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October 31, 2011

Donald Berwick, MD
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Submitted via the Federal Rulemaking Portal: <http://www.regulations.gov>

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

Dear Dr. Berwick:

On behalf of the 1.1 million members of the National Association of REALTORS® (NAR), I submit the following comments in response to the Proposed Rule to implement the new Affordable Insurance Exchanges (“Exchanges”), as issued in the Federal Register on July 15, 2011 (76 Fed. Reg.19528).

The National Association of REALTORS® is America’s largest trade association, including NAR’s five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

Finding affordable and accessible health care coverage is one of the biggest challenges facing NAR’s members today. NAR’s members include individual real estate agents, real estate brokers and realty firm broker/owners. The overwhelming majority of real estate agents are not employees of the realty offices with which they are affiliated. Rather, they are independent contractors, a separate legal business entity from the real estate office. Many of these individuals struggle to find and maintain affordable health insurance coverage in the individual market. In a limited number of states, our members have benefited from state laws that allow so-called “groups of one” to participate in the small group market. This enrollment option is one that must not be eliminated for those individuals in any final rule governing the Exchanges.

Realty firms and those independent contractors with employees of their own also face difficulties as they search small group markets for affordable coverage for their salaried staffs. As a result, 28% of NAR’s members are uninsured and only 39% of realty firms owned by our members are able to offer coverage to their salaried staffs.



REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

Consequently, REALTORS® have been active in the different discussions on small business health reform over the past decade. We are proud to have been one of two small business associations involved in the drafting of the S. 979, the Small Business Health Option Plan Act (SHOP), cosponsored by Senators Durbin (D-IL) and Snowe (R-ME), which provided groundwork for the Affordable Care Act's (ACA) SHOP provisions. NAR strongly believes that the individual Exchanges and SHOP will (1) provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options on the basis of price, quality, and other factors, and (2) enhance competition in the health insurance market, (3) improve choice of affordable health insurance, and (4) give small businesses the same purchasing clout as large businesses.

Given the make-up of our membership, our comments are focused on considerations from the perspective of the self-employed individual and the small employer. Our comments will address the importance for real estate agents, realty firm owners and other self-employed individuals and small business owners of:

- Ensuring that the self-employed are not left with fewer health insurance markets in a post-reform world; and
- Creating standards and practices governing state Exchanges and SHOP that will proactively represent the interests of the self-employed and small employer.

Ensure More, Rather Than Fewer, Marketplace Options are Available to the Self-Employed

Given the experience of our members, the successful implementation of the ACA is an issue in which our association has a vested interest. NAR supported the SHOP concept from its earliest inception in the belief that the construct would enable small firms of all sizes to offer affordable health plans to those working in the firm. We agree with the Department of Health and Human Services (HHS) that the SHOPs will give small businesses access to a wider range of policy options than has traditionally been available and create the economies of scale that have benefited larger employers.

We strongly urge HHS to reconsider its proposed eligibility standards for SHOP participation. We are concerned that the proposed rule's definition of an eligible SHOP participant (1) will not provide the self-employed with improved access but, in fact, could reduce access already enjoyed by many self-employed persons, (2) is inconsistent with other ACA provisions that give the States authority to merge their individual and small group markets and (3) will create coordination issues for the Exchanges and SHOPs that will need to be proactively addressed.

Eligibility standards for SHOP (§155.710)

Citing the PHS Act definition of employer and ERISA definition of group health plans which refer to at least 1 employee, HHS proposes that sole proprietors, certain owners of S corporations, and certain relatives of each of these individuals be ineligible for SHOP participation. As the National Association of Insurance Commissioners (NAIC) have pointed out in their October comment letter on this proposed rule, this interpretation is

“inconsistent with both the plain language and the purpose of the statute, and with 15 years of established interpretation under HIPAA. Section 2794(2)(5) of the PHS Act states that “the term employee” has the meaning given such term under section 3(6) of the Employee Retirement Income Security Act of 1974,” and section 3(6) of ERISA states that “the term employee” means any individual employed by an employer.” There is no exclusion for self-employed persons or their relatives.”

