December 21, 2012

Marilyn Tavenner
Acting Administrator and Chief Operating Officer
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-9964-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Submitted online at www.regulations.gov

Dear Ms. Tavenner:

The National Business Coalition on Health (NBCH) appreciates the opportunity to provide comments on the proposed rule, HHS Notice of Benefit and Payment Parameters for 2014. Our comments focus exclusively on the Transitional Reinsurance Program (TRP), as the issues related to this program are of critical importance to the employer community we represent.

The National Business Coalition on Health (NBCH) is a national non-profit membership organization of purchaser-led health care coalitions. NBCH and its members are dedicated to value-based purchasing of health care services through the collective action of public and private purchasers. NBCH seeks to accelerate the nation's progress towards safe, efficient, high-quality health care and the improved health status of the American population. NBCH has a membership of 54 coalitions across the United States representing over 7,000 employers and approximately 25 million employees and their dependents. These business coalitions are comprised of mostly mid- and large-sized employers in both the private and public sectors in a particular city, county, or region. NBCH member coalitions are committed to community health reform, including an improvement in the value of health care provided through employer-sponsored health plans and to the entire community.

Section 1341 of the Affordable Care Act (ACA) requires establishment of a Transitional Reinsurance Program (TRP) to help reduce the uncertainty of insurance risk in the individual market by partially offsetting the risk of high-cost enrollees. HHS groups the TRP together with risk corridors and risk adjustment programs to collectively provide a "Premium Stabilization Program." As stated above, NBCH's comments focus solely on the TRP portion of the Premium Stabilization Program because of the

new requirements it places directly on employers. The TRP is an important concern for NBCH and its members because of the high cost of the fee (estimated for 2014 at $63 per covered life) and the operational burden associated with implementation.

While we understand the need for mechanisms to help stabilize the individual and small group markets, we are concerned about the general policy of imposing financial burdens on employers to support a program under which they will receive no discernible benefit. We understand that the TRP is, at this point, statutorily mandated, and HHS is simply carrying out its implementation obligations by issuing this proposed rule, but nonetheless wanted to express this concern on behalf of our members. We believe that imposing fees on employers, including state and local governments that often face tighter financial constraints than even the federal government, sets a dangerous precedent as this country engages in far-reaching and long-term discussions of its financial future. Employers fear this is the signal being sent, not only by this TRP, but also the PCORI Trust Fund fee, and others created by the ACA. To that end, we urge HHS to follow carefully the letter of the law and ensure that the Transitional Reinsurance Program is just that – transitional. Congress clearly intended that the program only operate for three years, but it may be difficult in the future to simply give up this revenue stream. However, imposing fees on employers to subsidize government programs is not a viable solution when job creation and economic growth remains our country's top priority.

Nonetheless, NBCH, on behalf of its members, urge you to consider the following comments on specific aspects of the TRP proposed rule.

<u>Uniform Per Capita Rate</u>

NBCH and its members appreciate HHS's clear policy in the proposed rule favoring an approach that minimizes administrative complexity and burden in implementing the TRP. Use of a uniform per capita rate on all covered lives across the country clearly provides operational efficiencies for employers, especially multi-state employers. We also support the proposal that HHS takes over collection and distribution of reinsurance payments. Collection by HHS, especially from self-insured employers is consistent with ERISA, and again, is the simplest approach for all employers, but especially for multi-state employers.

<u>Multiple Options for Counting Covered Lives</u>

The flexibility in the proposed rule offering multiple options for counting covered lives is welcomed by NBCH and its members. We believe that allowing employers to make these decisions, instead of dictating rigid, "one-size-fits-all" rules, will help ensure that reinsurance payments are accurate and received in a timely manner. We also believe that allowing employers to utilize a counting method that is appropriate for their individual situation will help lessen the possibility of double-counting that may have been more likely to occur under stricter parameters.

