



October 6, 2016

Secretary Burwell
Attention: CMS-9934-P
Centers for Medicare & Medicaid Services,
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Covered California comments on Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018; CMS-9934-P (RIN 0938-AS95); **Proposals Affecting the Small Business Health Options Program**

Dear Secretary Burwell,

Covered California is submitting comments in response to the proposed regulations CMS-9934. The comments in this letter refer to proposals affecting the Small Business Health Options Program (SHOP). Covered California has also submitted comments on the following additional areas: [FFE user fee](#), [standardized options and differential display](#), [innovation in Qualified Health Plans](#), and [direct enrollment and web-based entities](#).

In this letter, Covered California comments on the following areas: FF-SHOP enrollment through alternative means, enrollment periods under SHOP, and issuer participation for the full plan year.

1. FF-SHOP Enrollment through Alternative Means

Covered California currently enrolls 90 percent of SHOP groups with the assistance of certified insurance agents. It is understood this percentage is consistent with the rest of the nation. Web-based entities are often themselves certified agents, and can offer big potential gains in terms of marketing, consumer experience and SHOP enrollment; however, working only with WBEs and not offering other enrollment options to non-WBE agents may introduce channel conflict and potentially disrupt agent support of the exchange entirely. As further described below, these channel conflicts may be detrimental to SHOP group sales and enrollment:

- Agents may be resistant to working through a WBE as agents typically are hesitant in trusting another agent with their book of business, which may lead to channel conflict and potential harm to agent support of exchanges in general. All agents who are not the WBE will be cautious (at best) and more likely reluctant to write their business through another broker entity (i.e., the competition). Thus, a WBE performing direct enrollment functions would likely be viewed by the balance of brokers in the market as having unfair advantages. These concerns include the WBE having access to all the groups written by agents through

its portal and having the potential to market to these groups directly and secure a broker of record change. Given that the SHOP benefits from a competitive environment, reduced support and participation from the agent community can potentially result in reduced SHOP group sales and lower enrollment.

- If the WBE only works with employers and not agents, agents that had placed their existing small business customers through FF-SHOP would be cut off. Again, this would result in a negative impact to agent support of the FF-SHOP.
- WBEs have the potential to create sales channel conflict with insurance agents who offer consumers local, in-person assistance, but lack the technology and resources to participate.

These potential sales channel conflicts identified are relevant to both the FF-SHOP and other SHOP marketplaces. Covered California offers the following technical assistance for working with WBEs and avoiding channel conflict:

1. Marketplaces should consider working with General Agencies that focus on small businesses. Some General Agencies may also offer WBE or Benefit Administrative services to their agents to facilitate enrollment into SHOP. This may be an effective strategy in states that need to gain support of the insurance agent community or who want to avoid channel conflict by offering both WBE arrangements and arrangements with WBEs that are essentially resellers to local agents.
2. Include among the WBEs engaged, some that are not certified insurance agents or commission driven but that license the use of their WBE portal to any agent for a fee.

In light of these potential challenges that may require locally tailored solutions, Covered California further requests that any flexibility for facilitating SHOP enrollments through alternative means granted to States utilizing FF-SHOP also be provided to States which do not utilize the FF-SHOP (i.e. State Based Exchanges).

2. Enrollment periods under SHOP (45 C.F.R. §155.725)

The new proposal for waiting periods under SHOP may add administrative burden to small business employers that does not exist when enrolling through off-Exchange small group plans, thereby disadvantaging SHOP enrollment. Covered California believes the proposal is not necessary because there are already sufficient requirements under the Employee Retirement Income Security Act that govern employer-imposed waiting periods. As discussed below, the proposed changes may result in greater administrative burden and costs to SHOP in managing employer notifications and compliance with the proposed rule.

The new proposal utilizes the term “qualified employee” in a way that is not consistent with its definition. A qualified employee is one who has been made the offer of health coverage by a qualified employer. The newly proposed language uses that term to describe an employee who may have not yet fulfilled an employer-imposed waiting period. Employers do not make the offer of health coverage until an employee has successfully completed the waiting period. It is only after the successful completion of a waiting period that employers make the offer of coverage, which converts that new employee into a qualified employee.

The proposed language requires the employer to notify the SHOP about a new qualified employee by the 30th day after the employee becomes eligible for coverage. By definition, this

would be the 30th day after the employee has completed the employer-imposed waiting period and has been made the offer of coverage – the action that converts an employee into a qualified employee. Note that the action of making an offer of coverage to an eligible employee, converting them into a qualified employee, does not mean that the qualified employee accepts the offer of coverage. There are many reasons why employees decline an employer's offer of health coverage. Because of this, notifying the SHOP about the existence of this qualified employee is premature. Operationally, the SHOP cannot act upon this information and tracking this information is administratively unnecessary.

