

**Agency:** Centers for Medicare Medicaid Services (CMS)

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**Title:** Patient Protection and Affordable Care Act: Reducing Regulatory Burdens and Improving Health Care Choices To Empower Patients

**Comment:**

The ACA requires states to create at least two exchanges: a small business exchange (referred to as "SHOP" in the ACA) and an individual exchange. It also requires certain members of Congress and congressional employees to purchase insurance on an exchange created either by their state of residence (or by the District, if they are a D.C. resident) or by the federal government, if their state of residence did not establish an exchange. 42 U.S.C. § 18032(d)(3)(D)(i). Because the ACA limits the purchase of insurance on a small business exchange to employees of small businesses - and Congress is not a small business - the ACA unequivocally requires that certain members of Congress and congressional employees purchase insurance on an individual exchange created either by their state of residence (or by the District, if they are a D.C. resident) or by the federal government for that state.

Nonetheless, OPM promulgated 5 C.F.R. § 890.102(c)(9), which purportedly authorized congressional employees to purchase health insurance offered by an appropriate small business exchange, and the OPM Director subsequently issued guidance stating, "OPM has determined that the DC SHOP . . . is the appropriate SHOP from which Members of Congress and designated congressional staff will purchase health insurance in order to receive a Government contribution." Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60653, 60654 (Oct. 2, 2013).

Similarly, CMS issued guidance stating, "Consistent with the OPM rule, this guidance clarifies that offices of the Members of Congress are considered qualified employers eligible to offer coverage to Members and designated Congressional staff through the appropriate SHOP as determined by OPM. CMS clarifies that offices of the Members of Congress, as qualified employers, are eligible to participate in a SHOP regardless of the size and offering requirements set forth in the definition of "qualified employer" in the Exchange final rule, provided that the office offers coverage to those full-time employees who are determined by statute to purchase health insurance from an Exchange for the purpose of the government contribution." CMS, Affordable Insurance Exchanges Guidance (September 30, 2013, available at [URL REMOVED])

Because certain members of Congress and congressional employees are enrolled in a small business exchange, the government is contributing monies contrary to the ACA. If OPM's and CMS's regulation and guidance were revoked, the government would save monies being expended unlawfully to provide contributions to the approximately 20,000 members of Congress and congressional employees. In addition, the rule of law will be enforced.

Organization Name: Judicial Watch, Inc.

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