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*Sent via Email and
U.S. Certified Mail/Return Receipt*

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Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officers:

The National Immigration Law Center (“NILC”), the Requester, makes this request for information under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, for records pertaining to the Department of Health and Human Services’ (“HHS”) ¹ implementation of identity proofing standards for access to the marketplaces created by the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18001 *et seq.*; Pub. L. No. 111-148 & Pub. L. No. 111-152.

¹ For purposes of this FOIA Request, we include the Centers for Medicare & Medicaid Services (“CMS”) including the Center for Consumer Information & Insurance Oversight (“CCIIO”) and other subdivisions of the Department for Health & Human Services charged with helping to implement the many reforms of the Affordable Care Act, to the extent they have records that are responsive to this Request.

I. Background

The ACA's first open enrollment period began on October 1, 2013, and concluded on March 31, 2014. During that time, millions of eligible individuals enrolled in qualified health care plans through the federally-facilitated ("FFM") and state-based exchanges ("SBM") (or "marketplaces"), created by the ACA. However, as reported extensively in the news media, a large number of people faced barriers to enrollment and extensive delays, causing hardship for those who needed to obtain critical care while their applications for health care coverage languished. Immigrants and their families faced particular challenges, including difficulties with federal systems unable to verify their immigration status; fear of having their personal information shared with immigration enforcement authorities; insufficient resources and assistance for those facing language access barriers; and problems with the federal government's health insurance marketplace website, <http://www.healthcare.gov>, and its Spanish-language equivalent, <http://www.cuidadodesalud.gov>.

One particularly troublesome barrier to successfully completing an online application is the process used to verify the identity of any individual who initiates an application, whether the individual is applying for health insurance for herself or for someone else in her family, such as a child. In general, the first step of applying for health insurance in the marketplace is to set up an online account. This is necessary to submit an application online, select a health plan online, read electronic notices, report changes, and complete renewals online. HHS has contracted with the credit bureau Experian to verify the identity of the individual setting up the account and filing the application (the "filer"). If the filer has a credit history Experian is able to access, she is asked customized questions about her personal history generated from Experian's records. If Experian is unable to verify the filer's identity electronically, the system will provide a unique reference code and direct the filer to call the Experian help desk to try to verify her identity over the phone. If that fails, the individual is directed to upload or mail in documents that prove her identity.

This rigorous "identity proofing" requirement for persons enrolling through www.healthcare.gov has failed to adequately take into consideration the needs of low-income immigrant families. Many immigrants have limited or nonexistent credit histories, which impedes the verification process. In many cases, an undocumented immigrant attempting to enroll eligible members of his family, including U.S. citizen children, cannot move beyond the initial identity verification step. Those individuals who then try to call the Experian help desk because they cannot complete the online

verification due to a lack of credit history likely will not have any more success having their identity verified over the phone. These problems are exacerbated by a significant lack of language capacity among the Experian help desk staff, including insufficient provision of interpreter services to individuals who are limited English proficient.

The third step of the process—mailing or uploading copies of identity documents—results in significant delay for the applicants, leaving countless immigrants frustrated in their efforts to obtain health care coverage for themselves or for their eligible family members. Unlike other verification problems that may occur during the application process—such as when an individual’s income, citizenship or immigration status cannot be electronically verified—for which there exist important due process protections allowing the applicant to enroll in coverage pending final verification, the identity proofing process lacks basic due process protections. Filers whose identity cannot be immediately verified are unable to submit an application and unable to enroll in health insurance pending verification of identity. This is true even when the filer is not applying for insurance for herself, but for her eligible family members.

The barrier caused by the identity verification process may help explain the disproportionately low rates of Latino enrollment through the health care marketplaces. According to HHS’s own recent report,² Latinos comprise 14.5% of those eligible to purchase health plans through the state and federal insurance marketplaces under the ACA, but they made up only 10.7% of enrollees during the initial enrollment period. At least part of this gap is attributable to the rigorous identity proofing requirements to enroll online and, in SBM states, to enroll over the phone.

