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Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attn: CMS-9974-P
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Baltimore, MD 21244-8010

Submitted electronically to http://www.regulations.gov.

RE: CMS-9974-P

Comments on HHS’ Proposed Rule on Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers

To Whom It May Concern:

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. NILC is submitting the following comments on the Proposed Rule on Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers, published at 76 Fed. Reg. 51202-37 (August 17, 2011).

These comments focus specifically on issues affecting access to the insurance affordability programs in the individual Exchange for low-income immigrants and their family members. In general, the proposed regulations take helpful steps toward ensuring that eligible individuals in immigrant families can secure critical health coverage. Our comments are aimed at ensuring that all individuals who are eligible for health coverage and affordability programs through the Exchange are able to navigate the eligibility determination and verification process easily, efficiently and without unnecessary delay. In particular, these comments are intended to help ensure that the unique needs of low-income immigrants and their family members are addressed and that all eligible individuals are able to secure critical health coverage.

Areas of concern and comment:
155.300 Definitions and general standards for eligibility determinations
155.305 Eligibility standards
155.310 Eligibility determination process
155.315 Verification process related to eligibility for enrollment in a QHP through the Exchange
155.320 Verification process related to eligibility for insurance affordability programs
155.330 Eligibility redetermination during a benefit year
155.335 Annual eligibility redetermination
155.340 Administration of advance payments of the premium tax credit and cost-sharing reductions
155.345 Coordination with Medicaid, CHIP, the Basic Health Program, and the Pre-Existing Condition Insurance Program

INTRODUCTION

Under the Affordable Care Act (ACA), eligibility for members of mixed-status immigrant families is complex. Undocumented family members are prohibited from securing tax credits or even purchasing health insurance through the Exchange at full cost. For family members who are lawfully present, eligibility rules for Medicaid and the Children’s Health Insurance Program (CHIP) vary from state to state. Depending in part on a state’s rules, some lawfully present immigrants are subject to waiting periods, others may be barred indefinitely, while others may be eligible for these programs without a waiting period. The ACA’s procedures for verifying citizenship or lawful presence, discussed below, apply only in the individual market. The ACA left largely undisturbed the current system of employer-sponsored insurance because employers already verify the authorized immigration status of their employees at the time of hiring.

To connect immigrants and their family members to coverage and care, the Exchange must overcome concerns about the complex eligibility rules and the privacy of personal information. The U.S. Department of Health and Human Services’ (HHS) regulations must provide an opportunity for applicants to attest to or document eligibility accurately. This requires the agency to remain flexible in the types of evidence it will accept, both at the initial application and redetermination. The Exchange must be able to proactively encourage applications from hard-to-reach populations and to help each low-income family pursue affordable coverage through tax credits, Medicaid, CHIP, Medicare, the Basic Health Plan (BHP) where applicable, state health programs or the health care safety net. Effective Exchange policies and procedures must address and overcome barriers such as limited-English proficiency (LEP), distrust of government agencies, a lack of familiarity with the U.S. health care and health insurance system, and concerns about potential immigration consequences for individuals or their family members.

DEFINITIONS AND GENERAL STANDARDS FOR ELIGIBILITY DETERMINATIONS (45 C.F.R. §155.300)

§155.300(a) Definitions and (e) Attestation
The NPRM definition of “application filer” is helpful in clarifying that the term includes individuals who are not seeking health insurance coverage for
themselves, and who may make attestations on behalf of an applicant. This is a necessary distinction for some immigrant families in which an ineligible parent will apply on behalf of an eligible child or children. We also support the NPRM’s distinction between an application filer and a “primary taxpayer,” clarifying that they could be the same or different individuals.

**RECOMMENDATION:** We support the definitions of “application filer” and “primary taxpayer” and the general standards for “attestation” in §§ 155.300(a) and (c).

**ELIGIBILITY STANDARDS (45 C.F.R. §155.305)**

§155.305(a)(1) Citizenship, status as a national, or lawful presence

**Definition of “lawful presence.”** The preamble to the regulations notes that the term “lawfully present” is adopted as defined in the Pre-Existing Condition Insurance Plan (PCIP) at 45 C.F.R. §152.2. The preamble also clarifies that HHS intends to align the lawful presence requirements with the Medicaid and CHIP rules under Section 214 of the Children’s Health Insurance Program Reauthorization Act (CHIPRA), indicating that it will adjust its definition accordingly. We fully support this approach, which will help streamline procedures for individuals and families who move between the various programs and the Exchange. We recommend that the improved definition of lawful presence described below be adopted for all of these programs.

Although the PCIP definition provides a helpful starting point, we recommend that the definition be expanded slightly, to incorporate all individuals who are lawfully present in the U.S. First, the definition should include two categories that are currently listed in the CHIPRA definition: individuals who are lawfully present in the Commonwealth of the Mariana Islands and American Samoa, under the law that applies in those territories. These categories were omitted from the PCIP definition because Congress did not authorize the U.S. territories to operate a PCIP. By contrast, as explained in the preamble to the PCIP regulations, Congress specifically allows the territories to establish an Exchange. 75 Fed Reg. 45017 (July 30, 2010).

Next, the definition should include all individuals whose immigration status makes them eligible to apply for an Employment Authorization Document (EAD or “work permit”) regardless of whether they have secured a work permit. An immigrant’s lawful status does not depend on whether he or she has an EAD. The EAD requirement, which applies to some of the categories in the PCIP definition, imposes particular burdens on low-income children and persons with

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disabilities who cannot work. Low-income families and individuals cannot easily afford the fee (currently $380) to apply for and obtain a work permit, particularly if they do not otherwise need it. The final rule should eliminate this requirement.

