NJ For Health Care Campaign
December 25, 2012

COMMENTS to the Department of Health and Human Services and Centers for Medicare & Medicaid Services

RE: Patient Protection and Affordable Care Act: Health Insurance Market Rules, Rate Review, File Code CMS-9972-P

New Jersey Appleseed Public Interest Law Center respectfully submits, on behalf of the NJ for Health Care Campaign, the following comments to the Department of Health and Human Services (HHS) and Centers for Medicare & Medicaid Services (CMS) in response to the proposed regulations implementing insurance market rules and rate review released in the Federal Register on November 26, 2012.

The NJ For Health Care Campaign is a broad-based alliance of health care, consumer, senior, student, disability, women's, labor, faith-based, civil rights and social justice organizations working to bring guaranteed, high quality, affordable health care to all New Jersey residents. Such organizations include, but are not limited to, AARP-NJ, New Jersey Policy Perspective, New Jersey Citizen Action, NJ-PIRG, Statewide Parent Advocacy Network and Latino Action Network. See http://njforhealthcare.org/index.html (list of all participating organizations). We have been working over the past several years to build strong alliances with patients, providers, small and large businesses and health care and social service agencies across the State in order to ensure that the Affordable Care Act (ACA) is effectively implemented in New Jersey in accordance with our core principles: affordability, transparency, and accountability to all consumers. We were instrumental in assisting our Legislature develop a blueprint for a state-insurance exchange, which unfortunately was vetoed by our Governor, and we are committed to making sure that the ACA works for New Jersey residents.

As a general matter, we commend HHS in drafting provisions that seek to satisfy the goals of the ACA and to promote fair insurance premiums for the individual and small group markets, both inside and outside state exchanges. Toward that end, we support the standardization of rating factors, the application of the same rules inside and outside the exchanges, and the requirement that insurers consider the claims experience of all enrollees as members of a single risk pool. Notwithstanding these core provisions, NJ For Health Care wants

New Jersey Appleseed
Public Interest Law Center of New Jersey
744 Broad Street, Suite 1600
Newark, New Jersey 07102

Phone: 973.735.0523 Fax: 973.735.0524
Email: rsteinhagen@lawsuites.net
Website: www.njappleseed.net

HHS to expressly state that these regulations will serve as a floor with which states must comply, and not a ceiling for purposes of pre-emption. For the past few decades, New Jersey has had modified community rating, and in some areas has adopted more stringent regulations than the federal government is now proposing. Accordingly, although we welcome federal oversight and enforcement, we clearly want New Jersey's statutes and regulations to prevail when they are more rigorous and protective of consumer rights.

In addition, we would like to comment from the perspective of consumers on a few specific areas:

§147.102 – Fair Insurance Premiums

NJ For Health Care Campaign commends HHS for establishing standard rules with respect to health insurance premiums, which will apply uniformly to both the individual and small group markets inside and outside of the state exchange. Leveling the playing field within states will benefit consumers by curtailing many of the current discriminatory practices carried out in the current insurance market, and by ensuring that consistent rules are more readily understood by consumers. Specifically, we welcome the flexibility provided to states to vary the age rate by less than 3:1, and the proposal to adjust rates based on the enrollee's age at the date the policy is issued or renewed, not at any other time mid-policy. We also encourage HHS to provide specific language explicitly to state that states are permitted to decline using tobacco use altogether as a rating factor in addition to using a ratio narrower than 1.5:1.

Finally, we recommend that HHS create a broad federal definition for family composition. At this time, many different types of families, including non-legally recognized same-sex partners and their children, are enrolled in family insurance plans. The final rule should account for different types of family compositions (including a spouse or partner, as defined by state law, biological children adopted children, foster children, children under guardianship, grandchildren, stepchildren and any other family member recognized under state law) and ensure that rating rules are broad enough to permit issuers to rate and continue to offer coverage to all families.

Without further comment, we merely state that we support the rule establishing age bands as proposed, HHS's proposal that all states must establish uniform age rating curves, and the flexibility provided to states to use either the per-member or composite rating for small group premiums (understanding that providing for employee choice makes it challenging to base small group premiums on average enrollee amounts).

§147.104 – Guaranteed Availability of Coverage

NJ For Health Care Campaign strongly supports the proposed guaranteed issue and renewal regulations that allow everyone to enroll in coverage and maintain that coverage. However, we have concerns about the enrollment periods currently proposed. The proposed standard suggests that a person would be required to wait for the triggering event for the special enrollment period to commence. We believe that individuals should be permitted to start the special enrollment period in advance of a known triggering event so that gaps in coverage can be

prevented when possible. Accordingly, we urge HHS to adopt a standard that allows consumer s to apply for special enrollment thirty (30) days prior to a known triggering event. Furthermore, the rules should permit enrollment up to sixty (60) days after a triggering event consistent with both the Exchange rules and COBRA rules (instead of the 30-day period proposed). Triggering events should include receipt of advance notice of plan termination, and when an insurer is responsible for that event, HHS should require the insurer to give consumers a 14-day advance notice before the special enrollment period commences.

In addition, with respect to the guaranteed renewability of coverage provision, §147.106, we suggest that HHS ensure that special enrollment triggers align with guaranteed renewability, such that any activity not the fault of the enrollee, which results in non-renewability of a current plan, would trigger a special enrollment to allow that person to obtain a new plan with seamless coverage.

