



April 1, 2013

Marilynn Tavenner  
Acting Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
200 Independence Ave SW  
Washington, DC 20201

Submitted electronically: [www.regulations.gov](http://www.regulations.gov)

**Re: Comments on Proposed Rule, "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program" – CMS 9964 – P2**

Dear Ms. Tavenner:

I am writing on behalf of The National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. We are pleased to provide comment on the proposed rule "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program (SHOP)" published in the *Federal Register* on March 1, 2013.

The members of NAHU work on a daily basis to help millions of individuals and employers purchase administer and utilize health insurance coverage. A representative group of health insurance agents and brokers that actively monitors and participates in exchange development activities in every state helped to develop these comments, so they reflect the views of experts who fully understand both consumer needs and interests and are also fully versed in the various points the states are at regarding health benefit exchange implementation.

NAHU appreciates the recognition CMS has continually provided relative to the role health insurance agents and brokers are expected to play in health insurance exchanges, both with individual and small business health insurance consumers. Just as our nation's health insurance agents and brokers stand ready to assist individual health insurance consumers with their exchange purchasing and coverage service needs, we also are ready to serve small employers who may wish to purchase coverage through state-based Small Business Health Options Exchanges and federally facilitated and partnership SHOP exchanges (FF SHOP). In fact, agents and brokers will likely be the group best equipped to serve FF SHOP exchange consumers, as virtually all small-group health insurance coverage is placed and serviced through independent agents and brokers today.

Licensed and certified insurance producers will do all they can to make SHOPS successful ventures, but from the outset we feel that CMS should set realistic expectations for what will constitute a successful SHOP exchange, particularly concerning enrollment and participation in the first few years. Experience from other states that have established purchasing pools for small businesses, including the Massachusetts Connector and the Utah Exchange, shows that not all



small businesses are drawn to the exchange concept and that enrollment may be very low, particularly initially. NAHU sees no reason why history will not repeat itself with the SHOP exchanges. In fact, while we understand the reasoning behind the transition delays proposed in this rule for both employee plan choice and premium aggregation, we believe these two implementation changes will also have a significant impact on the interest the small employer community will have in the SHOP concept in 2014.

### **Employee/Employer Choice**

PPACA provides that employers participating in the SHOP exchanges have a degree of choice in determining the plan options and coverage levels made available to their employees. NAHU believes that in order for SHOP exchanges to attract small employer participation, coverage rules need to be as convenient and flexible for small employers as possible. Employers should be able to maintain control over the options they offer to their employees, not the exchange. Otherwise, we do not believe the SHOP exchanges will be a successful alternative to the traditional small-group market.

NAHU understands the proposed delay in employee choice and the decision to allow employers to select just one QHP offering for employees in a FF SHOP for the 2014 plan year and to make the employer choice option optional for state-based SHOP exchanges in 2014. For plan years moving forward beyond 2014, NAHU suggests that the final exchange rule should specify that for plan years beginning in 2015 and on forward, employers should be allowed to keep their employees together as a uniform group and should be allowed to select a limited selection of qualified coverage options amongst the health plans offered in the exchanges for their employees. Employers should be able to select coverage level(s) for their employees and select the QHPs made available to their employees.

### **Premium Aggregation**

NAHU believes that the defined contribution concept associated with the SHOP exchanges and the aggregation of employee premiums from multiple QHPs is the main reason why a small employer would seriously consider the SHOP as a viable coverage option. While we understand that there is no need for premium aggregation in FF SHOP exchanges in 2014 now that only one plan choice will be available to employees, we feel that premium aggregation will be critical to employer participation once greater employee choice commences. Furthermore, in state-based SHOP exchanges that allow employee choice in 2014, NAHU believes that premium aggregation should also be required.

### **Additional Factors That Will Impact FF SHOP Enrolments and Participation**

In addition to the delay of both employer choice and premium aggregation, NAHU believes there are a variety of other health reform factors that may make employers very hesitant to participate in a SHOP exchange, particularly initially. The recent decision to not have a broker portal for the management of SHOP exchange business in 2014 will limit the ability of health insurance producers to assist their clients in managing their FF SHOP business, both at the time of enrollment and throughout the plan-year. Small businesses rely on their agents and brokers to provide such service. Furthermore, many health insurers and others in the states are developing their own private exchange models that will be similar to and compete with the FF SHOP exchange concept. The additional price impact of the FF SHOP fee, which will most certainly be passed on to consumers, will also surely be a disincentive towards the purchase of FF SHOP coverage.



Another concern we have is that the timing process being followed by CMS with regard to SHOP exchange carrier contracting is extremely tight, and many small employers who are already looking ahead to make benefit plan decisions in 2014 right now. Those employers will not be sure of their SHOP options until late summer 2013, which may cause them to disregard SHOP as an option for next year.

We have also seen evidence in the marketplace that small employers with locations in multiple states may find that the requirement to allow employees to utilize the SHOP exchange in the state of the employee's primary worksite is much too complex to administer. For example, employers would have to work with multiple SHOP exchanges with respect to contribution of premiums, enrollment, reconciliation, etc, eliminating the value of premium aggregation and enrollment simplicity that SHOPS are designed to provide. If small employers are required to interact with multiple exchanges to provide coverage, they may opt not to offer group coverage and push employees into individual coverage, depriving consumers of the many benefits of group health insurance coverage.