We recommend that three other lawfully present immigration categories be added to the definition: (a) certain victims of trafficking, (b) asylum applicants, and (c) individuals granted a stay of removal, as described below.

Victims of human trafficking can be granted continued presence in the U.S. by the Department of Homeland Security (DHS) in order to aid in the prosecution of traffickers in persons. This category of non-citizens already was eligible for Medicaid and CHIP under 22 U.S.C. §7105(b), and therefore did not appear in CMS’ list of newly covered immigrants for the purpose of implementing CHIPRA §214.

Asylum applicants should be considered “lawfully present” without regard to whether they are eligible for employment authorization, since they have a right to remain in the U.S. throughout the pendency of their asylum adjudication, a process that can take years. Asylum applicants are not eligible for employment authorization until 180 days after the asylum application has been filed, and errors and delays in the administration of this waiting period have made the wait much longer for many applicants, as noted in the USCIS Ombudsman’s recent report on this problem.[1]

Stays of removal generally are granted to individuals with cases pending before an immigration judge, the Board of Immigration Appeals, or a court, allowing them to remain in the U.S. lawfully while often lengthy proceedings continue. Grants of prosecutorial discretion under the Obama Administration’s recent Department of Homeland Security guidelines will include stays of removal and similar discretionary relief. Individuals granted such relief, including some teenagers and young adults who have grown up in the U.S., should be recognized as lawfully present.

Several states provide health coverage to individuals with these lawful statuses. To promote consistency and to maximize enrollment, it is appropriate to include them among the lawfully present categories for purposes of implementing the Exchange. To aid in these determinations, we have attached a list of “typical” documents that lawfully present individuals may have.

Finally, we recommend that, to avoid unnecessary burdens and increase administrative efficiency, the final rule should provide flexibility to states to include new lawfully present categories as they become available. Immigration

law frequently changes, producing new statuses and document requirements. *The regulation should recognize that the list is not exhaustive.*

**RECOMMENDATIONS:**

- Amend the definition of “lawfully present” by adding the following five categories of individuals:

  1) who are lawfully present in the Commonwealth of the Northern Mariana Islands under 48 U.S.C. § 1806(e);
  2) who are lawfully present in American Samoa under the immigration laws of American Samoa;
  3) who are victims of human trafficking who have been granted continued presence;
  4) whose status makes them eligible to apply for work authorization under 8 C.F.R. §274a.12;
  5) who are granted a stay of removal by administrative or court order, statute or regulations.

and by revising the current category pertaining to asylum applicants as follows:

  6) A pending applicant for asylum under section 208(a) of the Immigration and Nationality Act (INA) or for withholding of removal under section 241(b)(3) of the INA or under the Convention Against Torture, whose application has been accepted as complete.

- Provide that states may continue using existing administrative mechanisms for determining eligibility, as long as the rules are no more restrictive than federal law.

**Determining whether an individual is “reasonably expected” to be a citizen, national, or a non-citizen who is lawfully present for the entire period for which enrollment is sought.** The proposed rule requires that an applicant be a citizen, national, or lawfully present non-citizen who is reasonably expected to be a citizen, national or lawfully present non-citizen during the entire period for which enrollment is sought. The determination that a non-citizen is lawfully present, along with a finding that the individual has established residency in a State, as required by §155.305(a)(3), should be sufficient to determine that the applicant is “reasonably expected” to be lawfully present during the enrollment period. A non-citizen’s attestation of lawful presence is verified by DHS, and state residency requires the intent to reside in the State.

Immigrants who are within HHS’ definition of lawful presence for the purpose of establishing eligibility for the Exchange may later adjust to another lawfully present status, but typically do not lose lawful presence altogether. There is no general rule that would enable eligibility workers to make the “reasonable
expectation” determination accurately, and the potential for erroneous denials is great. Some common immigration documents, including “green cards” and “work permits,” may expire, while the underlying status remains intact. Similarly, some immigration statuses, such as Temporary Protected Status, have a termination date, but can be renewed. Some statuses that have an expiration date provide a pathway to another status. Finally, a non-citizen in one lawfully present status may become eligible to adjust to another status through an unrelated pathway. The complexity of immigration law and the individualized nature of the immigration process make any general rule impossible to administer accurately.

To advance the goals of streamlining and reducing administrative burdens, evidence of lawful presence combined with state residency should establish a presumption that the applicant reasonably expects to be lawfully present during the enrollment period. If this proposal is not adopted, the Exchange could accept a self-attestation indicating that the applicant reasonably expects to be lawfully present throughout the enrollment period. Because the proposed rule already requires enrollees to report any change in circumstances (§155.330(b)(1)), non-citizen enrollees would be required to report any changes in immigration status or state residency. Thus there is a mechanism in place to address any changes in eligibility that may occur.

**RECOMMENDATION:** Amend §155.305(a)(1) to require an Exchange to find that a non-citizen is reasonably expected to be lawfully present during the entire period for which enrollment is sought, based on evidence of lawful presence and state residency. Alternatively, accept an applicant’s self-attestation that he or she reasonably expects to be in a lawfully present status throughout the enrollment period.

**§155.305(a)(3) Residency**

We support the practical and reasonable standard for establishing state residency set forth at §155.305(a)(3). We recommend a related amendment in the proposed residency verification rule at §155.315(c)(4); please see below. We appreciate the helpful preamble discussion at 51206, noting that seasonal workers and individuals seeking employment in the State or service area meet the residency standard. We suggest that HHS consider creating a portability pilot program for seasonal workers that would enable an individual to enroll in one Exchange for coverage under a QHP that would then reimburse for services received in another state or Exchange area.

