

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

To: Members, Committee on Small Business  
From: Committee Staff  
Date: December 9, 2013  
RE: Hearing: "Small Business Health Options Program: Is It Working for Small Businesses?"

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On December 11, 2013, at 1:00 p.m. in room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for a hearing titled, "*Small Business Health Options Program: Is It Working for Small Businesses?*" The purpose of the hearing is to examine the status of the establishment of the SHOP exchanges and whether they are meeting the needs of small businesses. Gary Cohen, who serves as the Deputy Administrator of the Centers for Medicare and Medicaid Services (CMS) and Director of the Center for Consumer Information and Insurance Oversight, will be providing testimony.

## **I. Background**

The Patient Protection and Affordable Care Act<sup>1</sup> ("health care law") requires "large" employers to offer full-time employees the opportunity to enroll in an employer-sponsored health care plan or pay a penalty.<sup>2</sup> The law also requires individuals to enroll in health insurance, either on their own or through plans offered by an employer, or pay a penalty.<sup>3</sup> These requirements are colloquially referred to as "employer mandate" and the "individual mandate."

The Small Business Health Options Program (SHOP) are exchanges required by the law to assist small businesses in identifying, comparing, and enrolling in health insurance coverage. Some states chose to establish and operate the SHOP exchanges. For those states that did not opt to do so, the federal government is responsible for operating the SHOP exchanges, called a Federally-Facilitated SHOP (FF-SHOP).<sup>4</sup>

## **II. Employer-Sponsored Health Insurance and Small Businesses**

The rate at which businesses sponsor health benefits appears largely dependent on the employer's size. According to a recent survey, approximately 99 percent of firms with 200 or more employees offered health benefits to at least some of their employees, compared to 57 percent of firms with fewer than 200

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<sup>1</sup> Pub. L. No. 111-148, 124 STAT. 199 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 STAT. 1029 (2010) codified in scattered sections of titles 20, 25, 26, 29, and 42 of the United States Code. For ease of reference, this memorandum will cite to the United States Code rather than Public Law.

<sup>2</sup> 26 U.S.C. § 4980H(a). The type of coverage that must be offered to employees is specified at 26 U.S.C. § 5000A(f)(2). Technically, the employer penalty only occurs if an employee enrolls in a plan for which the employee obtains a tax credit or when a cost-sharing reduction is allowed or paid, or if the employer's coverage fails to meet minimum federal standards. 26 U.S.C. § 4980H(a)(2).

<sup>3</sup> *Id.* at § 5000A.

<sup>4</sup> 42 U.S.C. § 18041.

employees.<sup>5</sup> Of these smaller firms, only 45 percent with three to nine employees offer health insurance, while approximately 85 percent of small businesses with between 25 to 49 workers offer health insurance.<sup>6</sup>

In addition to differences in sponsorship rates, the survey revealed discrepancies in employer and employee cost for health benefits. While the survey found that the average family premium for workers covered at small businesses was slightly lower compared to average family premiums at large firms,<sup>7</sup> part of this discrepancy could result from higher employee cost sharing at smaller firms,<sup>8</sup> as well as small employer plans offering less generous benefits.<sup>9</sup>

The decision by employers to offer health insurance as an employee benefit is based on a number of factors beyond the scope of this memorandum. However, the primary factor influencing this decision appears to be based on whether providing health benefits is a cost-effective means of finding and retaining employees.<sup>10</sup> Therefore, a policy intended to expand the availability of employer-sponsored health insurance should seek to reduce the cost of that insurance as an incentive for more firms to offer that benefit. As a result, any policy changes must be examined in the context of reducing employer costs if the policy goal is to increase coverage.

### **III. The Goals of the Affordable Care Act**

The Obama Administration has publicly stated a number of goals it hopes to achieve through the health care law. Among these are: slowing the rate of growth in health care spending to reduce the rising cost of health care to individuals, businesses, the federal budget and the economy; reducing the cost of health insurance for individuals, families and small businesses; extending health insurance benefits to millions of uninsured individuals; enhancing the quality of health insurance available to the insured; eliminating pre-existing conditions for denying health insurance; and prohibiting insurers from charging higher rates based on an individual's, or, in the case of small employers, a group's health status.

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<sup>5</sup> THE HENRY J. KAISER FAMILY FOUNDATION, EMPLOYER HEALTH BENEFITS 2013 ANNUAL SURVEY 36 (2013) available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20132.pdf> [hereinafter "Kaiser Small Business Survey"]. The survey found that sponsorship rates for part-time workers were likewise dependent on employer size although the survey does not define the number of hours an employee must work to be considered full-time versus part-time. The health care law defines full-time employee as one who works an average of 30 hours per week. 26 U.S.C. § 4980H(c)(4)(A). This matter was examined extensively at an October 7, 2013 hearing before the Subcommittee on Health and Technology of the Committee on Small Business titled, "The Effects of the Health Law's Full-Time Employee Definition on Small Businesses."

