



October 31, 2011

Mr. Steve Larsen
Deputy Administrator and Director
Center for Consumer Information and Insurance Oversight
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-9989-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-9989-P: Establishment of Exchanges and Qualified Health Plans Proposed Rule

Dear Director Larsen:

On behalf of Regulatory Education and Action for Patients (REAP), I would like to thank you for the opportunity to comment on Proposed Rule CMS-9989-P, “Establishment of Exchanges and Qualified Health Plans” (“the Proposed Rule”) published in the *Federal Register* on July 15, 2011.¹

REAP is an umbrella coalition comprised of patient advocacy groups whose goal is to strengthen current relationships and build new relationships with government agencies that have the responsibility for implementing provisions of the Patient Protection and Affordable Care Act (“PPACA”),² as amended, and to ensure that implementation of the Act’s provisions is patient-centric. The unique experience and expertise of each REAP member organization allows REAP to provide the patient voice in a cross-disciplinary manner.

REAP’s mission is to communicate issues to Federal and State regulatory bodies, Congress, health care insurers and others that regulate, develop, manage and/or impact health delivery, coverage, cost and availability of services to the United States population. REAP will, through its member entities, contribute information and perspectives regarding important health care decisions to a degree that has not been possible heretofore by health care advocacy groups in the regulatory arena.

¹ 76 *Fed. Reg.* 41866 (July 15, 2011).

² Pub. L. 111-148.

Both REAP and its member organizations are deeply committed to expansion of access to affordable health insurance for all Americans under the PPACA. We are encouraged by the flexibility and Federal support that would be available to States under the Proposed Rule. The guidelines for Exchanges detailed in the proposal adhere to the spirit and intent of PPACA. At the same time, they appear to offer opportunity for creativity in the States' efforts to develop competitive, efficient, open marketplaces for health insurance tailored to mesh well with the needs of their citizens and the characteristics of their existing insurance markets.

We applaud the decision to permit States to partner with the Department of Health and Human Services (HHS) in the development and ongoing operation of their Exchanges as well as the Proposed Rule's provisions for allowing States that elect such partnerships or that initially allow HHS to set up and run their Exchanges to transition from a federally facilitated Exchange to a State Exchange. We hope State-operated Exchanges become the norm since we would expect locally designed and managed Exchanges to operate in ways that are more aligned with and sensitive to the specific needs and preferences of the individuals and small businesses an Exchange serves.

We have limited our comments to suggestions we believe will help the Center for Consumer Information and Insurance Oversight (CCIIO) to fine-tune the Proposed Rule in ways that will make the operation of the Exchanges more consumer-centric.

Exchange Structure and Governance

The Proposed Rule reflects the intent of PPACA in that it allows States to designate an executive branch agency such as the department of health, the insurance commission or even the State Medicaid agency to run the Exchange. Under this approach, even if a State were to create an advisory board to provide input and advice to the operating agency, the ultimate decision-making authority would rest with the State's executive branch. Alternatively, a State may choose to establish the governing body for its Exchange as an independent agency or not-for-profit that is separate and apart from any State executive branch agency. The Proposed Rule also would allow Exchanges to contract out some or all of the day-to-day operational tasks associated with the virtual marketplaces they will be tasked with running but, wisely, in our view, prohibits the obvious conflicts of interest that would arise if health insurance issuers were allowed to take on Exchange functions.

For a variety of reasons, REAP member organizations intend to work to encourage States to set up their Exchanges through independent agencies. First and foremost, an Exchange that is operated by an entity outside the State's executive branch would have greater independence, be more likely to involve individuals in Exchange governance drawn from across the political spectrum, and be better able to ensure continuity, both operationally and from a policy perspective, in the face of changes in administrations. Exchanges that are not executive branch agencies also would have more flexibility in hiring – flexibility that we think could prove crucial given the specialized needs that Exchanges will have for employees with sophisticated information technology expertise and experience, and for employees with firsthand knowledge



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of the ways the individual and small business health insurance markets operate. In addition, independent Exchanges would be free of the types of procurement restrictions applicable to State agencies – a consideration that may be important to helping Exchanges meet the systems needs that come with some of the near-term operational deadlines that loom in late 2013.