We support HHS’s intention to align the Exchange residency standard with the one used in Medicaid, as confirmed at 51206 of the preamble. However, the Exchange standard omits two provisions from the residency standard as proposed in the Medicaid NPRM. First, the Medicaid NPRM at §435.403(h)(1)(ii), proposes to define the state of residence, or the Exchange service area of residence, to include the state where the individual has entered with a job commitment or seeking employment, whether or not currently employed.
Second, under §457.320(d)(2)(i) of the Medicaid NPRM, a state may not impose a durational residency requirement. We suggest that the final rules for the Exchange incorporate these two Medicaid standards, to ensure that workers seeking employment in a new geographic area may apply for health coverage there. Including these standards in the Exchange rule will also promote consistency with Medicaid and effectuate the intent expressed in the NPRM preamble, to align the two regulatory schemes.

**Recommendations:**
- We support the practical and reasonable standard for establishing state residency, at §155.305(a)(3).
- To refine the applicability of the residency standard (§155.305(a)(3)) to seasonal workers and individuals seeking employment, we recommend that HHS create a pilot project allowing an individual to enroll in one Exchange area with a QHP that can reimburse for services received in another Exchange area.
- Amend the standard at §155.305(a)(3) to align with the Medicaid NPRM to, first, define the State or Exchange area of residence to include the state where the individual has entered with a job commitment or seeking employment, and second, to prohibit an Exchange from imposing a durational residency requirement.

§155.305(f)(2) Special rule for non-citizens lawfully present who are ineligible for Medicaid
We support the NPRM at §155.305(f)(2), providing the essential clarification that lawfully present non-citizens who are ineligible for Medicaid but who have income below 100 percent of the Federal Poverty Level (FPL) are eligible for an appropriate tax credit based on their income. This proposed rule facilitates the eligibility of all lawfully present immigrants, including those with very low incomes who cannot receive Medicaid due to restrictions on the eligibility of newly arrived and other lawfully present non-citizens. It also promotes consistency with Section 1.36B-2(5) of the Notice of Proposed Rulemaking and Notice of Hearing for the Health Insurance Premium Tax Credit (76 Fed. Reg. 50931, 50940, August 17, 2011).

**Recommendation:** We support §155.305(f)(2), which provides that lawfully present non-citizens who are eligible for the Exchange but are ineligible for Medicaid, and who have income below 100 percent FPL, are eligible for an appropriate tax credit based on their income.

§155.305(f)(4) Compliance with filing requirement
The NPRM notes that the Exchange may not determine a primary taxpayer eligible for advance payments of the premium tax credit if HHS notifies the Exchange, as part of the verification process related to eligibility for insurance affordability programs in §155.320, that advance payments were made on behalf of the primary taxpayer in a previous year and the primary taxpayer did not
comply with the requirement to file a tax return. While this process may work for primary taxpayers who attest to having a Social Security number (SSN) and for whom the Department of Treasury (Treasury) is able to verify tax data, it is not clear how the process will work for primary taxpayers who file with other taxpayer identification numbers.

As noted in the next section below, the preamble at 51208 regarding §155.305(f)(5) on the Collection of Social Security Numbers states that the Secretary of the Treasury is able to provide tax data only for primary taxpayers for whom the Exchange provides an SSN or Adoption Taxpayer Identification Number (ATIN). If that is the case, the Exchange must have an alternative mechanism or procedure for determining whether a primary taxpayer, who does not attest to having an SSN and, therefore may not have tax data readily available electronically has complied with the filing requirement. The Exchange, or HHS via the data service hub, must not rely solely on electronic data from Treasury to determine whether a primary taxpayer has complied with the filing requirement. This is critical to ensure that primary taxpayers who file with Individual Taxpayer Identification Numbers (ITINS), who are applying for advance payments on their own behalf (if they are lawfully present) or on behalf of eligible household members, are not penalized or denied advance payments erroneously.

RECOMMENDATION
Amend §155.305(f)(4) to clarify that the Exchange must provide an alternative mechanism or procedure for determining whether a primary taxpayer who does not attest to having an SSN, and therefore may not have electronically verifiable tax data readily available, has complied with the filing requirement.

§155.305(f)(6) Collection of Social Security numbers
The NPRM requires the Exchange to collect the Social Security number (SSN) of the primary taxpayer “if an application filer attests that the primary taxpayer has an SSN and filed a tax return for a year for which tax data would be utilized for verification of household income and family size.” The preamble at 51208 states that ACA §§1412(b)(1) and 1411(b)(3) provide that eligibility determinations for advance payments are to be made based on tax return data, to the extent that tax return data is available, and that the Secretary of the Treasury is able to provide tax data only for primary taxpayers for whom the Exchange provides an SSN or Adoption Taxpayer Identification Number (ATIN).

Given these considerations, we support the proposed rule which includes the important qualification that an SSN is required ONLY IF the primary taxpayer has an SSN and filed a tax return for the previous year. This limitation is extremely important because, as the statute recognizes, some primary taxpayers may not be able to file taxes with SSNs. For instance, as mentioned above, a primary taxpayer who files taxes with an ITIN may be a lawfully present immigrant who is not eligible for an SSN, and/or may have household members who are citizens or lawfully present individuals. To facilitate access to the
affordability credit for mixed-status households that include individuals who are eligible for medical coverage through the Exchange, it is critical that advance payments for eligible applicants be available where the primary taxpayer files taxes with an ITIN instead of an SSN.