The proposed language goes on to say that after the SHOP has been notified of the new qualified employee, that employee must be given a 30-day enrollment period (this is an enrollment outside of the employer's annual open enrollment period; thereafter, the employee will fall into the group's annual OE) to make a QHP selection and that the SHOP is required to monitor that the qualified employee is given those 30 days.

This is not a practical process. SHOPS should not be monitoring these enrollment periods on behalf of employers. Employers subject to ERISA must have Summary Plan Description (SPD) and one of the required elements in a compliant SPD is information regarding enrollment rules. By our own regulations, Covered California's SHOP does not monitor employer-imposed waiting periods (another required element of a compliant SPD) or employers' annual open enrollment periods. We require the employer to attest that their benefit plan is compliant with state and Federal laws.

But this proposed language would require Covered California SHOP to monitor only new hire enrollment periods and require employers to provide an additional notice to SHOP (notifying of the existence of a new qualified employee who may or may not enroll) that (1) off-exchange policies do not require, (2) creates administrative burden for SHOP operations that do not exist in the off-Exchange market, and (3) produces redundancies with existing laws that provide protections for new qualified employees.

Additionally, proposed language discusses the calculation of waiting periods in SHOP. It says that waiting periods begin on the date the employee becomes eligible for coverage. This is not possible because employees do not become eligible for coverage until after they have fulfilled the employer's waiting period.

Finally, the proposed language says that waiting periods in the SHOP must not exceed 60 days in length. Presumably, waiting periods in the SHOP were shortened from the permissible waiting periods of up to 90 days under federal law to more easily accommodate the 30-day SHOP notice requirement plus the 30-day enrollment period for new qualified employees. Again, Covered California's SHOP, by regulation, does not monitor employer waiting periods, preferring employers to attest to their compliance with state and Federal law. The proposed language would unnecessarily require Covered California SHOP to begin monitoring this aspect of employer benefit plans as well.

In 2014, Governor Brown signed Senate Bill 1034, which allows employers to impose up to a 90 day waiting period. The legislation was enacted to conform to the ACA. The proposal, however, would limit the Covered California SHOP to waiting periods of no more than 60 days instead of the full 90 days permissible by state and federal law.

In lieu of the proposed changes, Covered California provides the following technical assistance:

- Propose that employers should provide the employee's coverage selections to the SHOP no later than 30 days past the eligible date and require the employer to manage the OE for this employee in accordance with their SPD that governs their employee benefit plan.
- The date of coverage for the employee is the first day of the month following the eligible date. If the eligible date is the first day of the month, that date is the effective date of coverage.
- Waiting periods do not begin on the date the employee becomes eligible for coverage. They begin on the date the employee becomes eligible for consideration as a qualified employee. Employees who do not make it past their waiting period are never eligible for coverage. An employee cannot be a qualified employee until they have completed an employer imposed waiting period.

As an additional note, the proposed changes to definitions in 45 C.F.R. § 157.205 appear to be consistent recommendations made above, but conflict with the proposed changes in 45 C.F.R. § 155.725 proposed changes.

3. Issuer Participation for Full Plan Year (45 C.F.R. §156.272)

This proposal states QHP participating in SHOP must be made available for the full plan year that the QHP is certified. Although Covered California believes the proposal does not affect quarterly rate changes for FF-SHOPs allowed under 45 C.F.R. §155.705, there is a potential need to clarify the ability of state-based marketplaces to also make adjustments to offerings on a quarterly basis.

To help remain competitive with the overall small group market, Covered California currently allows SHOP carriers to make plan and rate changes quarterly. These plans and rates are available on an ongoing basis for groups both purchasing new and renewing.

Covered California understands the proposal to mean the employer's plan year. When a small business group on- or off-Exchange purchases a group policy, the plans and pricing for the group are "locked-in" for the duration of the group policy (i.e., the employer's plan year).

If this proposal takes effect, Covered California requests that SHOPs administered by states retain the ability to make adjustments to offerings on a quarterly basis. Should Covered California SHOP lose the ability to make quarterly adjustments, the SHOP offerings may be less likely to meet evolving market needs. For example, this could negatively affect the viability particular SHOP offerings, such as alternative benefit design offerings that may require flexibility in making plan changes.

Thank you and please contact me if you have any questions.

Sincerely,



Peter V. Lee
Executive Director

cc: Covered California Board of Directors