agency for Healthcare Research and Quality, Center for Financial, Access and Cost Trends, 2010 Medical Expenditure Panel Survey – Insurance Component, Table I.A.2.d.

small businesses with less than 50 employees, only 59 percent of employees are enrolled in health insurance at establishments that offer the benefit,⁸ indicating that a minimum participation percentage, if used, should be set below that level in order to ensure that small businesses do not drop out of the system. Therefore, the Coalition recommends that HHS defer to the states to determine whether a minimum participation rate should apply and, if so, what types of waivers are necessary.

Finally, the Coalition supports the following proposals in this section of the Proposed Rule: that SHOPS be required to notify employees of the effective date of coverage; process enrollment applications; aggregate premiums for payment to QHPs; and maintain enrollment records. The statute and the Proposed Rule appropriately place these administrative functions within the responsibilities of the Exchanges, rather than employers. According to an NFIB small business poll, only 12 percent of all employers with fewer than 250 employees have at least one employee whose exclusive role is personnel or human resources.

Furthermore, the law mandates a number of reporting requirements for employers including, but not limited to, attestations on the offer of health insurance and W-2 information reporting. Individually, these requirements may not appear burdensome, but in totality they represent a significant paperwork and regulatory burden for small employers. Administrative burdens serve as a barrier to offering health insurance for many small businesses. A recent study released by the Small Business Administration (SBA) Office of Advocacy found, “Small businesses still face higher costs when they encounter government regulations compared to larger firms...on a per employee basis it costs small firms \$2,830 more than larger firms to comply with government regulations.”⁹ As the SBA Chief Advocacy Counsel contended upon release of the report, “That is a 36 percent difference and that is an unfair burden to place on American small business.” Small businesses have higher administrative costs per employee when offering health insurance and have less predictability in costs compared to large businesses.¹⁰

The Coalition requests that HHS does everything possible to minimize the administrative burden imposed on small businesses. We appreciate the flexibility in the Proposed Rule but wish to ensure that SHOPS, in particular, are encouraged to exercise this flexibility to benefit small employers.

§155.715 Eligibility determination process for SHOP.

(b) Applications.

The Coalition supports allowing eligibility determinations to be made on the basis of employers’ self-reported information rather than through more stringent means. For example, requiring employers to supply documentation in support of their self-reported size would present an unnecessary additional burden that many small businesses lack the capacity to bear. The

⁸ Agency for Healthcare Research and Quality, Center for Financial, Access and Cost Trends, 2010 Medical Expenditure Panel Survey – Insurance Component, Table I.B.2.b.

⁹ Nicole Crain and W. Mark Crain, “The Impact of Regulatory Costs on Small Firms,” September 2010. Available at: <http://archive.sba.gov/advo/research/rs371tot.pdf>.

¹⁰ “Health Insurance in the Small Business Market: Availability, Coverage, and the Effect of Tax Incentives,” Small Business Administration Office of Advocacy, September 2011.

Coalition believes that self-reporting and an employer attestation are sufficient for determining employers' eligibility.

The Coalition also supports HHS' interpretation of the law's requirements that the Secretary develop and provide to States a single, streamlined form and that issuers must use a uniform enrollment form for qualified individuals and employers to enroll in a QHP through the Exchange. Specifically, we agree that the SHOP should use a single form for employees and a single form for employers, and we urge HHS to work with the National Association of Insurance Commissioners to ensure that these forms are as brief and as simple as possible. In addition, the Coalition wishes to emphasize that many small employers still use paper-based systems for administrative purposes, from bookkeeping to employee benefits. Although these functions are increasingly being moved to computerized programs and the Web, many employers are not comfortable with such functionality and prefer to maintain their paper-based systems. It is important, therefore, that all employer and employee forms be streamlined for both electronic and paper-based users.

§155.725 Enrollment periods under SHOP.

(d) Annual employer election period notice.

In paragraph (d), HHS proposes that the SHOP must notify participating employers that their annual election period is approaching. Small businesses currently receive aggressive education and outreach efforts regarding election periods, plan changes, and other details related to their coverage. The Coalition recommends requiring that participating employers be given at least 30 days advance notice that the election period is approaching and options available. The Coalition recommends that outreach and enrollment vehicles be diversified so that a variety of communication and response tools can be utilized so consumers can use phone, fax, public kiosks, and in-person visits to facilitate entry into the SHOP.

§155.730 Application standards for SHOP.

(b) Single employer application.