We commend CCIIO for its offer to partner with State Exchanges to permit those States that cannot or are not willing to accept all Exchange responsibilities to play as central a role as possible in the design and implementation of the Exchanges serving their citizens. We suspect it could be more cost effective for CCIIO to contract for the development of the key software tools that will be needed to operate Internet-based Exchange functions. We strongly encourage CCIIO to consult with States about their anticipated needs and their platform preferences, to contract for software tools likely to be useful to the largest number of States and to offer the States access to any federally developed software, regardless of whether the State wants to partner with CCIIO on an operational basis or simply incorporate the software into its own Exchange operations.

We urge CCIIO to take steps to encourage the eventual establishment of more independent State Exchanges whenever it is called upon to operate Federal Exchanges in States that are not willing or not able to furnish Exchange functions in 2014 or beyond. To this end, we suggest that CCIIO run Federal Exchanges by contracting with one or more State non-profit organizations to carry out day-to-day Exchange functions and setting up a State-specific advisory board to provide input on tailoring each federally facilitated Exchange to an individual State's needs and preferences. Adopting such an approach would allow CCIIO to leverage existing State-based knowledge, avoid hiring and procurement limitations associated with direct Federal government operations, and better position any federally facilitated Exchange for eventual turn-over to the State. We also endorse the requirement that Federal Exchanges meet all regulatory requirements (except approval requirements or other specific State requirements) that would be applicable to State Exchanges under the Exchange Final Rule because this too should facilitate transitioning Federal Exchange operations to a State that eventually determines it wants to take on that responsibility.

Regardless of the structure adopted for an Exchange by a State or by CCIIO, REAP sees establishment of an appropriate Exchange advisory board as essential. Experience from the implementation of Part D suggests that the operation of at least some Exchange functions could be chaotic in the early years. There is little doubt that adequate effective outreach will be a challenge. We certainly have seen that already with Pre-existing Condition Insurance Plans under PPACA. Suggestions from an advisory board that represents many segments of a State's

population, including those that stand to benefit most from the insurance access to be provided by well-functioning Exchanges, should help resolve the growing pains more quickly and effectively. Without limiting the options to the methodologies listed, we would like to see the Proposed Rule at 45 CFR 155.130 expanded to list not just the categories of stakeholders that should be consulted routinely by Exchanges but also a number of the techniques that Exchanges should use to effectuate such consultations. We suggest beginning that list with a requirement to have an Exchange advisory board made up of the types of stakeholders already listed in the proposed provision. Open town hall meetings with call-in or webinar access should be on the list, as should the solicitation of public comments on draft Exchange policy guidelines, particularly those related to marketing and outreach.

We appreciate the Proposed Rule requirement at 45 CFR 155.110 (c) that the majority of the voting members on an Exchange's governing body have relevant experience and we are particularly pleased that one of the listed categories of experience is the uninsured. That said, REAP member organizations believe another requirement needs to be added to the regulations stipulating that representation on the governing body must include representatives of the disabled, of ethnic and racial minorities in a State, and of consumers generally. The number of consumer-centric representatives on the governing body must be sufficient to ensure that the voice of various categories of consumers will be effectively heard. We suspect that necessitates requiring that at least a fourth of the governing body seats be selected to provide a consumer-centric perspective from an array of different key constituencies.

For the sake of public confidence in the Exchanges, adequate conflict of interest rules must be adopted both for the governing bodies of Exchanges that are operated as independent agencies and for the advisory boards that we hope each Exchange will be required to establish. REAP recognizes many States likely will be tempted to include health insurance agents, brokers, and/or employees of insurance issuers on Exchange governing bodies and/or advisory boards because of their understanding of the local insurance market and their experience in the industry. We would prefer to see conflict of interest provisions codified in the Exchange regulations that would encourage States to look to individuals knowledgeable about health benefits administration, health care finance, health plan purchasing, health care delivery system administration, and/or public health and health policy issues who are not current health insurance industry executives, agents or brokers. To that end, we recommend expanding the requirement at 45 CFR 155.110(d)(2) relating to an Exchange's obligation to implement procedures for disclosure of financial interests by governing body members so as to provide a more robust set of minimum conflict of interest standards that define a disqualifying conflict, require both disclosure and recusal from voting and, when a financial conflict is sizable, prohibit participation in discussions as well. We also suggest applying these more robust standards to any advisory board added as a requirement under Proposed Rule 45 CFR 155.130.