NAIC goes on to point out that while HIPAA does define “small employer” and “employer” to refer to employers with 2 employees, states were permitted to adopt broader definitions in state law. Today, eleven states allow so-called “groups of one” to participate in the small group market. By denying the self-employed eligibility, the proposed rule now appears to be challenging that existing, longstanding interpretation.

This interpretation not only upsets established practice but runs counter to the bill's goal of expanding small business access to affordable coverage and denies self-employed small business persons without employees access

to the SHOP small group market that will be available to other small businesses in their states. Additionally, the ACA clearly allows states to merge their individual and small group markets so it is unclear why a state should not be allowed to expand participation to those already subject to the state's small group regulations.¹

Finally, barring the self-employed individual from the SHOP exchange will increase the administrative and coordination challenges - and the likelihood for consumer hardship - for both the Exchanges and SHOPs as the self-employed bounce back and forth between the two marketplaces when periods of economic growth or contraction lead them to hire and/or lay-off employees. In the real estate sales industry, for example, it is not uncommon for a "top producing" independent contractor sales agent to hire staff during the good times to keep up with client demands. These employees might include a transaction coordinator to handle the closing process, a salaried agent to handle showings, and/or an administrative assistant to help with the paperwork. In today's market, many of those same self-employed agents who had sales teams in the recent past have since had to let them go. Since real estate is a cyclical business, real estate sales agents will be forced to deal with the Exchange, and then the SHOP, and then the Exchange, etc. until such times as the States merge their two exchanges.

For each of these reasons, we strongly encourage the Department to reconsider its interpretation of the bill's SHOP eligibility provisions. We believe that allowing the self-employed to participate in SHOP is in keeping with the bill authors' intent and longstanding established practices. At a minimum, states that allow "groups of one" to participate in the small group market should be allowed to permit these individuals to continue their participation in their states' SHOPS.

Creating Standards and Practices Governing State Exchanges that will Proactively Represent the Interests of the Self-Employed and Small Employer

Exchange Governing Board Structure §155.110 (c)

In §155.110, the Department proposes standards related to conflicts of interest and qualifications for members of an Exchange governing board. As the notice states, Exchanges are intended to support consumers, including small businesses. NAR believes that the majority of the voting members of governing boards should be individuals who represent the interest of these groups. NAR agrees with the Department that is particularly important that the Exchange governing boards are not dominated by the insurance provider community, but rather are balanced and diverse.

Paragraph (c)(4) proposes that the Exchange governing body ensure that a majority of governing board members have relevant experience in health benefits administration, health care finance, health plan purchasing, health care delivery system administration, public health, or health policy issues related to the small group and individual markets and the uninsured. NAR would strongly urge that the boards also be required to include at least one representative involved in the day-to-day administration, sale or purchasing of health plans for the self-employed who will also be served by the Exchanges.

We believe that this requirement is particularly important in order to represent the interests of the self-employed individual. Too often throughout the health reform debate, the self-employed were characterized as being no different than employed individuals. It is important that this not be the case in the Exchanges where it is critical to include those who keenly understand that the interests of the self-employed are often not coincident with individual purchasers or small firms.

We would also urge that the governance board consult with the self-employed and small employers on a regular basis to assess how well the Exchange and SHOP are meeting the needs of its clientele.

¹ We would also raise the question as to what the adverse-selection ramifications could be for the SHOP and/or the remaining state-regulated small group market in those states where the self-employed continue to participate in the state small group market as "groups of one".

SHOP Governance and Administration Structure §155.110 (e)

Section 1311(b)(2) of the Affordable Care Act provides each state with flexibility to merge its individual market Exchange and SHOP under a single administrative or governance structure. Paragraph (e)(1) of this rule allows a state to operate these two Exchanges under separate governance or administrative structures.