**RECOMMENDATION:** We support §155.305(f)(6) requiring the Exchange to collect the SSN of the primary taxpayer only if an application filer has attested that the taxpayer has an SSN and filed a tax return for the relevant tax year.

**§155.305(g)(1)(ii) Eligibility for cost-sharing reductions**

We also support §155.305(g)(1)(ii), requiring the Exchange to find an applicant eligible for cost-sharing reductions if the applicant meets the eligibility requirements for an advance payment of the premium tax credit, at §155.305(f), discussed above. We support this rule, particularly the provision on cost-sharing reductions for lawfully present applicants [in a primary taxpayer’s household] with incomes under 100 percent FPL, who are not eligible for Medicaid. These subsidies are critical in securing health coverage for these very low-income families.

**RECOMMENDATION:** Support §155.305(g)(1)(ii), providing cost-sharing reductions to low-income individuals including lawfully present applicants with incomes below 100 percent FPL who are not eligible for Medicaid.

**§155.305(h) Eligibility categories for cost-sharing reductions**

The NPRM at §155.305(h) sets forth three categories of eligibility for cost-sharing reductions. The categories are: individuals with household income between 1) 100 and 150 percent FPL, 2) between 150-200 percent FPL, and 3) between 200-250 percent FPL. There is no explicit category for lawfully present: immigrants with income below 100 percent FPL who are not eligible for Medicaid. Although §155.305(g) ensures that lawfully present immigrants with incomes of 0-100 percent FPL are eligible for cost-sharing reductions, we suggest that HHS add a category of 0-100 percent FPL at §155.305(h) as well, for clarification. This addition would ensure consistency throughout this section, provide protection for very vulnerable applicants, and clarify the Exchange’s obligation to consider the eligibility of such applicants for cost-sharing reductions that are fair and based on their actual income.

**RECOMMENDATION:** Amend §155.305(h) by adding a new first category for cost-sharing reductions as follows: “(1) An individual who has household income less than or equal to 100 percent FPL;” and re-number the succeeding subsections.

**ELIGIBILITY DETERMINATION PROCESS (45 C.F.R. §155.310)**

§155.310(a)(2) Information collection from non-applicants
The proposed rule at §155.310(a)(2) is critically important to mixed-status immigrant families; NILC strongly supports its inclusion in the final rule. The rule codifies what has long been federal policy, to protect fairness and privacy by strictly limiting the personal information that may be required as a condition of eligibility from an individual who is not seeking any benefit for him or herself (a “non-applicant”).

The proposed rule states that the Exchange may not require a non-applicant to provide information regarding citizenship or immigration status on any application or supplemental form. It also restricts the Exchange from requiring a non-applicant to provide an SSN (except where the non-applicant is also a primary taxpayer, whom the application filer has attested has an SSN and tax data on file, and who is applying for tax credit). The policy codified in §155.310(a)(2) is grounded in Title VI of the Civil Rights Act, the Privacy Act, and Medicaid confidentiality provisions at §1902(a)(7) of the Social Security Act, and conforms to ACA §1411(g). To encourage coordination and a streamlined process, the final rule for the Exchange should reference the corresponding rule for Medicaid at §435.907(c)(1).

**RECOMMENDATION:** We support §155.310(a)(2) as a critical privacy protection for non-applicants who are assisting with the application of persons eligible for coverage but who are not seeking coverage for themselves. Amend the rule by adding a reference to the corresponding Medicaid rule at §435.907(c)(1).

**§155.310(d)(2) Special rules relating to advance payments of the premium tax credit**

We support the proposed special rules providing flexibility for taxpayers to limit their repayment liability, and setting out conditions for authorizing advance payments; we also suggest an amendment. To effectuate the affordability mechanisms for eligible mixed-status immigrant families who file taxes using an ITIN rather than an SSN, a primary taxpayer who is not eligible for an SSN must be able to receive a tax credit for applicants in his or her household who are eligible for coverage, including for him or herself.

**RECOMMENDATION:** To avoid confusion and administrative burden, we recommend that the final rule clarify that a primary taxpayer who does not attest to having an SSN must nonetheless receive advance payments of the premium tax credit for eligible applicants in the household, including the primary taxpayer.

**§155.310(f) Notification of eligibility determination**

The proposed rule at §155.310(f) requires the Exchange to provide timely notification of an eligibility determination. The preamble at 51210 clarifies that the notice, intended to provide the applicant with a record of the actions taken and those still needed, as well as information about appeal rights, should be in writing. The rule should require written notice, in order to protect the applicant. The preamble states that the notice should be provided in a manner that meets the
needs of diverse populations by, *inter alia*, providing meaningful access to limited-English proficient (LEP) individuals. We recommend that this preamble statement be codified in the final regulation, with specific standards, consistent with existing U.S. Department of Justice and HHS policy, for promoting “meaningful access” through translation of notices.

**RECOMMENDATION:** Amend §155.310(f) to require that the notice of eligibility determination be provided in writing and translated into languages other than English when there is a threshold of 500 LEP individuals or five percent of those eligible to be served by the Exchange are LEP, whichever is less. Further amend to require Exchanges to provide taglines in at least 15 languages that inform LEP application filers and applicants how to access free language assistance services.²

§155.310(g) Notice of an employee’s eligibility for advance payments of the premium tax credit and cost-sharing reductions to an employer

The NPRM at §155.310(g) requires the Exchange to notify an employer that an identified employee has been determined eligible for advance payments of the premium tax credit or cost-sharing reductions. The proposed rule places no restrictions on the circumstances of the notice and does not provide safeguards for employees who could be vulnerable to retaliation as a result of the notice. We recommend that the final rule limit the circumstances precipitating such a notice, limit the information that appears on the notice, and require the notice to specify that employers cannot retaliate against the employee.