<sup>6</sup> Kaiser Small Business Survey, *supra* note 5, at 36.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.*

<sup>9</sup> <http://kff.org/private-insurance/issue-brief/snapshots-a-comparison-of-the-availability-and-cost-of-coverage-for-workers-in-small-firms-and-large-firms/>. A different study found that small business employees pay on average 18 percent more in health insurance premiums for the same benefits compared to employees at large businesses. Jon Gabel, Roland McDevitt, Laura Gandolfo, Jeremy Pickreign, Samantha Hawkins & Cheryl Fahlman, *Generosity and Adjusted Premiums in Job-based Insurance*, 25 HEALTH AFF. 832, 840 (2006).

<sup>10</sup> EMPLOYEE BENEFIT RESEARCH INSTITUTE, SMALL EMPLOYERS AND HEALTH BENEFITS: FINDINGS FROM THE 2002 SMALL EMPLOYER HEALTH BENEFITS SURVEY 7 (January 2003), available at <http://www.ebri.org/pdf/briefspdf/0103ib.pdf>.

However, achievement of some of these goals could result in outcomes that are contradictory to other goals of the health care law.<sup>11</sup> One strategy utilized in the health care law to achieve its objectives is through the creation of centralized marketplaces, or exchanges.

#### IV. SHOPs for Small Businesses

The SHOPs are marketplaces where small businesses can shop for and purchase health insurance for their employees.<sup>12</sup> The SHOPs are available to small businesses with 50 or fewer full-time or equivalent employees, increasing to businesses with 100 or fewer full-time or equivalent employees by 2016.<sup>13</sup> According to the Obama Administration, the purpose of the SHOPs is to expand coverage options available to small businesses, increase their purchasing power to lower the costs in the small group health insurance market, and simplify the administrative burden of sponsoring health coverage.<sup>14</sup>

The SHOPs<sup>15</sup> permit small businesses to select a health insurance plan, approved for sale in an exchange, for their employees<sup>16</sup> as well as select the tier level of coverage they will make available.<sup>17</sup> Some SHOPs currently allow employers to permit their employees to choose for themselves from the multiple plans that may be offered in a SHOP exchange.<sup>18</sup>

In addition to facilitating comparison shopping and enrollment, small businesses with fewer than 25 full-time equivalent employees that want to claim the small employer health tax credit must apply for and receive an official SHOP eligibility determination.<sup>19</sup> The SHOPs also provide consumer assistance, such as assistance comparing plans and enrollment via a call center, website and in-person assistance.

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<sup>11</sup> For example, eliminating a pre-existing condition as reason to deny health insurance coverage could result in healthier individuals forgoing health insurance coverage until a time when they expect to need health care services, thereby raising costs for individuals with insurance as insurers seek to cover claims payment of individuals without premium income from health individuals.

<sup>12</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PATIENT PROTECTION AND AFFORDABLE CARE ACT, STATUS OF FEDERAL AND STATE EFFORTS TO ESTABLISH HEALTH INSURANCE EXCHANGES FOR SMALL BUSINESSES 1 (2013) (GAO-13-614) available at <http://www.gao.gov/assets/660/655285.pdf> [hereinafter "GAO SHOP Report"].

<sup>13</sup> 45 C.F.R. § 155.20.

<sup>14</sup> THE WHITE HOUSE, THE AFFORDABLE CARE ACT INCREASES CHOICE AND SAVING MONEY FOR SMALL BUSINESSES 1, available at [http://www.whitehouse.gov/files/documents/health\\_reform\\_for\\_small\\_businesses.pdf](http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf).

<sup>15</sup> Most states have opted not to establish a SHOP exchange. Currently, 17 states have established state-based exchanges, 7 states have entered into partnerships with federally-facilitated exchanges and 27 states are federally-facilitated exchanges. <http://kff.org/health-reform/slide/state-decisions-for-creating-health-insurance-exchanges/>.

<sup>16</sup> 45 C.F.R. §155.705.

<sup>17</sup> *Id.* at §155.705(b)(2).

<sup>18</sup> This is colloquially known as "employee choice." It is an option for state-based exchanges in 2014, but all SHOPs will be required to begin offering employee choice for plan year 2015. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 33,233, 33,235 (June 4, 2013).

<sup>19</sup> 26 U.S.C. § 45R. The credit may be claimed only through plan(s) accessed through the SHOP exchange.

