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Individuals and small employers will be able to purchase private health insurance through a new marketplace called “The Exchange” beginning in 2014. Each state that chooses to operate an Exchange must also establish a Small Business Health Options Program (“SHOP”) that assists eligible small businesses in providing health insurance options for their employees. HHS has also provided for a federally facilitated SHOP (“FF SHOP”) in states such as Texas and Louisiana that will not establish a state-based Exchange. Participation in the SHOP is strictly voluntary for small employers. However, beginning in 2014, purchasing group health coverage through a SHOP will be the only way for certain small employers to obtain a small business health care tax credit.

Special Enrollment

The special enrollment period for the SHOP aligns with the HIPAA Special Enrollment Rule, allowing individuals 30 days to request an election change for most applicable triggering events (e.g., an employee or dependent losing group coverage or an employee gaining a dependent through marriage, birth or adoption). Where an employee or dependent becomes eligible for Medicaid or SCHIP, the employee or dependent would have 60 days to request an election change.

Delay for Employee Choice Model

In a previous rule, both state-operated SHOPs and FF SHOPs were required to allow employers the option to offer employees all qualified health plans (“QHPs”) at a metal level of coverage (bronze, silver, gold, or platinum), chosen by the employer, and the SHOP could allow employers to offer one or more QHPs to qualified employees by other methods. However, there were some concerns as to whether (i) issuers could meet deadlines for submission of small group market QHPs given the new small group market rating rules; (ii) issuers could complete enrollment and accounting changes required to interact with the SHOP enrollment and premium aggregation systems required by employee choice; and (iii) there would be adequate time to educate employers, employees and brokers about the employer and employee choices available in the SHOP.

CMS now proposes that the employer choice requirements for both state-based SHOPs and FF SHOPs will be effective January 1, 2015. In 2014, state-based SHOPs (but not FF SHOPs) could elect to offer employee choice for plan years beginning before January 1, 2015. This transitional policy is intended to provide additional time to prepare for an employee choice model and to increase the stability of the small group market while providing small groups with the

benefits of SHOP in 2014 (such as choice among competing QHPs and access for qualifying small employers to the small business health insurance tax credit).

Employer Size

A small employer is an employer that employed an average of at least one but not more than 100 employees on business days during the preceding calendar year, and employs at least one employee on the first day of the plan year. Before 2016, a state will have the option to define “small employer” by substituting 50 for 100 in the standard definition. For purposes of counting employees to determine whether an employer is a small employer (and thus SHOP eligible), the final regulations adopt the employer penalty counting method which includes counting full-time employees (as well as part-time employees as a fraction). These counting rules apply in 2014 for FF SHOPs, but a transitional rule allows state-operated SHOPs to rely on state counting methods – which in some states may not include part-time employees – for determining group size and status as a full-time employee until 2016.

Minimum Participation

Under the earlier final Exchange establishment regulations, a state-operated SHOP may have minimum participation requirements as long as they are based on the rate of employee participation in the SHOP, not on the rate of employee participation in any QHP of a particular issuer. The final regulations adopt a default minimum participation rate for an FF SHOP of 70%, also calculated at the level of the participation of the employees of the employer in the FF SHOP and not enrollment in a single QHP.

The final regulations provide that insurers cannot deny coverage to small employers for failure to satisfy minimum participation or contribution requirements (i.e., coverage is guaranteed available). However, the final regulations continue to allow an insurer to refuse to renew a group policy in the small group market if the employer fails to satisfy an employer contribution or group participation rule under applicable state law (i.e., coverage is not guaranteed renewable). This inconsistent result, of guaranteed availability but no renewability, is good news for employers in the small group market that are large enough to be subject to the employer penalty taxes. It means they will at least be able to offer coverage to reduce or avoid penalties, but unfortunately, may be forced to switch insurers every year.

