

October 27, 2011

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS 9974-P  
Mail Stop C4-26-05  
7500 Security Boulevard  
Baltimore, Maryland 21244-1850

To Whom It May Concern:

Thank you for the opportunity to comment on the Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market; Eligibility Determinations; Exchange Standards for Employers Proposed Rule, published at 76 Fed. Reg. 51202 *et. seq.* (August 17, 2011). We appreciate having the opportunity to express our views on this regulation.

HighRoads provides health and welfare employee benefit and Employee Retirement Income Security Act (ERISA) communications consulting and solutions to large and medium sized employers located throughout the United States. Although our clients typically self-insure and will likely not utilize the Exchanges to provide health benefits to their employees, they will nevertheless be affected by this regulation and the policy decisions that the Department of Health and Human Services (HHS) makes in implementing it. Therefore, we feel that it is important to share our thoughts with HHS as it finalizes the rule.

At the outset, we would like to thank the Department for its consistent recognition of and appreciation for the role of employer-based insurance that appears throughout the regulation. Employer-based insurance is, and will remain, an important employee benefit even after the Exchanges become operational in 2014 and the insurance affordability programs become effective. Our clients are committed to providing a comprehensive health and welfare benefit package to their employees, who they view as their most important asset.

General Comments:

Although this regulation is principally designed to spell out the functions, and ensure the smooth operation, of the Exchanges in the individual health insurance marketplace, it is inevitable that the Exchanges will need to interact with large employers once they become operational. Indeed, the regulation contemplates this interaction at multiple points. We want to stress at the outset that the interaction between large employers and state regulators regarding employee benefits will be a new and unfamiliar development for our clients. Because ERISA pre-empts state laws that “relate to” employee benefit plans, *see* 29 U.S.C. § 1144(a), our clients do not typically interact with state officials on any type of routine basis.

Although we do not in any way object to this new interaction, we would hope that HHS and the states would recognize that large employers, who employ individuals in multiple states, will, by necessity, have to begin to interact with multiple state Exchanges. These relationships will take time to develop. It is therefore important that states not use this opportunity for collaboration to become overly prescriptive, or to overstep the bounds of ERISA pre-emption

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that remains in effect. States have a proper role in implementing the Affordable Care Act, and we respect that role. We also hope that states will respect the role that large, multi-state employers play in the American health care system.

With that by way of background, we would like to highlight two areas of the regulation where we believe that additional guidance by HHS would be helpful. These areas are:

- The lack of an appeals mechanism when an Exchange determines that an employer's health plan is unaffordable or that it does not offer minimum value;
- Interaction with large employers when individuals are applying for coverage under a plan offered through an Exchange;

### Appeals Mechanism

The employer responsibility provisions of PPACA impose a penalty on employers that do not offer to an employee a health plan that is "affordable" or that does not offer "minimum value," if an employee of that employer receives a subsidy for enrolling in a health plan through an Exchange.<sup>1</sup> Determining whether these criteria are met is one of the functions of an Exchange.<sup>2</sup> In the proposed rule, HHS explains these requirements, and then states that the agency intends "to propose through future rulemaking standards for a process through which an employer would be able to appeal a determination that an employee of the employer is eligible" for the insurance affordability programs based on a finding that the employer did not offer qualifying coverage.<sup>3</sup>

We believe that it is unfortunate that HHS did not use the opportunity in this regulation to propose this appeals process, and we strongly encourage HHS to issue such a regulation promptly. It is not difficult to envision a situation where an employee would apply for coverage through an Exchange and not present adequate information to enable the Exchange to determine whether, in fact, she had access to affordable coverage or that her plan offered minimum value. Employers should have the opportunity to present all relevant information through an appropriate appeals mechanism to an Exchange in order to avoid mistaken determinations. Therefore, we urge HHS to issue this regulation expeditiously.

We also note that the statute that authorizes HHS to establish this appeals mechanism makes clear that the appeals mechanism is "in addition to any rights of appeal the employer may have under subtitle F of" the Internal Revenue Code.<sup>4</sup> Subchapters B and C of subtitle F of the

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<sup>1</sup> See Internal Revenue Code § 4980H(b)(1)(B) (imposing penalty for employer whose employee obtains a tax subsidy for a health plan enrolled in through an Exchange). See also *id.* at § 36B(c)(2)(C)(i)(II) (defining affordability) and § 36B(c)(2)(C)(ii) (defining minimum value).

<sup>2</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by Pub. L. No. 111-152 § 1411(a)(3), 42 U.S.C. § 18081(a)(3).

<sup>3</sup> 76 Fed. Reg. at 51223.

<sup>4</sup> Patient Protection and Affordable Care Act, *supra* n. 2, § 1411(f)(2)(A), 42 U.S.C. § 18081(f)(2)(A).

Internal Revenue Code set forth the means by which a taxpayer may challenge an assessment by the Internal Revenue Service and by which the Internal Revenue Service can enforce an assessment. At the very least, we request that in the final rule, HHS make clear that an employer may utilize these procedures in the event of a dispute between an employer and an Exchange that leads to a tax penalty on an employer. But we also request that HHS rapidly propose and finalize an appeals rule that would apply in addition to the Internal Revenue Code's adversarial appeals process.

### Interactions With Large Employers

In the proposed rule, HHS notes that the Exchanges will have the responsibility of verifying information provided to them by an applicant for coverage through an Exchange. Among the information that must be verified includes the cost of coverage, whether family coverage is available, and whether the plan provides minimum value.<sup>5</sup> The Department then goes on to note that much of this information will be available to the Exchange because of other statutorily-required reporting provisions.<sup>6</sup> However, as HHS notes, there still may be situations where an Exchange "is unable to gain access to authoritative information regarding an applicant's eligibility for qualifying coverage in an eligible employer-sponsored plan."<sup>7</sup>

We would like to thank the Department for recognizing, as it does, the importance of minimizing burden on employers, and we also thank the Department for attempting to develop innovative solutions to do so. HHS proposes two possibilities: a standardized template consolidating the statutorily-required information already reported, and a centralized database that employers could voluntarily populate. It then solicits comments on these possibilities.

As HHS notes, much of the information necessary to determine whether or not an applicant is eligible to purchase a plan on an Exchange and eligible for the subsidies will have already been reported pursuant to other statutory provisions of PPACA. Therefore, we are hesitant to endorse yet another reporting requirement for employers such as a centralized database or a standardized template. We believe that an Exchange should have the capacity to query information that the Department of Labor of the Internal Revenue Service will already possess in order to determine eligibility for an Exchange applicant. In the vast majority of cases, this information will already be available to an Exchange.

If HHS believes that it is necessary to develop an additional process for those rare cases in which this information is not available, we believe that it should develop it through a collaborative process involving organizations representing employers. HighRoads would be pleased to participate in such a process.

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<sup>5</sup> 76 Fed. Reg. at 51217.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

## Conclusion

We would like to conclude by again expressing our appreciation to HHS for its recognition of the role of employment-based health insurance in the United States. Although we recognize and acknowledge the requirement for greater interaction between large, self-insured employers and states as a result of the enactment of PPACA, we urge HHS to ensure that these interactions not become burdensome in light of the historic pre-emption of ERISA employee benefit plans by states. We also urge HHS to propose and finalize a process for employers to appeal a finding by a state Exchange that an employee of a large employer is eligible to enroll in a plan through an Exchange and qualify for subsidies in doing so.

Thank you for your attention to our concerns. We are pleased to answer any questions that you may have.

Sincerely,



Kim A. Buckey, Practice Lead, SPD Services