## V. SHOP and Health Care Law Outcomes

The SHOPS were supposed to be fully functional on October 1, 2013. While many of the state-based SHOPS are operational and accepting enrollment, the FF-SHOPS are not fully functional.

The FF-SHOPS have been subject to a series of delays. On March 11, 2013, the Department of Health and Human Services (HHS) issued a proposed rule that stated that FF-SHOPS would not offer employers a choice of health care plans within a single level of coverage until 2015.<sup>20</sup> On September 26, 2013, HHS announced that online enrollment would be postponed from October 1, 2013 until November 2013.<sup>21</sup> At a hearing before the Committee on Ways and Means, CMS Administrator Marilyn Tavenner stated that the SHOPS would be operating at the end of November 2013.<sup>22</sup> On November 27, 2013, the Administration announced that small businesses will not be able to enroll online until November 2014.<sup>23</sup>

The operational delays of the SHOP exchanges undermine the health care law's goal of simplifying the purchase of employer-sponsored health insurance and expanding employee choice. As a result, small businesses that use a SHOP to purchase health insurance will need to spend additional time and effort filling out and filing paperwork that the online portals were meant to eliminate. In addition, employees at small businesses in states with a FF-SHOP will not be permitted to choose their own health plan until 2015 at the earliest, thus negating the goal of providing these workers with a choice of plans.

The intent of the SHOPS was to reduce the cost of health insurance for individuals and small employers. However, a number of small businesses in several states have reported that their cost of providing health insurance is increasing significantly as a result of the health care law. While this outcome is not necessarily attributable to SHOP, it is indicative of the tradeoffs inherent in the inability of the law to reconcile some goals, such as requiring plans to offer more generous benefits, with other goals, namely reducing the cost of health insurance to small businesses. Many of the health care law's mandates reduce the ability of insurers to vary the number and scope of benefits covered by their product offerings as a cost-containment mechanism thereby diminishing or eliminating the cost savings that arise through increased competition.

Finally, the narrow criteria and complexity of the small employer health tax credit has led far fewer small businesses to claim the tax credit than was originally estimated. In a report requested by the Committee on Small Business, GAO found that in tax year 2010, only 170,300 employers claimed the credit, although government agencies and the small business groups estimated that between 1.4 and 4 million small

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<sup>20</sup> Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 15,553, 15,554 (March 11, 2013).

<sup>21</sup> <http://www.hhs.gov/news/press/2013pres/09/20130926b.html>. That same day, White House Press Secretary Jay Carney stated that small businesses would be able to enroll on November 1, 2013. <http://www.whitehouse.gov/the-press-office/2013/09/26/press-briefing-press-secretary-jay-carney-9262013>.

<sup>22</sup> J.D. Harrison, *Delayed Again: Critical Function of Health Care Law's Small Business Exchange Pushed Back*, THE WASHINGTON POST, Oct. 30, 2013, available at [http://www.washingtonpost.com/business/on-small-business/delayed-again-critical-function-of-health-care-laws-small-business-exchange-pushed-back/2013/10/30/c8a3f414-416e-11e3-a624-41d661b0bb78\\_story.html](http://www.washingtonpost.com/business/on-small-business/delayed-again-critical-function-of-health-care-laws-small-business-exchange-pushed-back/2013/10/30/c8a3f414-416e-11e3-a624-41d661b0bb78_story.html).

<sup>23</sup> <http://www.hhs.gov/healthcare/facts/blog/2013/11/direct-new-path-to-shop-marketplace.html>. The GAO raised important questions on the readiness of the FF-SHOPS to meet implementation deadlines. GAO SHOP Report, *supra* note 12 at 1.

businesses were eligible.<sup>24</sup> Most significantly, these tax credits expire in 2016. As many businesses make important financial decisions, such as undertaking an expansion, hiring new employees, or sponsoring an employee benefit plan based on time horizons beyond one or two years, a temporary tax credit is unlikely to provide an adequate incentive for firms to make decisions whose cost and benefits are calculated and amortized over a longer period of time.

## **VI. Conclusion**

A well-functioning SHOP website could provide some small businesses with a more convenient means of comparing coverage options and facilitating enrollment of their employees in a health benefit plan. However, the technical problems afflicting FF-SHOPs, and the decision by the Administration to postpone online enrollment to late 2014, and the delay in implementing the employee choice options appear to significantly decrease the SHOP as a useful tool for small businesses.

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<sup>24</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, SMALL EMPLOYER HEALTH TAX CREDIT: FACTORS CONTRIBUTING TO LOW USE AND COMPLEXITY 9-10 (May 2012) (GAO-12-549), available at <http://www.gao.gov/assets/600/590832.pdf>.