<u>Statutory Authority to Defer Treasury Portion of Payments</u>

In the proposed rule, HHS requests comment on whether it has the statutory authority to defer the portion of the reinsurance payment that goes directly to Treasury to re-pay funds expended under the Early Retiree Reinsurance Program. We believe that HHS does have the authority to defer this portion of the payment, as long as the full $5 billion is eventually paid to Treasury by the end of the program period. We also believe deferral of this portion of the payment is good policy, in that reducing the amount required to be paid by employers in the beginning of the program will essentially allow a phasing in of the payments, thereby reducing administrative burden.

EAP/Wellness Programs/Disease Management Programs

We appreciate the clarity provided in the proposed rule that employee assistance, wellness, and disease management programs are excluded from the reinsurance contribution requirements "to the extent they do not provide major medical coverage." NBCH and its members understand the need for plans offering major medical coverage to be making the required TRP payments, but more guidance or specific regulation is needed to further define what does NOT constitute major medical coverage. In lieu of more specific guidance or regulations, HHS should consider offering a safe harbor or allowing a "reasonableness" determination, made in consultation with the employer's vendor, to be relied upon by an employer.

HRAs/HSAs/FSAs

Similar to the issue stated above regarding employee assistance, wellness, and disease management programs, we welcome the clarity in the proposed rule that health reimbursement arrangements, health savings accounts, and flexible spending accounts are excluded from the reinsurance contribution to the extent they are "integrated" with a major medical plan. Again, we understand the need to close loopholes in the TRP, but more guidance or specific regulation is needed before an employer can determine whether its HRA, HSA, or FSA is integrated with its major medical plan. An employer may have a fully insured major medical plan, while self-funding an HRA for its employees. How should that employer's TRP contribution be calculated? In lieu of more specific guidance or regulations, HHS should consider offering a safe harbor or allowing a "reasonableness" determination to be relied upon by an employer.

State High-Risk Pools

As HHS is aware, many states operate their own high-risk pools to help provide health insurance coverage to high-risk individuals; many of these state pools existed before passage of the ACA. We believe there remain unanswered questions regarding the interactions between state high-risk pools, which can also be funded by employers, and the federal TRP. As stated in the proposed regulation, states must "eliminate or modify" their high-risk pools "to the extent necessary" to carry out the TRP. States may maintain their high risk pools for the purpose of making the TRP in their states more generous than required by the ACA (i.e. lower attachment point, higher out-of-pocket maximum, and/or more generous co-insurance), but states may not collect additional fees from self-insured plans governed by ERISA. We believe there should be stronger requirements in place to ensure that a state high-risk pool and the TRP are not duplicating each other and providing funds to pay for the costs of care for the same individuals. As mentioned, funding for state high-risk pools can also come from self-insured employers, and just as in the federal TRP, employers receive no direct benefit for this expense. We appreciate the clarification in the preamble of the proposed rule stating that ERISA preemption rules apply to state high-risk pools, and states cannot require contributions beyond those under the federal TRP from a self-insured employer. This is of utmost importance to self-insured employers, and we suggest adding specific regulatory language codifying the position of HHS on this matter.

In closing, we would like to mention the important fact that there is nothing in the ACA's statutory language, nor the proposed regulations, prohibiting an employer from simply passing along this fee to its plan's enrollees. Employed individuals could easily see their premiums rise by $63 per year; the premium increase for a family of four would be $252 annually. As stated above, we understand that the TRP is mandated by statute, and this proposed regulation is part of the implementation phase, but wanted to make mention of how the TRP has the potential to affect working families across the country. For an employer facing ever-rising health care costs, now being asked to pay for something that will never have a direct benefit, it may be difficult to think of a reason NOT to pass along these costs to

employees. However, NBCH and its members do appreciate the clarity and flexibility offered to employers in this proposed rule, and in accordance with our comments above, urge HHS to maintain this clarity and flexibility in the final regulations.

NBCH and its members appreciate your thoughtful consideration of these comments on the proposed regulations. If you have any questions about these comments or wish to discuss anything further, please contact Colleen Bruce, Director of Value-Based Purchasing and Public Policy at (202) 775-9300 or cbruce@nbch.org.

Sincerely,

Andrew Webber
President and CEO