Aside from the information available on <http://www.healthcare.gov> about the need to verify one’s identity before initiating an application, very little information about the authority for, and implementation of, the identity proofing standards is available. For example, unlike other aspects of the application process which have gone through a robust federal rulemaking and public comment process, the account set-up and identity proofing process did not. This lack of information and opportunity for stakeholder feedback has seriously limited the ability of legal

² Available at

http://aspe.hhs.gov/health/reports/2014/marketplaceenrollment/mar2014/ib_2014mar_enrollment.pdf

service providers, attorneys, advocates, and other members of the public to understand why such a rigorous standard of identity proofing is being implemented and what kind of flexibility the FFM and SBMs have to implement the process, in order to effectively assist ACA-eligible individuals to complete the marketplace application process.

This inability to fully assist ACA-eligible individuals has harmed applicants for marketplace coverage, particularly those who are unable to submit the application for health insurance coverage because they lack a credit history and the accepted documents. Moreover, without a better understanding of how and why the identity proofing standards have been implemented in the way that they have, it is difficult to ascertain the reasons motivating their implementation in a manner that has resulted in the stalling of numerous applications, and to understand why there are no due process protections in place.

There are significant gaps in the public's understanding of several aspects of CMS's implementation of the identity proofing standards, including, but not limited to the rationale behind the implementation of especially rigorous identity proofing requirements; what documents are being accepted as proof of identity and the rationale for including these documents and excluding other types of documents; how many applications were stalled or abandoned due to problems with identity verification; how many individuals completed the first, second or third steps of the process and how many did not; what notice was provided to individuals whose identity could not be verified and whether they were alerted to alternative options (*e.g.*, to submit a paper application); and how many individuals who faced identity proofing problems were ultimately able to complete their applications, either online, over the phone, or through some other method.

II. The FOIA Request

We request disclosure of records³ that were prepared, received, transmitted, collected and/or maintained by HHS relating or referring to the following information:

³ The term "records" as used herein includes but is not limited to all records or communications preserved in electronic or written form, including but not limited to correspondence, directives, documents, data, videotapes, audio tapes, faxes, files, e-mails, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training materials, or studies, including records kept in written form, or electronic format on computers and/or other electronic

A. Policies, Procedures, and Objectives

Any and all records relating to the policies, procedures, or objectives of HHS's implementation of the identity proofing standards in the federal and state health insurance marketplaces.⁴ Such records include, but are not limited to:

- 1) Records explaining the rationale behind the identity proofing requirements and standards, including records indicating why the chosen standards were selected over other less rigorous standards.
- 2) Records indicating whether a lower assurance level for e-authentication than what is currently being used by HHS would have provided the necessary security for interactions between consumers and the www.healthcare.gov website.
- 3) Records indicating whether the chosen e-authentication assurance level for the marketplace was determined based on the types of interactions with consumers and between agencies originally intended for the system, and whether the chosen e-authentication assurance level is appropriate, given the capabilities and reported shortcomings of the system as it is currently being operated.
- 4) Records indicating which documents are acceptable proof of identity and why such documents were chosen as well as records indicating why other documents that could serve as proof of identity were excluded from the list of acceptable proof of identity documents.

B. Data and Statistical Information

Any and all records containing data or statistics prepared, compiled, or maintained by HHS or any agency of subdivision thereof relating to the implementation of the identity proofing standards in the ACA marketplace application process. Such records should include, but are not limited to:

storage devices, electronic communications and/or videos, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

⁴ Please note that the Requesters are not interested in receiving any personally identifying information on any individual marketplace applicant and would not oppose any redactions that are meant to protect such information.

- 1) Records or data that contain information about how HHS monitors compliance with the identity proofing standards.
- 2) Records or data that contain information about the total number of individuals who attempted to set up an account online; the number of individuals whose identity could not be electronically verified and who were instructed to call the Experian help desk; the number of individuals who called the Experian help desk; the number of individuals whose identity was verified, and the number of individuals whose identity was not verified, by the Experian help desk; the number of individuals who uploaded or mailed in identity documentation; and the number of individuals whose identity was verified after uploading or mailing in documents, including but not limited to all records involving communications between HHS and/or any of its components and Experian.
- 3) Notices provided to individuals at any or all steps of the processes described above, including notice provided to individuals after the identity proofing “yellow error screen”⁵ problem was resolved, notice provided of an individual’s potential eligibility for a special enrollment period due to problems with the identity verification process, and information on the manner in which the notice was delivered.
- 4) Records or data that contain information about the number of people whose applications have not been completed, or were abandoned, due to identity proofing, including but not limited to all records involving communications between HHS and/or any of its components and Experian.

