



Via electronic submission at www.regulations.gov

March 18, 2013

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9958-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-9958-P

NPRM: Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions
78 Fed. Reg. 7348 (February 1, 2013)

Dear Madam/Sir:

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, labor unions, 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 submits the following comments in response to the NPRM with the goal of identifying and eliminating potential barriers for immigrant families that could arise if the proposed rule becomes final. We also provide comments where we believe the proposed rule will be particularly helpful in addressing the concerns of immigrant families when enrolling in Medicaid, CHIP or the Exchange.

General Recommendations

Detailed recommendations regarding the NPRM's regulations follow these general recommendations. We provide the following general recommendations in response to request for comments in the Preamble of this NPRM:

- We SUPPORT the proposed rule that application for an exemption for individuals who are not "lawfully present" (as provided by Section 5000A(d)(3) of the Internal Revenue Code (IRC)) should be implemented solely through the tax filing process. However, we RECOMMEND that the final rule require the Exchange to provide clear notice and instructions to individuals who attempt to apply for this exemption from the Exchange and that the Exchange must comply with Section 6103 of the IRC as it relates to information the Exchange may obtain for requests for this exemption. We RECOMMEND that future guidance on this exemption create a contact for consumers within the IRS (via a call center or

ombudsman) who have questions about applying for this exemption during open enrollment as well as beyond the tax filing period. We RECOMMEND future guidance on this exemption ensure that applicants are not required to attest that they are not lawfully present; instead other general questions should be proposed to these applicants that allow them to truthfully answer and qualify for this exemption. We also RECOMMEND that future guidance clarify and create procedures that permit individuals who are eligible for this exemption but choose to apply for a hardship exemption through the Exchange so that such an applicant need not re-apply for an exemption in the tax filing process. We also RECOMMEND that future guidance on this exemption clearly require compliance with Section 6103 of the IRC as well as other confidentiality and information sharing protections.

- We RECOMMEND that future guidance regarding procedures to apply and verify an exemption based on hardship shift the burden of proof to the state/exchange wherever possible and that the procedures adopt best practices for good cause and claiming hardship exemptions that may be available in Medicaid as well as other U.S. Department of Health and Human Services (HHS) programs. We also RECOMMEND that a hardship exemption be granted for a full calendar year because reconciliation can account for changes in the individual's income circumstances during the calendar year. By nature of the term hardship, reducing burdens and requirements on those who meet the hardship exemption should be a requirement.
- We SUPPORT the proposed rule's attempt to address the "family glitch" by providing a hardship exemption that more accurately determines affordability for a family through employer coverage.
- We RECOMMEND that the final rule require navigators or application assistors who are permitted to assist individuals apply for an exemption must be clearly trained and be required to comply with Section 6103 of the IRC and other confidentiality protections as well as Section 1411(g) of the ACA.
- We strongly SUPPORT that application procedures for an exemption must ensure the process and notices are accessible to LEP individuals as well as persons with disabilities.
- We SUPPORT the proposed rule's addition of an exemption for low-income individuals who remain uninsured specifically because a state does not expand Medicaid per the ACA. However, we OPPOSE the proposal that this exemption is limited to those who are ineligible for the advance premium tax credit. Under current immigrant eligibility rules in the ACA, there are lawfully present individuals who are ineligible for Medicaid, with incomes below 138% FPL, but who ARE eligible for the advance premium tax credit under the ACA. However, these individuals should also be able apply and/or qualify for this exemption, if requested by the applicant, if a state does not expand Medicaid because many of these individuals could have been potentially eligible for Medicaid if a state had expanded its Medicaid program.

Detailed Recommendations

Subpart G—Exchange Functions in the Individual Market: Eligibility Determinations for Exemptions

155.600(b) Definitions and General Requirements - Attestation

We SUPPORT permitting the application filer to attest for an applicant for an exemption. This will help streamline application for an exemption in families where not all family members enrolled for coverage through the Exchange.

155.610 Eligibility process for exemptions

We strongly SUPPORT the requirement at §155.610(a) and 155.610(b) requiring the Exchange to collect only information necessary for eligibility determination and granting of an exemption. We also SUPPORT the requirement at §155.610(c) that the Exchange “must not request duplicate information or conduct repeat verifications” and use the information already provided by an applicant for a QHP.

This is consistent with Section 1411(g) of the Affordable Care Act of 2010 (ACA) which permits the Exchange to obtain only information that is “strictly necessary” for eligibility determination should be requested. To ensure consistency with the statutory language at 1411(g) and to streamline the exemption process, we recommend the following additions:

RECOMMENDATION:

Amend 155.610 (a) as follows:

(a) Application. Except as specified in paragraphs (b) and (c) of this section, the Exchange must use an application established by HHS to collect **only the information that is strictly** necessary for determining eligibility for and granting certificates of exemption as described in § 155.605 of this subpart.