With respect to Marketing (§147.104(e)), the NJ For Health Care Campaign welcomes the new standard that prohibits all insurers in the individual and small group markets from employing marketing practices or benefit designs that will discourage the enrollment of individuals with significant health needs in coverage. Nonetheless, we assert that HHS must do more to ensure enforcement of this standard. For example, we recommend that HHS establish a process for consumers to challenge marketing practices that would violate this provision, including a clear statement outlining the administrative complaint process. HHS should also require state exchanges, state regulators and agencies responsible for enforcing unfair and deceptive practices statute to form inter-agency working groups and memoranda of understanding to monitor advertising and marketing practices, share information, and allocate enforcement roles and responsibilities. Well-meaning policies are meaningless unless backed up by strong enforcement mechanisms.

§150.101 -- Enforcement In Insurance Markets

In accord with the call for strong enforcement of nondiscriminatory marketing practices, NJ For health Care Campaign recommends that HHS take a strong stance on enforcement of market reforms generally. States must know that if they are unwilling or unable to enforce the consumer protections in the ACA, then the federal government will do so. In assessing a state's enforcement record, HHS should look at both enactment of state conforming legislation and regulations as well as actual conduct (such as, the conduct of rate and form reviews, market conduct examinations, and response rates to and tracking of consumer complaints).

§150.200 – Rate Increases Subject to Review

There is little doubt that New Jersey is a high cost state. Accordingly, NJ For Health Care Campaign is hesitant to support a rate increase standard that relies solely on "state-specific" thresholds "based on factors impacting rate increases in a State." We believe that relying on such a standard is unlikely to prod insurers and providers in our State to control costs. Accordingly, we recommend employing the lower of a state-specific trend or a nationwide threshold based on average, or even slightly less-than-average, rates of private-sector health care cost increases, in order to place appropriate pressure on insurers and providers to bend the cost

curve. HHS should develop the nationwide threshold with data that is kept current, and is consistent with other components of the health care law that employ definitions for medical services and administration (for purposes of Medical-Loss Ratio filings and rate review filings).

Furthermore, we support HHS making determinations on state requests for state-specific thresholds for rate review in advance of the open enrollment period (subject o our comments regarding development of the threshold criteria). As part of such process, however, HHS should invite public comment, and explicitly respond to that comment in its decision.

§154.301 --- Determination of Effective Rate Review Programs

NJ For Health Care Campaign supports the employment of the additional criteria additional criteria than those HHS is currently proposing to be part of an effective rate review program. Factors set forth in §154.301(a)(4) are a good start, but we urge the adoption of additional criteria to curb excessive rate increases:

--- Current provisions dealing with surplus and capital should be retained, and the proposed (a)(4)(xii) should also be retained, but renumbered;
--- The broad solvency and financial strength of the entire company;
--- The company's mission in the case of nonprofit insurers;
--- The company's history of rate increases;
--- The balance of solvency against affordability for consumers;
--- The company's quality and cost control efforts; and
--- The lack of competition in the provider and carrier markets.

With respect to public disclosure and input, we urge HHS to strengthen its public comment requirement for effective rate review to ensure that public comment occurs prior to implementation of a rate increase (i.e., prior review) rather than after. Moreover, states must be required to consider such comment during their review of proposed rate increases. States, such a New Jersey, must also link to the HHS website directly so that consumers have a direct link to specific rate filings.

NJ For Health Care Campaign also urges HHS to adopt the same language standards utilized by the Department of Justice (DOJ), and set forth in the Health and Human Services LEP Guidance for determining the translation of written documents. A 5% of those eligible to be served by an exchange standard is outlined in the DOJ and HHS' LEP Guidelines, as well as recently revised regulations from the Centers for Medicare and Medicaid Services on marketing by Medicare Part C & D plans.

§156.80 – Single Risk Pool

As representative of New Jersey consumers, we are glad to see that HHS has included the claims experience of all enrollees (excepting only those covered by grandfathered plans) as members of each insurer's single risk pool within a state and a market. Notwithstanding our support for such principle, we recommend amending the proposed rule to preclude insurers from thwarting the single pool requirement by excluding the enrollees of issuer subsidiaries or

affiliates from its single risk pools. The rule would thus require that any subsidiary or affiliate's enrollees also be included in the single risk pool of the parent corporation.

NJ For Health Care Campaign is also quite supportive of the concept of an index rate. Such rate is essential in creating a starting point for insurers to use in the applicable markets to price their plans. However, we agree with the position taken by Consumer s Union, in their comments dated December 20, 2012, and suggest the following changes to the proposed rules:

--- Amending the language in §156.80(d) to clarify that claims costs include the shares paid respectively by the insurer and enrollee and includes in-network and out-of-network claims;
--- Adding language that explicitly states that HHS will monitor the methodologies used by plans in estimating their index rate;
--- Adding language that clarifies that the index rate established by each issuer be set on a consistent, annual basis. A standard time period for the calculation of such rate is needed to enable consumers to make informed selections and to enhance the administrative accuracy of the federally-financed premium tax credits;
--- Deleting the phrase "and cost-sharing design" from §156.80(d)(2)(i); and
--- Deleting §156.80(d)(2)(iv) in its entirety since there is a substantial likelihood that this provision would permit a backdoor to medical underwriting or to adjust for age twice, when pricing catastrophic plans.

In sum, while the proposed regulations are a positive step toward implementing the ACA, there are some provisions that should be strengthened and/or clarified in order to sufficiently protect consumers. In specific, NJ For Health Care Campaign supports the employment of additional criteria than those HHS is currently proposing to be part of an effective rate review program, and amending provisions regarding the index rate to ensure effective implementation of the concept.

On behalf of New Jersey consumers, we look forward to regulations that provide access to affordable coverage for New Jerseyans and permit New Jersey to adopt more comprehensive and protective regulations if it so chooses.

Respectfully submitted,

Renée Steinhagen, Esq.
Ex. Director, NJ Appleseed PILC