C. Guidance and Communications Provided to the States

Any and all records containing information, guidance, and requirements related to identity proofing as communicated by HHS to states, including states running their own health insurance marketplaces, and states implementing federal-state partnership exchanges. Such records should include, but are not limited to:

- 1) Records of communications between HHS and state marketplace entities related to identity proofing requirements and implementation of the requirements.

⁵ When the identity of an individual is unable to be verified online, the individual receives a “yellow error screen” indicating that she cannot proceed with the application and must attempt to verify her identity over the phone. This “yellow error screen” is a hard stop in the online enrollment process.

For all of the above-mentioned requests, please specify if no such records exist.

III. Waiver of All Costs

We request a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the Requester.”). The public interest/benefit fee waiver provisions of the FOIA are to be “liberally construed” and are “consistently associated with requests from journalists, scholars, and non-profit interest groups who it was intended to benefit.” *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of fee waivers for noncommercial requesters.’”) (citation omitted); *see also* 6 C.F.R. § 5.11(k).

Further, Congress has provided that a “minimal showing” is all that is necessary for an agency to grant a FOIA fee waiver.

[T]he legislative history . . . demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that when such requesters demonstrated information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request. *Institute for Wildlife Protection v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1232 (D. Or. 2003).

The Ninth Circuit has interpreted the requisite “minimal showing” in noting that “if a non-profit organization has ‘identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,’ then a waiver is appropriate.” *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (quoting *Friends of the Coast Fork v. U.S. Dep’t of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997)).

NILC is a nonprofit national legal advocacy organization that engages in policy analysis, advocacy, education, and litigation to promote and advance the rights of low-income immigrants and their families. NILC serves as an important resource to a broad range of immigrant advocacy groups, community organizations, legal

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service organizations, and the general public. As a part of its work, NILC disseminates information to the public through electronic newsletters, news alerts, issue briefs, trainings, and other educational and informational materials. In addition, NILC disseminates information to individuals, tax-exempt organizations, not-for-profit groups, and members through its website at <http://www.nilc.org>.

With respect to the ACA, NILC has done extensive work in developing and disseminating background information about the ACA, as well as fact sheets that legal service providers, policy advocates, enrollment assisters, government officials and other stakeholders have used in their work with individuals eligible to apply for health care coverage through the ACA's marketplaces. These resources include fact sheets related to (1) who is considered "lawfully present" for purposes of the ACA; (2) the exclusion of people granted Deferred Action for Childhood Arrivals (DACA) from affordable health care; and (3) mixed-status families and their access to health care coverage under the ACA. See <http://nilc.org/ACAfacts.html>. NILC has also conducted a number of webinar trainings on immigrant access to health care under the ACA, including, at the invitation of HHS, three trainings for HHS-funded assisters and personnel, reaching over 5,000 advocates, assisters and service providers.

It is NILC's intent to synthesize and disseminate the information produced by this FOIA request in a manner that is accessible to a broad public audience. NILC has analyzed, synthesized, and disseminated information from prior FOIA requests in the past to facilitate the sharing of this information with a broad public audience. See *Deportation without Due Process*, report by NILC, Western State Immigration Clinic & Stanford Law School Immigrants' Rights Clinic summarizing 20,000 pages of FOIA documents, available at <http://www.nilc.org/document.html?id=6>.

The records requested are not sought for commercial use, and the Requester, a non-profit organization, plans to disseminate the disclosed information to the public at no cost. See 6 C.F.R. § 5.11(k). Disclosure of the requested records is likely to contribute significantly to public understanding of the operations and activities of the government regarding the implementation of the ACA marketplaces. The requested information is of great interest to the public at large, but it is not available in the public domain.

Release of this information to NILC will significantly advance the general public's understanding of the ACA and the affordable health insurance programs that are available. It is very likely that a proper search in response to this Request will turn up a large volume of information. NILC has the capacity, intent, and legal expertise to review, analyze, and synthesize this information and make it accessible to a broad

public audience. Public education is a cornerstone of NILC's work. NILC uses many approaches in disseminating information for the public's benefit, including sharing information with local, regional, and national media through press releases and media interviews; publishing reports and memoranda through internet websites and email to individuals and organizations working on immigration issues; and creating and disseminating materials to educate the public about federal immigration laws and policies and about the ACA and immigrants' access to health care specifically. NILC's website receives nearly 34,000 visits per month, and many visitors actively download our reports, brochures, and fact sheets. NILC's email listserv has about 18,000 subscribers.

