



January 9, 2011

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-10415

RE: CMS-10415
Agency Information Collection Activities: Proposed Collection – State Exchange Certification Application Use

Dear Sir/Madam:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, non-profit organizations and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members.

With the implementation of the Affordable Care Act (ACA), it is critical to ensure that the state based Exchanges provide the most robust access to affordable, quality health coverage for all eligible residents, especially individuals in vulnerable populations, including low and working immigrant families. However, we are concerned that recent HHS guidance emphasizing state flexibility and discretion in health care reform implementation may unintentionally weaken Affordable Care Act (ACA) consumer protections for vulnerable populations. The proposed State Exchange Certification Application is such an example. Therefore, NILC recommends that crucial ACA standards be clarified in CMS-10416 to reiterate HHS oversight and authority over required nondiscrimination, privacy, and language access guarantees in all Exchanges of any form.

Below are our comments and suggestions per relevant sections on CMS-10416 to help HHS ensure that state Exchanges are fully compliant with the ACA so that the benefits of the ACA reach as many individuals as was originally intended by the law.

Part 1: ENABLING AUTHORITY AND GOVERNANCE

II. Governance

c. Contracted Entities

III. Regional or Subsidiary Exchanges

NILC supports the requirement that the state must “describe how the Exchange will ensure that entities carrying out responsibilities of the Exchange do so in compliance with all Exchange requirements.” However, the proposed application should not utilize such open-ended requests for information, but rather solicit specific confirmations of ACA compliance indicating states are fulfilling mandated conditions. In this case, the requirements should include a description of how the contracted entity will comply with the nondiscrimination, as well as privacy, confidentiality and security protections of the ACA and related federal laws.

In particular, NILC recommends that any contracted entity describe how it will comply with the nondiscrimination provision of §1557 of the ACA to ensure that no individual is excluded from participation in, denied the benefits of, or is subjected to discrimination in the Individual Market and SHOP Exchanges. Any contracted entity should also describe how it will carry out the protection of information requirements pursuant to §1411(g) of the ACA, the Privacy Act (5 U.S.C § 552a), and section 36B of the Internal Revenue Code of 1986.

While it is important for states to demonstrate how contracted entities will comply with all Exchange standards, it is equally important that states demonstrate how regional and subsidiary Exchanges, and how the state itself, will comply with all Exchange standards, including how they will comply with the nondiscrimination and protection of information requirements listed above. These requirements should be added to Part I of the certification application for fully state operated Exchanges, as well as contracted entities, and regional and subsidiary Exchanges.

Part 2: EXCHANGE FUNCTIONS

I. Consumer Functions

a. Outreach and Education.

Language barriers currently are among the most persistent and harmful barriers to health insurance and health care for immigrant and limited-English proficient individuals. In 2010, limited-English proficient (LEP) individuals accounted for 25.2 million, or 9%, of the US population over five years old.¹ Further, as the number of LEP individuals has increased substantially in recent decades, consistent with the growth of the US foreign-born population, so has its linguistic diversity.² In general, NILC recommends that the State Exchange Certification Application be strengthened throughout to ensure that the

¹ Pandya, C., McHugh, M. and Batalova, J. Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity. Migration Policy Institute, December 2011. Accessible at <http://www.migrationinformation.org/integration/LEPdatabrief.pdf>.

² Ibid.

9% of the population who is LEP has meaningful access to all portals and services of the state Exchanges.

In particular, NILC recommends that the certification application require the states to demonstrate how outreach and education will be done in a culturally and linguistically appropriate manner to ensure that all eligible individuals are aware of the new options for health insurance and their responsibilities.

In addition, while NILC strongly supports the requirement for a state Exchange to demonstrate how it will consult with advocates of “hard to reach” populations, NILC recommends a more inclusive interpretation of “advocates for hard to reach” populations that specifically includes advocates for individuals who need culturally and linguistically appropriate services.

b. Call Center

c. Insurance Portal

NILC supports the requirement that the state must provide a description of how its call center will provide interpretation services. Interpretation services should be provided for all limited-English proficient callers. The state should also be required to demonstrate how the online insurance portal will be accessible to limited-English proficient individuals.

NILC also recommends that HHS require the Exchange to ensure the call center and insurance portal are able to provide referrals to local health care providers to consumers who are seeking or in need of immediate medical attention. This is for consumers whose application and enrollment are pending as well as for individuals who are exempt or excluded from affordable options and do not submit an application.

d. Navigators

States should be required to describe in more detail how the state’s Navigator program meets federal standards, including how the entities serving as Navigators:

- Reflect a cross section of stakeholders and include community and consumer focused nonprofits;
- Provide information that is fair, accurate, and impartial;
- Provide information in a culturally and linguistically appropriate manner;
- Ensure accessibility and usability of Navigator tools and functions for individuals with disabilities in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act;
- Maintain an expertise in eligibility, enrollment and other duties; and
- Comply with privacy, confidentiality and security of information provisions.