Additionally, NAHU members see compliance concerns with COBRA, ERISA, HIPAA, Medicare secondary payer rules, FMLA, Sections 125 and 105, and more, particularly in state-based SHOP exchanges where employee choice will begin in 2014 and in FF SHOP exchanges in 2015 once employee choice commences. For example, will SHOP offerings be subject to ERISA requirements? What about COBRA? How will employers utilizing the FF SHOP or a state SHOP, for that matter, meet all of their general election and notice requirements? Regarding the Medicare secondary payment requirements, who is the primary payer if a group is split between many QHPs and issuers? If these issues and many others like them are not immediately addressed, participation in the SHOP exchanges will be extraordinarily limited. Agents and brokers have a legal liability to accurately advise their clients about these matters and need to be able to answer the questions of employer clients on these topics as soon as possible to ensure any degree of employer comfort with the SHOP concept. Furthermore, until these issues are clearly resolved, the FF SHOP will not be able to meet its goal of ensuring parity with the outside market.

Another significant issue we have regarding potential participation in the FF SHOP is with the current CMS proposal to use the health reform law's shared responsibility employee counting standards (currently issued in proposed rule form by the federal Treasury Department) as the means of determining eligibility for the SHOP exchange. These counting standards are highly confusing and are already causing a significant compliance burden for large employers. Smaller employers have even less understanding of these requirements and fewer compliance resources to draw on. Furthermore, these standards utilize a different definition of a full-time employee than what is in common use today by both small employers and large employers alike.

The use of the shared responsibility standard will also result in variance between the way employers determine eligibility currently for the traditional small group market and the SHOP exchange. For traditional small group coverage, employers merely count the number of employees eligible for the group plan. We believe this may result in anti-selection against the SHOP exchange by mid-size employers who do not want to have to engage in the compliance work required under the shared responsibility standard. Use of two different eligibility standards in the small group market will also result in an unequal and lesser number of groups being eligible for SHOP coverage versus group coverage offered outside the exchange.



We understand that CMS wants to take into account part-time employees when determining eligibility, but small and large employers are under no obligation to offer part-time employees coverage. If a small employer does offer coverage to part-time workers currently, those employees would be reflected in the eligible employees number used to determine small group coverage applicability currently in all states. Another important point to consider is that insurers may not offer coverage that would be available to part-time employees; making the counting of these employees even less relevant. We urge CMS to reconsider its position on the SHOP exchange eligibility standard and instead utilize the eligibility standards being used for small group coverage in each state currently.

A final issue we see with FF SHOP enrollment potential concerns employer participation requirements. In a final rule on issued on February 22, 2013, CMS attempted to address participation and contribution requirement concerns for small employers, specifically referencing that such requirements could make it impossible for smaller employers who are subject to the shared responsibility provisions to meet their coverage obligations. In the final rule, CMS specified that issuers cannot require any participation and/or contribution requirements of smaller employers, but could limit employers that cannot meet traditional market-driven requirements to a one-month open enrollment period of November 15 to December 15. It is our understanding that for FF SHOPS, your agency intends to impose a 70% participation requirement or other state-based participation standard for all times of the year except for the specified November 15-December 15 open enrollment window. If this is the case, it is unclear what will happen to employer groups in FF SHOP exchanges who can meet issuer participation requirements one year but cannot upon renewal. Will that employer plan be forced to disband until the next November 15-December 15 open enrollment window? Uncertainty regarding this issue will definitely impact enrollment, as other state small group options are likely to afford small groups with more flexibility in this area, and meeting participation requirements and continuing to be able to meet them on each renewal is always an employer concern.

NAHU believes that all of these concerns we have identified with regard to SHOP exchanges are causing a great degree of employer hesitancy with regard to the SHOP concept and could significantly impact enrollment, particularly in the first year of exchange implementation. The availability of the federal Small Business Health Insurance Tax Credit (SBTC) only through the SHOP exchanges is supposed to be an incentive for small employers to purchase coverage via an exchange, but NAHU members are not convinced the tax credit availability will be a major draw for small businesses. The success of that SBTC has been disappointing, at best, to date. If to claim the credit in the future, the coverage choices are restricted to the SHOP exchange, and any or all of the current concerns we anticipate employers may have with SHOP coverage exist, we do not believe the limited value and reach of the SBTC will play a strong role in attracting employers to any SHOP exchange.

We urge CMS to take all of this data into consideration when weighing the potential design of any FF SHOP exchange and in developing and issuing final SHOP exchange regulations and guidance. Setting expectations appropriately from the outset with regard to enrollment and small-employer needs will allow your agency to manage resources and provide the best possible service to the limited population likely to utilize the FF SHOP in the early years of exchange implementation. Providing definitive and timely answers to the producer and small-employer communities on the many SHOP exchange questions we have raised herein will also go a long way toward ensuring that small employers consider the SHOP exchanges to be a viable coverage option for their employees.



### **Enrollment Periods**

While NAHU believes that there are many issues with the current design of SHOP exchanges that may impact employer interest in this coverage option in 2014 and beyond, we do appreciate the effort made in the proposed rule to align SHOP special enrollment periods with the HIPAA-specified timeline for special enrollment events that applies to the traditional small group marketplace. NAHU believes parity in areas like these will be very important to the future success of SHOP exchanges.

NAHU sincerely appreciates the opportunity to provide these comments, and we look forward to working with you as implementation of PPACA, and exchanges specifically, moves forward. If you have any questions, or if we can be of further assistance to you, please feel free to contact me at 202-595-3676 or [jwaltman@nahu.org](mailto:jwaltman@nahu.org).

Sincerely,

A handwritten signature in black ink that reads "Jessica F. Waltman". The signature is written in a cursive, flowing style.

Jessica F. Waltman  
Senior Vice President of Government Affairs  
National Association of Health Underwriters