While we would agree with this assessment of the underlying ACA provisions, NAR also agrees with the Department's view that a single governance structure for both the individual market Exchange and SHOP will yield better outcomes, in terms of policy coordination, increased operational efficiencies, and improved operational coordination. Any state choosing to operate two administrative structures must be required to coordinate and share relevant information between the two Exchange bodies.

This coordination of information and systems will be especially important for the self-employed, many of whom will move from the Exchange to SHOP and back when periods of economic growth or contraction lead them to hire and/or layoff an assistant or two. While we know this to be characteristic of many professions, we expect that our membership will be among those who will be forced to deal with both the Exchange and SHOP throughout their professional careers until such times when states merge the two exchanges.

Given that this characteristic is common to many self-employed, we would encourage HHS to strongly incentivize states to quickly merge the Exchange and SHOP functions into one structure, as well as merge the two markets.

Stakeholder consultation §155.130

Section 1311(d)(6) of the Affordable Care Act requires Exchanges to consult with certain groups of stakeholders as they establish their programs and throughout ongoing operations. The self-employed are specifically referenced in the authorizing language as one of the groups that the Exchange and SHOP are to consult. Given the movement of the self-employed between the Exchanges and SHOP, we urge the Department to include explicit requirements for the Exchanges and SHOP to consult with the self-employed, as well the small employer community.

Establishment of a regional Exchange or subsidiary Exchange (§155.140)

Section 155.140 of the proposed rule outlines the requirements governing regional Exchanges, i.e. Exchanges spanning two or more states, and subsidiary Exchanges. While the specifics of the operating criteria for the regional Exchanges or subsidiary Exchanges are outside of the expertise of NAR, we believe that the resulting final rule should (1) facilitate the establishment of viable regional Exchanges, (2) require a strong case, including strong documentation, to be made for the need for any subsidiary Exchange prior to approval, and (3) ensure that the boundaries of the geographically distinct areas for both the Exchanges and SHOP are identical.

While the authorizing language of the ACA allows states to establish subsidiary Exchanges, NAR has long held that administrative overhead and inefficiencies have been a major contributor to the high cost of health insurance premiums in the individual and small group markets. We believe that the regional and state Exchanges will offer greater economies of scale and efficiency if properly structured. NAR remains concerned that multiple subsidiary Exchanges within a state will not only increase administrative costs but will create confusion for consumers. This will especially be the case for those self-employed individuals who, as we noted earlier, may be forced to move between the two Exchanges as their businesses hire or release additional employees. For these reasons, we feel that any application for subsidiary Exchanges require a strong case, including strong documentation, to be made for its need.

On a related note, while separate Exchanges for individuals and small groups may be a necessary interim format, we hope that HHS will seriously encourage States to adopt a shorter timeline for the merger of the Exchange and SHOP into a single Exchange.

Functions of an Exchange (§155.200)

NAR is pleased that the Department acknowledges the need for a streamlined, coordinated system of eligibility and enrollment guidelines that are consumer oriented, minimize administrative hurdles and unnecessary paperwork and provide a means for consumers to appeal eligibility determinations.

While the challenges for reaching and serving employed individuals may be apparent, the challenges facing the self-employed will require special attention. For example, in the case of self-employed individuals in the Exchanges, eligibility for the individual affordability credits could change radically from year to year due to fluctuations in income. REALTORS[®], for example, routinely experience wide variations in income from year to year that will make the qualification process more complex and likely subject to appeal. For those self-employed individuals who hire employees mid-way through an enrollment year, the need to transition from the Exchange to the SHOP will create additional challenges to ensure that the self-employed individual's coverage is uninterrupted. We urge that attention to the distinct needs of the self-employed in the Exchange be a priority for those implementing the Exchanges.

