

## Proposed Health Insurance Exchange Rules Released: HHS Opts for State Flexibility

On July 11, the U.S. Department of Health and Human Services (“HHS”) released two proposed rules that outline the major contours of the Affordable Insurance Exchanges (“Exchanges”) that the *Affordable Care Act* requires to be operational by January 1, 2014. The proposed rules provide significant discretion to states in their design of Exchanges, including permitting Exchanges to engage in selective contracting and competitive bidding. The [first proposed rule](#) covers: (i) Federal requirements for states establishing Exchanges; (ii) requirements for health insurance issuers (“issuers”) that participate in an Exchange and offer qualified health plans (“QHPs”); and (iii) standards for employers participating in the Small Business Health Options Program. The [second proposed rule](#) provides standards for states and issuers concerning reinsurance, risk adjustment, and risk corridors. Major provisions of the proposed rules are described below.

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| <b>Establishment of Exchanges</b>                    | Exchanges must be a governmental agency or state-established non-profit with demonstrated experience. May have subsidiary Exchanges within state or regional partnerships with other states. Must be approved by 1/1/13, although conditional approval is available. Exchanges must establish a Small Business Health Options Program as part of primary Exchange or subsidiary.   |
| <b>Grandfathering for Certain Existing Exchanges</b> | Exchanges in operation prior to 1/1/10 presumed to be in compliance with requirements if percent of insured in the state is not less than the projected national insured rate. Exchanges not meeting this test must work with HHS to address areas of non-compliance.  |
| <b>Participation of Qualified Health Plans</b>       | Issuers must be licensed, and QHPs must be certified by state. Exchanges may permit all eligible plans to participate or may undertake a competitive bidding or selective contracting process. Exchanges must ensure that QHP enrollees have a sufficient choice of providers. States have discretion to impose predetermined service area. Issuers must charge the same premiums for a plan whether offered through an Exchange or directly. Must pay generally applicable payment rates to “essential community providers.” QHP issuers must offer a minimum selection of coverage levels, comply with reporting requirements, and maintain accreditation. |
| <b>Enrollment</b>                                    | Exchanges must perform enrollment functions and provide consumer information tools. Requires open enrollment and special enrollment periods.   |
| <b>Small Business Option</b>                         | Qualified employers may purchase insurance for employees if employer has fewer than 100 employees. Until 2016, states may lower threshold to 50 employees. Flexibility permitted in levels and types of plans employer may offer.  |

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| <b>Reinsurance</b>     | States operating an Exchange must offer transitional reinsurance program; otherwise HHS will operate program. States with Federally-run Exchanges may operate their own state reinsurance program. Permits a state to have multiple reinsurance entities and multiple states may contract with one entity, but risk pools must be maintained at separate state level. Reinsurance contributions will be set nationally by HHS based on a percent of premium. Payments will be made when an issuer's expenses for essential health benefits services exceed a threshold dollar amount. |
| <b>Risk Adjustment</b> | States operating Exchanges must implement risk adjustment program; otherwise HHS will implement the program. Methodology must be Federally-certified. Payment calculations begin in 2014 benefit year.  |
| <b>Risk Corridors</b>  | HHS will implement temporary risk corridor program to redistribute issuer losses and gains above a certain threshold.   |

If you have questions about these proposed regulations or other aspects of health insurance exchanges, please contact the Ropes & Gray attorney who normally advises you. Comments on the proposed rules are due by September 28, 2011. For additional resources on health reform, please visit the [Health Reform Resource Center](#).