Exchange Consumer Assistance Tools and Programs

We understand Exchanges are intended to operate primarily through the Internet. We are pleased, however, that the Proposed Rule implicitly recognizes that all individuals and



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businesses wishing to use an Exchange will not have or not be inclined to use the Internet to access information about or enroll in qualified health plans (“QHPs”) offered through the Exchange. With regard to the requirement that an Exchange operate a call center, REAP suggests that CCIIO consider requiring Exchanges to follow the specifications that have been put in place for Part D call centers with respect to hours of operation, call answering times, call abandonment frequency and the like.³ These requirements already have been tested and deemed adequate to facilitate broad enrollment in that voluntary program.

Exchanges should be required by regulation to operate programs to monitor the accuracy of information provided through their call centers, and to initiate appropriate corrective action plans on an individual and/or an Exchange-wide basis, as appropriate, when deficiencies are observed. One such program should involve the call center offering a random sample of callers an opportunity to respond to a brief consumer satisfaction survey after completion of the informational portion of a call. Test callers – akin to secret shoppers – presenting typical questions could be another effective monitoring tool.

Exchanges should operate under a regulation that requires them to develop clear guidelines distinguishing the responsibilities of call center operators from those of Navigators. REAP suggests having the call center handle questions that are common to many consumers and deal with the overarching functions and operation of the Exchange. In contrast, Navigators should be used to address more complex questions that focus on an individual’s particular situation. We would like to see requirements that call centers “warm transfer” consumers or small businesses with questions that go beyond the scope of the call center’s capabilities to Navigators. Depending on the scope of an Exchange’s Navigator program, guidelines on how to select the Navigator to which to transfer a particular caller could be needed as well. No such transfers should be made to brokers or agents for specific health plans offered through the Exchange unless a caller expressly asked for that service and specifies the plan to which the transfer will be made. We would like to see language added in the final version of 45 CFR 155.205 instructing Exchanges to provide information on their websites explaining the characteristics and roles of a Navigator, identifying the Navigators under contract with the Exchange, and providing information about how to contact them directly.

REAP members are excited about the plan comparative tools, the cost, quality and consumer satisfaction information, and the Exchange cost information that will be available via the Internet on the Exchange websites. We greatly appreciate the inclusion of a proposed

³ See <https://www.cms.gov/PrescriptionDrugCovContra/downloads/PartDCallCtrRequirements.pdf>.

regulation mandating that Exchange websites be accessible to people with disabilities or limited English proficiency. We expect many individuals eligible to purchase insurance through the Exchanges will reside in more rural areas. We therefore encourage CCIIO to ensure that the model template Exchange website that it is tasked with developing recognize the need to make the website format simple, easy to navigate, and unencumbered with graphics that will slow Internet operations in those areas of the country with limited broad-band access and for individuals still using old hardware. We strongly encourage CCIIO to develop or to require Exchanges to develop applications for mobile devices, not just websites, so that all of the Exchange Internet-based comparative tools can be accessed without using a computer but with a smart phone.

REAP members would like to see Exchange websites that allow individuals to create password protected accounts so that they can save information and return to the site at a later time to further consider information already gathered and at least partially vetted. An equivalent saving feature should be built into mobile applications. Many of the REAP member groups have found such a feature to be particularly helpful in the Part D context for individuals who wish to consult with a family member or other trusted advisor about plan choices. The feature also facilitates work with a Navigator. We also would like to see website designs that routinely encourage users to print out information that applies to a plan at the time they complete an enrollment application. Such information may prove important if an enrollment decision has been based on misleading information. Part D has developed special rules that allow exceptional circumstance special enrollment periods for Medicare beneficiary who selected the “wrong” plan based on incorrect information provided through the call center or on the CMS or plan Internet website. We are pleased to see that the Proposed Rule at 45 CFR 155.420(d)(4) also contemplates a special enrollment period under such circumstances. We suspect that CCIIO could benefit from looking to Part D for lessons learned and for already tested guidance addressing many of the issues that will eventually surface as Exchanges begin to operate. We encourage it to do so.

The Proposed Rule requires Exchanges to ensure that applications, forms, and notices are written in plain language and provided in a manner that affords meaningful access to persons with disabilities and with limited English proficiency. They are also to be streamlined and uniform across QHPs. We note that CCIIO itself will be developing many templates and standard forms for use by the Exchanges and their QHPs. We hope it will be equally conscious of these issues when it does so. We also believe all Exchange forms and QHP enrollment forms available for completion via the Internet, whether on the Exchange website or a QHP website, should be available in paper for dissemination through the call center, the Navigator programs and by the plans themselves. The Social Security Administration color codes certain of its forms to facilitate ease of communication and to prevent errors – a practice that we think would be useful for Exchanges and the QHPs, particularly in the context of forms needed to change coverage when a qualifying event, such as marriage, the birth of a child, divorce, or death of a spouse, triggers a time-limited special enrollment period occurs.



