

## New York State Insurance Department

### New York State Insurance Department Comments Consumer Operated and Oriented Plan (CO-OP) Program

Comments on the Draft Regulation of the Department of Health and Human Services (HHS)

**File Code:** CMS-9983-P

**Due Date:** September 16, 2011

**Comment 1. Clarification of Loans Terms and Compliance with State Law and Regulations.** The Affordable Care Act and rules proposed by the Department of Health and Human Services (HHS) state in multiple locations that the terms of the loan will comply with all applicable state solvency and reserve requirements. Under current New York law, loans that are received for the purpose of meeting state solvency or surplus requirements, and any interest accrued thereon, may only be repaid with the approval of the State Insurance Superintendent. This subordination requirement is essential for counting the loan proceeds as available surplus. Therefore, any loan agreement between the federal government and the CO-OP would need to be structured to allow for State approval of repayments in order to meet the regulation's promise of loan terms that will be compliant with state requirements. Significantly, in the event of dissolution under New York law, these type of loans are subordinate to many different types of claims beyond just claims and premiums, which are the only claims contemplated by HHS in the summary of the proposed rule. In addition, there are statutory restrictions in New York on the interest rate that may be applied to solvency loans. New York encourages HHS to give deference to state statutory interest rate caps on solvency loans. The proposed rule should specify that all terms of any solvency loans shall comply with, and be subservient to, any applicable state statutes or regulations. In New York, the Insurance Superintendent should review, and be a party to, all solvency loan agreements.

**Comment 2. Clarification of 10 Year CO-OP Certification.** The proposed HHS rules state that a CO-OP may be certified for 10 years. The rules should state whether CO-OPs will be recertified at the end of this period or whether they may opt for liquidation. The rules should also state whether policyholders may be transferred to affiliate insurers and, if so, whether those insurers need to be nonprofit entities. The rules should also clarify whether the "conversion" period extends beyond the 10-year certification period. Finally, the rules should clarify what happens to the CO-OP and its members after this period and whether state laws would apply.

**Comment 3. CO-OP QHP Certification.** The state or the Exchange is certifying all the Qualified Health Plans (QHPs) which will be sold through the Exchange. Accordingly, the state or Exchange should also have the authority to certify CO-OP QHPs to ensure consistency and a level playing field.

**Comment 4. Additional Funding.** In New York, new health insurers are typically expected to fund their operating needs and their surplus requirements through a three year potential break-even period and longer-term growth projections. Will HHS provide sufficient funding in the initial distribution of loan funds based on projections provided by the CO-OP? Additionally, in

the event a CO-OP is in need of additional funding or capital after the initial distribution of start-up and solvency loans, will HHS grant or loan additional funds? New York recommends that the proposed rules address this issue and if additional funds are available, how those funds will be disbursed.

**Comment 5. Reporting by CO-Ops.** The proposed HHS rules appear to subject CO-OPs to all state reporting requirements as required by the article of state law under which they are incorporated. Will the CO-OP be required to provide additional reporting to HHS to show they comply with federal law?

**Comment 6. Governance.** The governance requirements under the proposed HHS rules may conflict with state nonprofit governance requirements. New York encourages HHS to give deference to state law and regulations on issues relating to governance of non-profit risk bearing entities.