Required consumer assistance tools and programs of an Exchange (§155.205)

In §155.205, the Department outlines the standards for a number of consumer assistance tools and activities that Exchanges must provide. Of particular importance for our members is section 1311(d)(4)(C) of the Affordable Care Act, which requires an Exchange to maintain an Internet website. NAR believes that it is critical that the Exchange website be an easy-to-use access point that provides the information needed to make an informed decision as to the most appropriate type of Qualified Health Plan (QHP) and to be made aware of the other relevant information concerning Exchange activities. The self-employed individual and small employer community must navigate an onerous process in part because the information needed to make an informed decision is not available in one place. Lacking a dedicated human resources staff and the time needed to track down all of the information needed, having a single-point of contact is an especially important benefit of the ACA for the small business community.

Payment of Premiums (§155.240)

While the ACA did make references to payment of premiums through the Exchanges, NAR believes that it is important that individuals participating in the Exchanges have the ability to determine for themselves whether to pay their premiums through the Exchanges or pay the insurer directly if he or she chooses.

Privacy and Security of Information (§155.260)

In §155.260, the Department addresses the privacy and security standards Exchanges must establish and follow. Since each Exchange will need to obtain applicants' personally identifiable information, i.e. social security numbers, dates of birth, and other financial information to determine eligibility and the amount of any tax credit due, it is very important that the final rule clearly lay out the expectations for Exchanges', and their contractors or sub-contractors, handling of this sensitive information. It is also critical that the use of this information is limited to what is specifically required or permitted by the ACA or other applicable law.

Flexibility in SHOP Plan Offering (§155.705)

In paragraph (b)(3), the Department provides flexibility for Exchanges and their SHOPS to choose additional ways for qualified employers to offer one or more plans to their employees and invites comment on the statutory interpretation of section 1312(a)(2)(A), which speaks to employer specification of a level of coverage and section 1312(f)(2)(B), which may permit a single QHP (Qualified Health Plan) selection by an employer. While it might be argued that employee choice of plans as discussed by the proposed rule is a desirable long-term goal, NAR strongly believes that section 1312(f)(2)(B) of the Affordable Care Act does allow a qualified employer to select only a single QHP to be made available to its qualified employees.

Given the immense amount of change that will accompany implementation of the new law and the need for employer and consumer education regarding the rules that will guide this new marketplace and new benefit requirements, we urge the Department and the administrators of the new SHOPS to not require additional major changes in the employer provided model, including eliminating employer selection of plans offered, especially in the early formative years of the SHOP program. The choice of an employee plan is one that small business owners and

managers take very seriously; much time and effort goes into choosing a plan that best serves the need of its employees and explaining the plan's benefits to the employees throughout the year as questions arise. To allow employees to choose a plan with which the firm may not be well versed will result in additional work for these small entities that typically do not have a human resource staff to handle the issues that will arise.

Most importantly, we are greatly concerned that that allowing this approach in the critical early stages of this program will discourage employers from participating in the SHOP and result in the further fragmentation of a State's small group market, as firms choose to remain in the existing small group market. The learning curve for the SHOPS, employers and employees will be steep; a measured implementation strategy, we believe, will serve the best interests of everyone.

Payment of SHOP Premiums (§155.705).

NAR strongly believes that SHOP must allow qualified employers to receive a single monthly bill for all QHPs in which their employees are enrolled and to pay a single monthly amount to the SHOP (paragraph (b)(4)(ii)). As a result, we are pleased that the proposed rule does recognize the need to avoid imposing new costly burdens on small employers by requiring a SHOP to accept an aggregate premium for its employees' coverage.

Conclusion

In conclusion, on behalf of its 1.1 million members, almost all of whom today shop for insurance in the individual market, NAR thanks HHS for the flexibility that this proposed rule seeks to provide states in the implementation of the ACA's Exchange and SHOP provisions. NAR welcomes the creation of Exchanges and SHOP where it is our hope that our members will be able to access more affordable and quality care for themselves, their families and employees. NAR, its state and local associations and affiliate organizations look forward to continuing to work with the Department at both the national and state level to ensure that by 2014 the Exchanges can ably serve these purposes.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Phipps", with a stylized flourish extending to the right.

Ron Phipps, ABR, CRS, GRI, GREEN, e-PRO, SFR
2011 President, National Association of REALTORS®