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In a similar vein, we suggest addressing premium payment by ensuring that as many options as possible are available to those using the Exchanges. We note that proposed 45 CFR 155.240 allows Exchanges to establish a process to facilitate the collection and payment of premiums electronically. We do not view this as something that should be a discretionary Exchange function. Rather, we urge CCIIO to require every Exchange to have options for electronic premium payment, both by mechanisms that are automatically initiated monthly by the Exchange or a QHP and by mechanisms that are initiated directly by the enrollee. We see having the option of an automatic electronic premium collection process as protective for certain individuals who otherwise might be at high risk of cancellation for nonpayment. We appreciate the inclusion in the Proposed Rule of a provision providing for a grace period prior to termination of a QHP participant for non-payment of premium and the added requirement that AHPs provide reasonable accommodations to individuals with mental or cognitive conditions before termination. It would be helpful, in our view, if CCIIO spelled out its concept of “reasonable accommodations,” either in regulation or guidance. We also strongly encourage CCIIO to clarify that the grace period provisions in proposed 45 CFR 156.270 apply not just to individuals receiving advance payments of the premium tax credits but rather to all individuals who obtain their health insurance through the Exchange. We see this as essential because of the simple fact that long bouts of illness can frequently underlie late bill payment.

The Navigator Program and Other Outreach Initiatives

Many REAP members advocated for inclusion in PPACA § 1131 of a requirement for Navigators capable of serving both individuals and small businesses that wish to use the Exchange. We did so because we know that the majority of those eligible to participate in the Exchanges have never purchased a health insurance plan before. Despite the array of comparative tools that Exchanges and their SHOPS will be required to have available, we firmly believe many eligible participants will feel overwhelmed by the choices available to them and will want to seek advice related to the plan selection process. We know from our experiences with Part D that non-biased counseling on plan selection can increase individual participation in a voluntary insurance offering. From our perspective, it is preferable for such help to come from well-trained individuals who are free of financial conflicts of interest related to the choice at hand. Navigators offer this option. We therefore see them as the preferred approach for providing in-depth assistance with a patient-centric plan selection process.

We appreciate that CCIIO used its discretionary authority under PPACA to respond to initial public input and increase the list of entity types eligible for consideration for Navigator grants. We also understand that the Proposed Rule requires each Exchange to offer Navigator grants to

at least two different types of entities but does not prohibit an Exchange from funding a broader, more diverse group of Navigators. We strongly support mandating that at least one of the Navigator grants offered by an Exchange must be awarded to a community and consumer-focused non-profit organization. We also recommend encouraging Exchanges to extend Navigator grants to more than two entity types because we believe enhanced participation in the Exchanges will be encouraged by having Navigators available who have established trust relationships with a broad cross-section of eligible Exchange participants.

We applaud the requirement in the Proposed Rule prohibiting Navigators from having a conflict of interest, defined as receiving remuneration, directly or indirectly, from a health insurance issuer in connection with the enrollment of qualified individuals or businesses in a QHP offered through the Exchange during the term of their grant. We are exceedingly troubled, however, that the preamble to the Proposed Rule indicates that Navigators *may* receive compensation from health insurance issuers in connection with the enrollment of individuals, small employers or large employers in non-QHPs.⁴ We endorse expanding the regulatory prohibition against Navigator conflicts of interest to rule out such relationships so that no taint of self-dealing can be associated with entities selected to serve as Navigators. We do not want to endorse any arrangement, including one involving Navigators, with the potential to contribute to adverse selection between the Exchange and non-Exchange markets in a State, and we see financial inducements for referrals outside of the Exchange in this light. We also worry that health plans offered outside of the Exchanges will not provide essential health benefits or coverage levels commensurate with the public health and cost containment objectives of universal coverage. We know those patients served by our member groups who currently have “mini-med” coverage through their employers are not adequately insured for chronic, debilitating or life-threatening diseases, yet their nominally insured status is often sufficient to preclude them from qualifying for help from most of the available charitable assistance programs.