For all of these reasons, disclosure of the requested records is required by the FOIA and a total fee waiver is justified. If the fee waiver request is denied, while reserving our right to appeal the denial, we will pay fees up to \$25. If you estimate that the fees will exceed this limit, please inform us.

IV. Limitation of Processing Fees and Waiver of Search and Review Fees

In the event that the request for waiver of all costs is denied, we request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by ... a representative of the news media ..."). One of NILC's primary functions is to analyze, synthesize, and disseminate information to the public just as the news media does. Notably, non-profit organizations such as the Requester are routinely deemed representatives of the news media under this portion of the FOIA. *See, e.g., ACLU of Wash. v. Dept. of Justice*, 2011 WL 887731, *10 (W.D. Wash. 2011) on reconsideration. In fact, NILC is frequently the primary reporter to the public about important changes and developments in immigration laws and government policies. *See, e.g., Karen Tumlin et al., A Broken System: Confidential Reports Reveal Failure in U.S. Immigration Detention Centers* (July 2009), available at www.nilc.org/document.html?id=9; *see also* www.nilc.org/newsreleases.html (news releases and NILC statements informing the public about new developments). The information requested under the FOIA here is not sought for a commercial purpose, as it is the Requester's intent to synthesize the information to facilitate the dissemination of this information to a broad public audience free of charge as Requestor has done with previous FOIAs. *See* *Deportation without Due Process*, report by NILC, Western State Immigration Clinic & Stanford Law School Immigrants' Rights Clinic.

V. Request for Expedited Processing

Expedited processing is warranted because there is “an urgency to inform the public about an actual or alleged federal government activity” by organizations “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). This request implicates a matter of urgent public concern, namely, government policies and practices related to the implementation of identity proofing under the ACA marketplaces. There is “an urgency to inform the public” about this government activity because it will allow attorneys, advocates, enrollers, and legal organizations to serve a larger number of ACA-eligible individuals more effectively and very little information is presently available about the identity proofing requirement. Specifically, the increased dissemination of the information requested will benefit otherwise ACA-eligible individuals, who have attempted to apply for health care coverage for themselves or for their dependents without success. Moreover, it is urgent that the public be informed about the details of the identity proofing process before the next open enrollment in the health insurance marketplaces begins on November 15, 2014, so that those who are eligible to enroll are able to do so.

Should you determine that expedited processing is not warranted, while reserving our right to appeal that decision, we expect a response within the twenty-day time limit set forth under 5 U.S.C. § 552(a)(6)(A)(ii).

VI. Request for Release of All Responsive Records

We believe that all of the records requested are subject to disclosure, and we request prompt processing and release of the requested information. We also request a complete list of documents covered by the request. We expect that all records will be provided in complete form. To the extent that any requested records are marked classified, please redact only the necessary portions of those records and immediately provide us with the remaining portions. If any records are withheld, please state the exemption claimed and provide a list of the records being withheld. In addition, please provide us with all segregable portions of otherwise exempt material. If you deny this request in whole or in part, please provide a written explanation for that denial, including reference to the specific statutory provisions upon which you rely, and notify us of appeal procedures available under the law.

VII. Request for Records in Electronic Format

NILC requests that the information we seek be provided in electronic format, on a CD-ROM or via electronic transfer.

VIII. Conclusion

We look forward to a written response to this FOIA Request by the close of the statutory time period, which is within twenty (20) working days of your receipt of this letter. *See* 5 U.S.C. § 552(a)(6)(A)(ii). Without waiving any other appeal rights, we reserve the right to appeal a constructive denial of this Request as well as decisions to deny expedited processing, to withhold any information, to deny a waiver of fees, or to deny a limitation of processing fees. We also reserve the right to challenge the adequacy of the search for responsive documents, the withholding of any documents, as well as any redactions in the materials produced in response to this request.

Please provide us responsive documents as soon as they are identified. If you have any questions, please contact me directly at (213) 674-2829.

Thank you in advance for your prompt response to this Request.

Sincerely,

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