**RECOMMENDATION:** Amend §155.310(g) to require the notice of an employee’s eligibility for subsidies only if that eligibility has direct implications for the employer, to restrict the content of the notice to the minimal information strictly needed by the employer to evaluate its liability, and to require a clear statement on the notice that employers cannot retaliate against employees who are receiving subsidies.

**VERIFICATION PROCESS RELATED TO ELIGIBILITY FOR ENROLLMENT IN A QHP (45 C.F.R. §155.315)**

§155.315(b) Verification of citizenship, status as national, or lawful presence

NILC supports §155.315(b), if amended to facilitate the enrollment of immigrant families. The inclusion of §155.315(b) is necessary to comply with §1411(e)(3) of the ACA, but should be amended to conform more completely with the

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² The Social Security Administration, through its Multilanguage Gateway, translates many of its documents into 15 languages; CMS plans to translate Medicare forms and notices into 15 languages in addition to Spanish. [www.cms.gov/EEOInfo/Downloads/AnnualLanguageAccessAssessmentOutcomeReport.pdf](http://www.cms.gov/EEOInfo/Downloads/AnnualLanguageAccessAssessmentOutcomeReport.pdf). A sample tagline could read: “No Cost Language Services. You can get an interpreter and get documents read to you in your language. For help, call us at the number listed on your ID card or xxx-xxx-xxxx. For more help, call your state’s Department of Insurance at xxx-xxx-xxxx.”
Medicaid procedures under §1902(ee) of the Social Security Act, as directed in §1411(e)(3).

First, by incorporating §155.315(e), the rule helps to ensure that an applicant whose information cannot be verified by SSA or DHS, and who is not in immediate possession of relevant documentation, be given a reasonable opportunity of at least 90 days to obtain the relevant documentation or to resolve the inconsistency, during which time they would be enrolled in a QHP and provided advance payments of the tax credits based on the information attested to by the application filer.

In addition, to facilitate electronic verification with DHS via the HHS data services hub and to promote real time efficiency, we recommend that the final rule provide that applicants who attest to being a national or lawfully present non-citizen have the option of submitting an Alien Registration Number (or “A-Number”) if they have one, or other documentation of their status. The final rule should clarify that provision of an A-Number, which will facilitate an electronic verification procedure for those who have one, is acceptable “documentation that can be verified through the Department of Homeland Security.”

The final rule should also clarify that where an application filer has attested that the applicant is either a citizen or a lawfully present non-citizen but is not in immediate possession of an SSN, A-Number or other documentation, the Exchange must enroll the applicant in a QHP and provide advance payments of the tax credit during the 90-day reasonable opportunity period, once the application has been submitted rather than after the application filer has received notice, as directed in the inconsistencies provision at §155.315(e). This amendment would ensure that the final rule accurately reflects §1411(e)(3) of the ACA and is fully consistent with the Medicaid procedures under §1902(ee) of the Social Security Act. These Medicaid procedures incorporate the requirements under §1137(d) of the Social Security Act that an applicant’s coverage not be reduced, delayed, denied, or terminated while the applicant is gathering relevant documentation of citizenship or immigration status.

We note that the preamble at 51213 indicates that future rulemaking will address the standards that the Exchange will use to adjudicate documentary evidence of citizenship provided by an applicant within this consistency process. We suggest that future rulemaking also address the standards to adjudicate documentary evidence of lawful presence. To ensure that all eligible applicants have an opportunity to establish lawful presence, HHS and the Exchange should be instructed to accept a broad range of documents that may establish evidence of immigration status, including documents that cannot be verified electronically with DHS. Any such list must not be exclusive, given the range of evidence that a lawfully present applicant may have, as well as the fact that immigration statuses and documents continue to evolve.
Finally, we recommend that HHS emphasize the protections regarding the receipt, use and disclosure of applicant information required by ACA § 1411(g)(2), as well as the penalties prescribed by § 1411(h) for the improper use or disclosure of such information, and implemented in §§ 155.260 and 155.270 in the final rule at §155.315(b). These protections are uniquely important for immigrant families, who have heightened concerns stemming from attempts in several states to enact legislation requiring intrusive and likely unlawful, inquiries regarding the immigration status of non-applicants, as well as other measures that threaten the privacy or confidentiality of immigrant families. We also recommend that HHS monitor the Exchanges’ compliance with these privacy and civil rights protections.

RECOMMENDATIONS:

- Amend §155.315(b)(2) to allow an applicant who attests to being a lawfully present non-citizen to submit an Alien Registration Number (“A-Number”), paper document, or other evidence of his or her status, and to clarify that an A-Number is acceptable documentation that can be verified through the Department of Homeland Security.

- Amend §155.315(b)(3) to align with §1411(e)(3) of the ACA and §1902(ee) of the Social Security Act by clarifying that these procedures which direct the Exchange to follow the procedures in §155.315(e), apply to situations in which an applicant does not have an SSN, as well as to situations in which the applicant does not have an A-Number or other documentation readily available. This clarification would be consistent with the preamble’s explanation at 51211.

- Amend §155.315(b)(3) to clarify that in cases where an applicant’s citizenship or immigration status information is not immediately verifiable, including when the applicant is not in immediate possession of his or her SSN, A-Number or other documentation — the Exchange must determine the applicant’s eligibility, enroll the applicant in a QHP, and provide advance payments of the premium tax credit as soon as the application is submitted, rather than after notification of an inconsistency has been received.