NILC also recommends that states be required to describe what standards of measurement and training are or will be in place for Navigators, short of a formal

licensure process, as well as the states' process for initial and ongoing evaluation and monitoring of Navigators.

e. Agents/Brokers

NILC recommends that agents and brokers be required to comply with the same privacy, confidentiality and security of information sharing requirements under Section 1411(g) and all applicable privacy standards for information solicited and obtained from potential enrollees.

II. Eligibility

The state should be required not only to provide a description of the eligibility and redetermination process, but how the eligibility and redetermination process meets the federal standards of § 1411 and related regulations.

The following provisions are of key importance for immigrant and mixed immigration status families, and critical for successful enrollment of these populations. NILC recommends that the application reference the following key standards and requirements and require the state to demonstrate compliance with:

- § 1411(g) which limits the information that may be collected from applicants to only what is “strictly necessary to authenticate identity, determine eligibility, and determine the amount of the credit or reduction;” and
- § 155.310(a)(2) of CMS-9974-P which prohibits the Exchange from requiring Social Security numbers and information about citizenship or immigration status to be collected from non-applicants.

The state should also be required to describe the appropriate procedures in place to determine the eligibility of applicants whose information cannot be verified electronically or who is not in immediate possession of relevant documentation, pursuant to § 155.315(b) and (e) of CMS-9974-P. In particular, an applicant whose information cannot be electronically verified, and who is not in immediate possession of relevant documentation, should be given a reasonable period of at least 90 days to obtain the relevant documentation or to resolve the inconsistency, during which time they should be enrolled in a Qualified Health Plan (QHP) and provided advance payments of the tax credits based on the information attested to by the application filer.

Finally, NILC strongly encourages clear directives in the proposed application as to when language assistance services must be provided to ensure meaningful eligibility and enrollment access for LEP populations, including consent to the following standards:

- Development of a language access policy and procedure, taking into consideration current federal standards and best practices.

- Notification to LEP persons by federally funded entities, such as Exchanges, of their rights to language assistance services in a health care setting as well as to access the Exchange.
- The provision of oral interpretation to all LEP persons who request it to ensure understanding of health coverage information.
- The provision of written translation of applications and important written notices when the number of LEP persons of a specific language reaches 5% of the county population, or at least 500 persons within a given coverage area—whichever threshold is lower.
- If written translation is not required of all documents, Exchange documents should include multilingual taglines, with instruction on how to access oral interpretation services.

IV. Certification of Qualified Health Plans (QHPs) & Plan Management

NILC recommends that this section of the proposed application require certification that applicants understand that ACA nondiscrimination, privacy, and language access requirements applicable to Exchanges are equally binding on QHPs.

VII. Small Business Health Options Program (SHOP)

Finally, the State Exchange Certification Application should require that states demonstrate the eligibility and enrollment process for the SHOP is distinct from the enrollment process for the Individual Market Exchange, in order to minimize administrative barriers and help ensure small business employers will participate in the SHOP. For example, whereas the ACA requirement that only Qualified Health Plans (QHPs) may be offered in Exchanges is binding on both the Individual Market and SHOP Exchanges, the limit on access to QHPs for immigrants without lawful presence is only applicable to the Individual Market Exchange. It is particularly important that the processes described in § 1411(b)(2) and (c)(2) of the ACA only be carried out in the individual market, pursuant to § 1312(f)(3) of the ACA, in order to prevent any deterrent eligibility and enrollment factors arising within the SHOP Exchange. Therefore, NILC recommends that this separation of function be highly enforced through affirmative state acknowledgment in the proposed application, and the two types of Exchanges be disallowed from merging if they cannot demonstrate the satisfactory separation of market verification processes and eligibility determination measures. Inquiry of immigration status of employees in the SHOP Exchange is not only disallowed under the ACA, it will saddle businesses with unnecessary administrative burden, defeat streamlining, thereby discouraging participation by small businesses.

In general, NILC recommends that the SHOP's main role should be to help facilitate the pre-enrollment process between the employer and QHP, but not to perform the enrollment functions. In order to align the enrollment process in SHOP with existing group market practices, the SHOP should not take on the responsibility of enrolling individuals but instead should work to ensure as many eligible small business employers in the service area are certified as qualified employers and are participating in the SHOP. Once the SHOP certifies an employer to participate in the SHOP and helps the qualified employer choose coverage options for its employees, the enrollment information about the coverage options should be provided directly by the elected

QHPs and the qualified employer to the employer's employees. In fact, employees should be able to obtain information from and enroll directly with the selected QHP. The QHP(s) selected by the employer or employees should send all required enrollment forms to the employee which the employee completes and sends directly to the QHP. If there are any inconsistencies or problems with enrollment, the QHP or employer can resolve directly with the employee. In general, NILC recommends that the SHOP does not play a role where it is more efficient to have direct communication or interaction between the employee, the QHP, or the employer.

We hope these comments and recommendations are helpful. For more information, please contact me at 202-683-1994 or by email at rejeske@nilc.org.

Sincerely,

Jenny Rejeske
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National Immigration Law Center