Amend 155.610(b) as follows:

(b) Alternative application. If the Exchange seeks to use an alternative application, such application, as approved by HHS, must request **only the minimum information strictly** necessary for the purposes identified in paragraph (a) of this section.

§155.610(e)(2)

We also SUPPORT §155.610(e)(2)’s requirement that the Exchange may not require a “non-applicant” of an exemption from providing his/her Social Security Number except if the non-applicant’s tax information is relevant for the applicant’s exemption request. This is consistent with Section 1411(g) of the ACA, the Tri-Agency Guidance (now codified in regulations), and the Privacy Act.

§155.610(g)

We SUPPORT the requirement that the Exchange must determine eligibility for an exemption “promptly and without undue delay.” Under §155.610(g)(2), the timeliness will be determined from the date of the application to the date of notice of the decision. However, as the exemption application process is brand new, it is unclear how the Exchange will determine the date of

application. Depending on the method used by the applicant to apply or unforeseen delays in accepting applications for exemptions in the Exchange, the date of application may vary and is subject to the discretion of the Exchange.

RECOMMENDATION:

We RECOMMEND that the final rule define the date of application – that is, the standards the Exchange must use to determine the date of application and the procedures that must be created in order to log in or date stamp applications received by the Exchange. Similar to Medicaid, we RECOMMEND that the date of application is the date the applicant submits his/her application to Exchange, regardless of method, rather than the date the application is received by the Exchange.

We also RECOMMEND that the final rule add a requirement that the Exchange must provide applicants notice and appeal rights if the Exchange fails to determine eligibility for an exemption “promptly and without undue delay,” especially if past the timeliness standard.

155.615 Verification process related to eligibility for exemptions

§155.615(g)(2)(ii)

We SUPPORT requiring the Exchange to provide notice to the applicant regarding an inconsistency that could not be resolved through other means at §155.615(g)(2)(i). However, we DISAGREE with the proposed rule at §155.615(g)(ii) that the applicant be provided 30 days to “present satisfactory documentary evidence.” Instead, the final rule should require the Exchange to provide the applicant a “reasonable opportunity period” to resolve an inconsistency rather than a specific number of days. This “reasonable opportunity period” can then be extended further if the Exchange determines that the applicant is making a good faith effort as provided at §155.615(g)(3).

RECOMMENDATION:

Amend §155.615(g)(2)(ii) as follows:

(ii) Provide the applicant with a **reasonable opportunity** period of ~~30 days~~ from the date on which the notice described in paragraph (g)(2)(i) of this section is sent to the applicant to either present satisfactory documentary evidence via the channels available for the submission of an application, as described in 45 CFR 155.610(d) of this subpart, except for by telephone, or otherwise to resolve the inconsistency.

§155.615(g)(5)

We SUPPORT the requirement of notice to the applicant if the Exchange cannot verify the attestation to resolve the inconsistency. We RECOMMEND that the final rule require both notice and right to appeal for the applicant at this stage of the application process rather than having to wait for a denial notice from the Exchange.

§155.615(i)

We SUPPORT the requirement the Exchange must comply with all existing confidentiality protections, including Section 6103 of the Internal Revenue Code (IRC), if the Exchange intends to modify existing application and verification procedures for eligibility for exemptions. This is critical to ensure the confidentiality of information provided by immigrant families, in particular

mixed-status household, where confidentiality concerns often prevent eligible individuals in immigrant families from applying for the appropriate programs.

§155.615(j)

We SUPPORT requiring the Exchange to collect only information necessary for eligibility determination and granting of an exemption, but recommend an amendment to this section to ensure the provision is consistent with Section 1411(g) of the Affordable Care Act of 2010 (ACA) which permits the Exchange to obtain only information that is “strictly necessary” for eligibility determination should be requested.

RECOMMENDATION:

Amend 155.615(j) as follows:

(j) Applicant information. The Exchange must not require an applicant to provide information beyond **what is strictly the minimum** necessary to support the eligibility process for exemptions as described in this subpart.