- In future rulemaking, address the standards that the Exchange must use to adjudicate documentation of lawful presence, incorporating the flexibility necessitated by the limitations of electronic verification through the DHS database, and by the continually evolving nature of immigration status documentation.

- Amend §155.315(b) to emphasize applicant confidentiality protections required by ACA §§1411(g)(2) and (h), implemented in 45 C.F.R. §§155.260 and 155.270.
§155.315(e)(4) Verification of residency
We support the clarification at §155.315(c)(4) that a document providing evidence of immigration status may not be used alone to demonstrate a lack of state residency, and we suggest strengthening this rule by deleting the word, "alone." As noted in the preamble at 51212 and reinforced at §§435.403, 457.320, and 435.956, determinations of state residency are independent from determinations of citizenship or immigration status, and further, the rules should provide each individual with an opportunity to establish that he or she resides in a state.

Ensuring that state residency and immigration status are evaluated independently can protect against unnecessary inquiries of families seeking coverage. Some states, believing that a parent’s status is relevant in determining a child’s residence, have been asking for immigration status information of non-applicant parents, chilling access to coverage for eligible children, and violating the principles articulated in the Tri-Agency Guidance, §1411(g) of the ACA, §155.210(a)(2) and §435.907(e)(1). It is also important to ensure that U.S. citizen children have an opportunity to establish that they reside in a state, regardless of the parent’s immigration status.

**RECOMMENDATION:** To ensure that determinations of lawful presence and residence are made independently, and to reduce any potential confusion, we recommend that the word “alone” be deleted from this provision.

§155.315(e) Inconsistencies
We support the requirements in §§155.315(e)(2)(i) and (ii) that the Exchange must provide notice to the applicant of any inconsistency in application information submitted, and provide the applicant 90 days to either present documentation or resolve the inconsistency. We recommend that notices conform to the standards for Exchange notices, and be accessible to limited-English proficient (LEP) application filers.

We also support §§155.315(e)(3) and (4), permitting the Exchange to extend the 90-day period if the applicant demonstrates a good faith effort and that, during that "reasonable opportunity" period, the Exchange will determine eligibility based on an application filer’s attestation of information, enroll the applicant in a QHP, and provide advance payments of the tax credit.

Mixed-status families may be more likely than citizen families to have an "application filer" rather than an "applicant" submitting the application form, and to work with the Exchange to resolve inconsistencies with the information provided on the application. Given that the Exchange will need to communicate with the application filer regarding inconsistencies, we recommend that the final rule more carefully distinguish between "applicant" and "application filer" in §§155.315(e)(2), (3) and (5).
RECOMMENDATION:

- Support and amend §155.315(e)(2), providing for notification by the Exchange of any inconsistency and providing the application filer with 90 days to resolve the inconsistency; and amend to add new §(iii) requiring Exchanges to translate notices for each eligible LEP language group in the service area that constitutes 500 individuals or 5 percent, whichever is less, and ensure that notices include taglines in at least 15 languages informing individuals how to obtain assistance in their language.

- Support §§155.315(e)(3), (4), and (5) permitting an extension of the 90-day period and a determination of eligibility during the period based on the application filer’s attestation, including enrollment and advance tax credit payment, and allowing the Exchange to determine eligibility based on electronic data sources if still unable to verify the attestation.

- Amend §§155.315(e)(2), (3), and (5), to distinguish between applicant and application filer in resolving inconsistencies:
  - In §(e)(2)(i), add “and application filer” after “applicant” (the applicant and application filer should be notified that the Exchange is unable to resolve the inconsistency after making a reasonable effort to do so).
  - In §(e)(2)(ii), add “and application filer” after both uses of “applicant” (the Exchange should provide the applicant and application filer with a period of 90 days from the date on which the notice is sent to the applicant and application filer).
  - In §(e)(3), add “and application filer” after both uses of “applicant” and replace the reference to (e)(3) with (e)(2)(ii) (the Exchange may extend the period described in paragraph (e)(2)(ii) for an applicant and application filer if the applicant and application filer demonstrates that a good faith effort has been made).
  - In §(e)(5)(i), add “and application filer” after the second instance of “applicant” (the Exchange must determine the applicant’s eligibility based on the information available...and notify the applicant and application filer of such determination).

§155.315(f) Flexibility in information collection and verification

NILC supports the careful balance in the NPRM between the need for state flexibility in information collection and verification, and the need for clear federal standards that protect the privacy of applicants and their families and safeguard personal information in an application.

RECOMMENDATION: Support §155.315(f) providing that HHS will not approve an alternative verification system unless it reduces the administrative costs and burdens on the individual while maintaining accuracy and minimizing delay, and unless it complies with §§155.260 and 155.270 with respect to the confidentiality, disclosure, maintenance or use of information.
§155.315(g) Applicant information
NILC strongly supports the codification of the ACA §1411(g) prohibiting an Exchange from requiring an applicant to provide information beyond what is necessary to support the eligibility and enrollment processes. We particularly appreciate the emphasis of the NPRM that the rule also applies to the process for resolving inconsistencies in §155.315(e). This important provision simplifies and facilitates the eligibility and enrollment process.

Recommendation: Support §155.315(g) prohibiting an Exchange from requiring information beyond the minimum necessary for the eligibility and enrollment decision.