HHS has solicited comments regarding what employer information a SHOP should be required to collect. In a recent member poll, the NFIB found that nearly 80 percent of members strongly disagreed or somewhat disagreed that the new law will reduce paperwork and make providing healthcare less complex. This statistic reflects members' serious concerns about the increased administrative burden they anticipate under the reformed health insurance system, including Exchanges. The Coalition shares these concerns. Therefore, we urge HHS to minimize the paperwork burden for employers as much as possible by limiting the information required as part of an employer's application to the minimum information listed in the Proposed Rule. The four items proposed—the employer's name and address, number of employees, Employer Identification Number (EIN), and a list of qualified employees and their social security numbers—are sufficient for purposes of an employer's application to the SHOP, just as this information is sufficient for enrolling in a small group policy today. Furthermore, the SHOP will not be making determinations regarding the individual subsidies and, therefore, should not need information beyond these items. Thus, the Coalition requests that the final regulations specify

that the SHOP must limit the application information to the four items listed in proposed 155.730(b).

§155.1000 Certification standards for QHPs.

(c) General certification criteria.

HHS received comments in response to a Request for Comments (RFC) regarding the extent to which Exchanges should implement an “any-willing plan” model, or implement active purchaser approach, such as selective contracting or price negotiation. The Coalition urges extreme caution on limiting participation beyond QHP certification, as it could discourage participation within the SHOP by QHPs and small businesses. The Coalition advocates for solutions that promote choice, enhance competition for private insurance and increase the overall affordability of health insurance for small businesses. The Proposed Rule states, “insurance companies will compete for business on a level playing field, driving down costs. Consumers will have a choice of health plans to fit their needs. And Exchanges will give individuals and small businesses the same purchasing clout as big businesses.” These three goals can only be accomplished in competitive marketplaces that provide individuals and small businesses with options that address their unique personal and business situations.

§156.285 Additional standards specific to the SHOP.

(b) Enrollment periods for the SHOP.

HHS is considering whether to require QHPs in the SHOP to allow employers to offer dependent coverage and solicits comment on this potential requirement. In a recent NFIB survey, 42 percent of businesses with fifty or fewer employees offered health insurance to their employees. Of those offering businesses, 73 percent also offered dependent coverage. Small businesses should have the option, but not be required, to offer dependent coverage. The Coalition recommends QHPs should thus be required to provide the option to offer dependent coverage in a SHOP.

(d) Termination of coverage in the SHOP.

HHS proposes that a QHP issuer terminate all enrolled qualified employees of the withdrawing employer if the employer chooses to stop participating in the SHOP since the enrollee will no longer be eligible for SHOP coverage. HHS notes in the Proposed Rule that participation in the SHOP is strictly voluntary for small employers. Small business should have the flexibility to offer the best possible plan that works for their individual workforce, whether that is inside or outside the SHOP.

Conclusion

The Coalition appreciates the opportunity to comment and provide the unique perspective of small businesses. As the Administration works to develop additional regulations related to the Exchanges, one thing is clear – small business owners remain committed to working as partners to develop an insurance marketplace that is simple, efficient and responsive to their needs. The Coalition believes that the input of small businesses will be critical to ensuring that the individual Exchange and SHOP are able to effectively address the needs of employers.

The success of Exchanges is closely tied to the affordability of QHPs. As the Preliminary Regulatory Impact Analysis (CMS-9989-P2) states, “enrollment in the small group market will be sensitive to premiums. Unlike for individuals who receive advance payments of the premium tax credit, the employer or employee will pay the marginal cost of coverage in the small group market.”¹¹ The Congressional Budget Office (CBO) estimates approximately three million employees will obtain coverage through the SHOPS.¹² Other surveys of employers indicate employer sponsored coverage could drop off significantly due to the new incentives created within the law. The Coalition recommends careful consideration of the remaining outstanding regulations and recommends extensive conversation and consultation with small businesses and the organizations that represent them. Potential costs to small businesses must be closely examined as other regulations are proposed. Thank you for your time and consideration.

¹¹ U.S. Department of Health and Human Services, Center for Consumer Information and Insurance Oversight, *Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans (CMS-9989-P) and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (CMS-9975-P) - Preliminary Regulatory Impact Analysis (CMS-9989-P2)*, July 2011.

¹² Ibid.

Sincerely,

American Farm Bureau Federation
American Foundry Society
American Hotel & Lodging Association
American Rental Association
American Supply Association
Associated Builders and Contractors
Associated General Contractors of America
Automotive Aftermarket Industry Association
Automotive Recyclers Association
Commercial Photographers International
International Franchise Association
International Housewares Association
Metals Service Center Institute
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Federation of Independent Business
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Tooling and Machining Association
North American Die Casting Association
Petroleum Marketers Association of America
Precision Machined Products Association
Precision Metalforming Association
Professional Photographers of America
Small Business and Entrepreneurship Council
Society of American Florists
Society of Sport and Event Photographers
Specialty Equipment Market Association
Student Photographic Society
U.S. Chamber of Commerce