We expect Navigators to provide fair, accurate, and impartial information when they assist entities exploring Exchange options. For that reason, we are comfortable with the idea that Navigators should be required to demonstrate adequate training. We endorse having training and performance standards being spelled out in the Exchange regulations when they are finalized or as conditions in the terms of a Navigator’s grant. Similarly, we would not oppose the implementation of training and performance standards through State mandated Navigator certification programs. Regardless of how Navigator standards for training and performance are set, we are of the view that the same types of monitoring programs that we suggested for Exchange call centers should be implemented by Exchanges in the context of their Navigator programs. We would argue, however, that it is not appropriate to require Navigators to be licensed by the States as insurance agents or brokers just because they will be assisting individuals and businesses with plan enrollment. Doing so could lead to confusion among the public about who is an impartial counselor versus a “captive” counselor with a financial motivation. We do not want to support any regulatory provision that could confuse the public or undermine the public trust that we expect to attach to Navigators. Requiring licensure for

⁴ 76 *Fed. Reg.* at 41877.



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Navigators equivalent to that for agents and brokers also is unnecessary because the objectivity of Navigators is not compromised by a financial conflict of interest and because Navigators will be routinely supervised at work by an organization that is widely known as being committed to consumer assistance, not one in business to make a profit off selling insurance.

We endorse adding a requirement to 45 CFR 155.210 that would require Exchanges to have a fully operational Navigator program no later than the first day of the initial open enrollment period. Based on the experiences of REAP member organizations when Medicare Part D launched in 2006 coupled with the political divisions currently centered around PPACA, it seems inevitable that a high level of consumer confusion and possibly even consumer skepticism will surround the launch of the Exchanges, the availability of financial assistance for insurance coverage and the other requirements and options available under PPACA. That confusion and skepticism makes having trained Navigators at the ready to provide individualized counseling when program enrollment first begins critical.

We actually would prefer for Exchange Navigator programs to be operational in advance of the beginning of the initial open enrollment period, say by no later than July 2013, or earlier if possible. We favor this approach because we believe Navigators could be extremely effective in setting up and conducting public education activities to raise awareness of the Exchanges and we would like to see the Exchanges and their Navigators take all possible steps to ensure high public awareness before enrollment begins. We would like to see a variety of outreach and consumer education activities beginning early in 2013. Exchanges should consider working not just with their Navigators but also with local health departments and free clinics, with faith-based organizations, and with patient and consumer advocate groups and the like to educate the public about the coming changes in the health insurance market and the financial help that will be available to many Americans to assist with the cost of health insurance. REAP organizations are all willing to participate in such outreach activities. CCIIO could consider a health insurance bus tour akin to the Part D bus tour that was used to educate seniors and encourage their enrollment in a Medicare prescription drug program. Television and radio public service spots as well as newspaper and magazine articles and advertisement should be part of the campaign as should blast tweets and emails, hopefully facilitated by organizations with ties to groups of individuals likely to be eligible to use the Exchanges.

The Proposed Rule only addresses providing individuals with assistance in applying for advance payments of the premium tax credit and cost-sharing reductions for QHPs available under PPACA in proposed 45 CFR 155.220, which deals with the role of agents and brokers under the Exchanges. We are perplexed as to the Proposed Rule's silence on this aspect of health insurance reform in the proposed regulations at 45 CFR 155.210 governing the Navigator

program. The experience of REAP member organizations with the low-income subsidy program under Part D suggests it will be critical for Navigators to be in a position to help individuals not just with plan selection and enrollment but also with enrollment in those programs that ensure they will be able to afford and pay for the coverage they select. We urge CCIIO to amend the Proposed Rule to add as a Navigator duty under 45 CFR 210(d) language establishing as a Navigator duty the provision of assistance to individuals with applications for advance payments of the premium tax credit and cost-sharing reductions for QHPs.

Again, we appreciate the opportunity to share our perspective about Exchanges with you. REAP members all stand ready to answer questions and provide any additional information about the patient groups for whom we advocate. We also hope you will call on us to be involved in the outreach efforts that will be needed to introduce the public to the new world of Exchange-facilitated health insurance markets.

Sincerely,

Alpha-1 Association
Alpha-1 Foundation
American Kidney Fund
Arthritis Foundation
COPD Foundation
Friends of Cancer Research
Interstitial Cystitis Association
Kidney Cancer Association
LIVESTRONG – Lance Armstrong Foundation
Lymphoma Research Foundation
Marti Nelson Cancer Foundation
National Alliance on Mental Illness
National Patient Advocate Foundation
Prevent Cancer Foundation
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ZERO – The Project to End Prostate Cancer