VERIFICATION PROCESS RELATED TO ELIGIBILITY FOR INSURANCE AFFORDABILITY PROGRAMS (45 C.F.R. §155.320)

NILC supports the flexibility incorporated into the verification process regulations at §155.320 that relies primarily, but not exclusively, on electronic verification of tax records with the Secretary of Treasury. Rules providing for alternative methods of verification in cases where a family’s income has decreased and tax return data is unavailable, §§155.320(c)(3)(iv) and (v), which are supported in the preamble at 51216, will help facilitate the application and enrollment of eligible individuals. Pursuant to ACA §1412(b)(2), if a primary taxpayer, non-applicant, or applicant does not attest to having an SSN, the proposed rule directs the Exchange to follow the procedures at §155.315(e).

To ensure accuracy, the Exchange must provide an opportunity for an applicant, application filer or primary tax filer, whose information cannot be verified electronically, to submit other documentation of income, including attestation of income when other documentation is not available. This flexibility is particularly important for vulnerable populations, including immigrant families, and mixed-status households applying for child-only coverage. In §155.320(c)(3)(v)(C), we suggest that the Exchange be required to accept one of a range of documents to demonstrate household income, including self-attestation in cases where no other evidence is available. This will ensure that eligible individuals, including very low-income families who were not required to file taxes, as well as those who work in the informal economy and may not have tax data available, can secure access to affordable coverage for themselves and/or their children.

We strongly support the requirement in §155.320(c)(4) that the Exchange provide education and assistance to an application filer regarding the process for verifying eligibility for the insurance affordability programs. This is particularly important for applicants and non-applicants who do not have SSNs or tax return data available. Education and assistance for this population will be necessary to ensure that the application filer has all of the information that he or she needs to complete the application process and to ensure enrollment of eligible individuals.
We recommend that the rule require that education and assistance be provided in a culturally and linguistically accessible manner, with strict adherence to all privacy and security provisions.

At §155.320(f) NILC also supports the helpful reminder to states, in the preamble at 51217, that the immigration status standards for eligibility for enrollment in a QHP differ from those in Medicaid and CHIP, except for the lawfully residing pregnant women and children in states that have adopted the CHIPRA option. However, the particular citations listed in the preamble at 51217 and in the proposed rule at §§155.320(f)(1) and (2) do not capture the complexity of federal rules, let alone the state options and variations in implementing these rules. The incomplete references could cause confusion. Helpfully, these sections require the Exchange to verify an applicant’s Medicaid or CHIP eligibility in accordance with the state’s Medicaid or Child Health Insurance Plans, which if applied correctly, could address these discrepancies.

The preamble also confirms that the ‘reasonably expected’ element does not apply to any Medicaid or CHIP population. These clarifications simplify and facilitate the application and enrollment process for mixed-status families who are often deterred from participating due to confusion over the eligibility rules.

In §155.320(f), we support the clarification that lawfully present immigrants who would be eligible for Medicaid and CHIP “but for” the immigrant eligibility restrictions are eligible for the treatment of an emergency medical condition under Medicaid. The preamble at 51217-18 contains helpful confirmation that an individual found to be eligible only for emergency Medicaid coverage, including “qualified immigrants” who are within Medicaid’s five-year waiting period, may nonetheless be eligible for a QHP in the Exchange. We recommend that the final rule clarify this point, to prevent confusion. The rule should direct the Exchange to follow the procedures at §155.305 for such an individual, by determining the applicant’s eligibility for the Basic Health Plan, if operating in the service area of the Exchange, and for advance payments of the premium tax credit and cost-sharing reductions. It would be helpful to reference the Special rule for non-citizens lawfully present who are ineligible for Medicaid at §155.305(f)(2), which specifically applies to this population.

RECOMMENDATIONS:

- Support and amend §§155.320(c)(3)(iv) and (v), providing alternative methods of verifying eligibility for affordability programs, including situations where tax return data is unavailable. This provision will help facilitate the application and enrollment of eligible individuals.

- Amend §155.320(c)(3)(v)(C), to require the Exchange to accept one of a range of documents to demonstrate household income, and if no documents are available, self-attestation of the income.
• Support the requirement in §155.320(c)(4) for outreach and education on the verification process; amend to require the Exchange to communicate in a culturally and linguistically accessible manner, to provide meaningful access to applicants, non-applicants and application filers who are LEP; to communicate effectively with application filers in mixed-status families who face unique barriers to participation, including complex eligibility and verification rules; and to adhere to privacy protections, including those at §§155.315(g), 155.310(a)(2), and 435.907(c).

• Support and amend §155.320(f) as follows:
  o Support the recognition that the immigration status standards for enrollment in a QHP differ from those in Medicaid and CHIP, and that the Exchange must determine a non-citizen applicant’s eligibility for Medicaid or CHIP in accordance with the Medicaid State Plan and Child Health Insurance Program Plan;
  o Support confirmation in the preamble that the ‘reasonably expected’ element does not apply to any Medicaid or CHIP population.
  o Support the clarifications of the proposed rule and the preamble that lawfully present immigrants who would be eligible for Medicaid and CHIP “but for” the immigrant restrictions are eligible for Medicaid for the treatment of an emergency medical condition, and that such individuals are also be eligible for a QHP in the Exchange. Amend final rule to state that the Exchange should continue with the eligibility determination procedures for such applicants for the BHP if available, advance payments of the premium tax credit (referencing the Special rule for non-citizens lawfully present who are ineligible for Medicaid at §155.305(f)(2)), and cost-sharing reductions, and enroll the applicant in a QHP.

REDETERMINATION (45 C.F.R. §§155.330 and 155.335)

§155.330 Eligibility re-determination during a benefit year
NILC supports the requirement in §155.330(a) that the Exchange must re-determine eligibility for an enrollee if it receives updated information reported by an enrollee or identifies updated information through regulated data matching. In some cases a change in immigration status may result in an applicant’s eligibility for Medicaid or CHIP rather than the BHP or a QHP in the Exchange.