155.620 Eligibility redeterminations for exemptions during a calendar year

The NPRM requests comments regarding notification of redeterminations at §155.620(c)(3). We recommend the following:

- 1) That the Exchange must provide electronic notifications regarding reporting changes to consumers only as needed rather than periodically. There is no need to arbitrarily set a regular time to notify individuals of their obligation to report changes; this is likely to result in unnecessary administrative burdens and costs for the Exchange. Furthermore, randomly periodic notices will lead consumers to either ignore the notice or be confused. ***We recommend that the final rule require the Exchange to provide notices similar to change reporting requirements in Medicaid or based on specific circumstances.***
- 2) Furthermore, the final rule should require the Exchange to send electronic notifications only to those who have consented to receiving such notices. This is different from the proposed rule which requires notice be sent to every individual unless he or she affirmatively opts out of receiving notification. This violates consumers’ privacy and also adds unnecessary administrative costs and burdens. Unlike other enrollment choices where it’s in the best interest of the consumer to be automatically “opted-in” and must affirmatively opt out, there is no significant benefit of receiving periodic electronic notifications reminding the consumer of his/her existing obligation. ***We recommend the final rule change this provision so that the Exchange can only send notices, as needed, to consumers who choose to receive the notices.***

155.625 Options for conducting eligibility determinations for exemptions

§155.625(c)(2)

We SUPPORT the requirement the Exchange must comply with all existing confidentiality protections, including Section 6103 of the Internal Revenue Code (IRC), if the Exchange

conducts its eligibility determination of exemptions through another agency or the U.S. Department of Health and Human Services (HHS). This is critical to ensure the confidentiality of information provided by immigrant families, in particular mixed-status household, where confidentiality concerns often prevent eligible individuals in immigrant families from applying for the appropriate programs.

155.630 Reporting

The proposed rule requires the Exchange to transmit relevant tax information to the IRS for an individual for whom the Exchange grants an exemption. Specifically, the Exchange must provide the IRS the individual's name, Social Security number, and exemption certificate per §155.630(a) and any other information required by the IRS per §155.630(b).

We agree and SUPPORT that the Exchange may not require an application filer to provide his/her Social Security Number unless relevant to determine the applicant's exemption per 45 CFR § 155.610(e)(2). However, if the application filer provides his/her SSN to the Exchange, the Exchange should also be required to submit that information to the IRS under §155.630. This will help ensure that the relevant tax information is shared with the IRS so that the applicant's exemption is properly recorded by the IRS, for both the applicant and the application filer, who is subject to the minimum essential coverage tax penalty.

In addition, we recommend that the final rule require the Exchange to obtain and provide the applicant's and/or application filer's (if relevant) Tax Identification Numbers (TIN), rather than limiting the tax information transmitted to the IRS to only an SSN. Application filers whose dependent or member of household is applying for an exemption from the Exchange may provide an Individual Tax Identification Number (ITIN) in order to allow the Exchange to obtain the relevant income tax data for an applicant's exemption request. Individuals with ITINs are subject to the IRS's tax liability but may not be eligible for a work SSN and instead use an ITIN to file taxes. If the application filer provides the Exchange with his/her ITIN in place of an SSN, solely for purposes of determining eligibility for an exemption, the Exchange should be required to provide that information to the IRS. This would prevent the application filer from being asked to re-submit that information to the IRS if needed.

RECOMMENDATION:

Amend 155.630(a) as follows:

(a) The individual's name, ~~Social Security~~ **Tax Identification** number (TIN), and exemption certificate number;

We also recommend that the final rule at §155.630 explicitly require the Exchange to comply with existing confidentiality protections of individual tax information under the ACA and Section 6103 of the IRS Code.

Add subparagraph (c) at 155.630 as follows:

(c) Any transmission of data for these purposes must comply with applicable requirements under 45 CFR 155.260, 155.270, and 155.315(i) of this part, and section 6103 of the Code with respect to the confidentiality, disclosure, maintenance or use of information.

155.602 Other coverage that qualifies as minimum essential coverage

We express concern regarding the proposed rule at §155.602(b) which allows “foreign health coverage,” provided by a home country to be considered minimum essential coverage. Although the preamble references HHS’ familiarity with foreign health coverage, the proposed rule does not provide sufficient explanation of why such coverage would automatically meet the minimum essential coverage requirements. Such coverage may require covered individuals to obtain any care needed in the foreign country rather than the U.S. If so, this would be a barrier to care for many foreign-born individuals living in the U.S., especially low-income individuals who do not have the disposable income to make regular trips home or may be unable to leave the United States due to their immigration status.

We recommend that HHS review on a case-by-case basis whether foreign health coverage should be considered minimum essential coverage rather than providing a blanket designation. This will help ensure lawfully present individuals are easily able to enroll in a QHP and premium tax credits if they have foreign health coverage that does not provide them with minimum essential coverage. To do otherwise may create a policy that inadvertently discriminates based on national origin in violation of Section 1557 of the ACA and Title VI. More importantly, such a designation by HHS may directly cause individuals to remain uninsured when they would have preferred to be able to buy affordable health coverage through the Exchange.

Thank you for the opportunity to provide these comments. If you have any questions, you may contact Sonal Ambegaokar at ambegaokar@nilc.org or at (213) 639-3900 ext. 114.

Sincerely,



Ms. Sonal Ambegaokar
Health Policy Attorney
National Immigration Law Center