In the special case of an enrollee who is a lawfully present immigrant who becomes eligible for Medicaid or CHIP as a result of completing the five-year waiting period, HHS must place the burden on the Exchange, not the immigrant enrollee, to re-determine eligibility, notify the enrollee of the change in eligibility, and ensure a seamless transition in coverage. This change in eligibility would not reflect a change in immigration status (which the enrollee would be required to
report to the Exchange under §155.330(b)(1)) but rather the completion of a
waiting period for these particular programs. Due to the complexity of
immigration law and variation of immigrant eligibility rules for Medicaid and
CHIP from state to state, we recommend that the Exchange redetermine the
eligibility for this special population of lawfully present non-citizens during the
annual redetermination process, rather than during a benefit year.

**Recommendation:** Support §§155.330(a) and issue post-regulatory guidance
to states and Exchanges on annual redeterminations of eligibility for Medicaid
and CHIP of enrollees who become eligible due to the completion of the five-year
waiting period or become eligible under other immigrant-related rules.

**§155.335 Annual redetermination process**
NILC supports §155.335 with amendments to add flexibility for enrollees and
primary taxpayers who have no tax return data available electronically to verify
income or compliance with the filing requirement of a primary taxpayer who
received an advance payment. This flexibility is especially critical if Treasury
does not have tax data available through HHS’s federal data service hub, as
described in the preamble at 51208, for a primary taxpayer who files with a
taxpayer identification number other than an SSN or ATIN. For LEP enrollees
and application filers, it is critical that the notices provided in §155.335(c) comply
with the Exchange standards for ensuring that notices are linguistically accessible.
Finally, for child-only applications or when an application filer is not the
applicant/enrollee, it is important for the final rule to distinguish more carefully
between “enrollee” and “application filer.”

**Recommendations:**
- Support §155.335, and amend to clarify that if the Exchange is unable to
  update the data electronically as directed in §155.335(b), it must proceed to
  §155.335(c) and provide notice to the application filer. This notice should
  initiate the “Inconsistencies” process of §155.315(e) that directs the Exchange
to request additional information from the application filer. As in §§155.315
  and 155.320, amend the final rule to require the Exchange to give the
  application filer an opportunity to submit other documentation of income,
  including self-attestation.

- Amend §155.335(c) to add a new subsection (4) requiring Exchanges to
  translate notices for each eligible LEP language group in the service area that
  constitutes 500 individuals or 5 percent, whichever is less, and ensure that
  notices include taglines in at least 15 languages informing individuals how to
  obtain assistance in their language.

- Amend §§155.335(e), (d), (e), (f), and (g) to clarify distinctions between
  enrollees and application filers, as follows:
  - In §(e), change title to “Notice to enrollee or application filer” and
    add “or application filer” after “enrollee” – *(The Exchange must*
provide an enrollee or application filer with an annual redetermination notice... “)

- In §§(d), (e), and (f), add “or application filer(s)” after all instances of “enrollee(s).”
- In §(g)(i), add “or application filer” after the second instance of “enrollee” — (“as supplemented with any information reported by the enrollee or application filer... “) and in §(g)(ii) add “or application filer” after “enrollee” and in §(g)(iii)(2), add “or application filer” after the first instance of “enrollee” — (“if an enrollee or application filer reports a change... “).

ADMINISTRATION OF ADVANCE PAYMENTS OF THE PREMIUM TAX CREDIT AND COST-SHARING REDUCTIONS (45 C.F.R. §155.340)

§155.340(b) Requirement to provide information related to employer responsibility
NILC is concerned about the vagueness in §155.340(b)’s requirement to report SSNs. We recommend amending this provision, because the terminology is inexact and inconsistent with other parts of the rule (e.g. use of the terms "enrollee" and "individual" in the rule, and the term “applicant” in the preamble). We recommend that the final rule clarify that only the SSN of the employee who is an enrollee is required to be reported.

RECOMMENDATION: Amend §155.340(b) to clarify that the reporting requirements pertain to an employee who is an enrollee, and to the reporting of the employee’s SSN, but do not pertain to any covered dependents.

COORDINATION WITH MEDICAID, CHIP, THE BASIC HEALTH PROGRAM, AND THE PRE-EXISTING CONDITION INSURANCE PROGRAM (45 C.F.R. §155.345)

NILC supports the coordination provision in general, including the requirement in §155.345(a) for the Exchange to enter into agreements with Medicaid or CHIP agencies. In particular, we appreciate the helpful clarification in the preamble at 51221 that the agreements should ensure that Exchange determinations are consistent with the approved State Medicaid plan and policies. Because of the complex eligibility rules faced by immigrant families, we support the important provisions in §§155.345(b) and (c) requiring the Exchange to provide applicants the opportunity for a full determination of eligibility for the Exchange and/or Medicaid upon request. Finally, given the heightened confidentiality concerns of immigrant families, we support the codification in §155.345(c) that the Exchange must utilize a secure, electronic interface for the exchange of data for the purposes of determining eligibility.

RECOMMENDATION: Support §155.345 calling for the Exchange to coordinate with Medicaid, CHIP, the BHP, and the PCIP, including the coordination of
eligibility determinations, rights of applicants to a full eligibility determination for Medicaid upon request, and requirements to use a secure electronic interface for exchanging data with the agencies administering Medicaid, CHIP, and the BHP for the purposes of determining eligibility and other functions required.

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

Sincerely,

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