



NATIONAL  
IMMIGRATION  
LAW CENTER  
www.nilc.org

**BOARD OF DIRECTORS**

Muzaffar Chishti  
*Chair*  
Migration Policy Institute  
at New York University  
School of Law

Emma Leheny  
*Vice Chair*  
California Teachers  
Association

Lilia Garcia-Brower  
*Secretary*  
Maintenance  
Cooperation Trust Fund

Allen Erenbaum  
*Treasurer*  
Erenbaum Legal  
Strategies, Inc.

Della Barnett  
Bahan & Associates

Richard Boswell  
University of California  
Hastings College  
of the Law

Charles Claver  
Union Bank

Iris Gomez  
Massachusetts  
Law Reform Institute

Inez González  
National Hispanic  
Media Coalition

Sara Gould  
Atlantic Philanthropies

Lucas Guttentag  
Yale Law School

Cynthia Lange  
Fragomen, Del Rey,  
Bersen, & Loewy, LLP

Hiroshi Motomura  
University of California  
Los Angeles School of Law

*Organizations listed  
for identification  
purposes only*

**EXECUTIVE DIRECTOR**

Marielena Hincapié

**LOS ANGELES  
HEADQUARTERS**

3435 Wilshire Boulevard  
Suite 2850  
Los Angeles, CA 90010  
213 639-3900  
fax 213 639-3911

**WASHINGTON, DC**

1444 Eye Street, NW  
Suite 1110  
Washington, DC 20005  
202 216-0261  
fax 202 216-0266

VIA ELECTRONIC SUBMISSION AT REGULATIONS.GOV

September 4, 2012

U.S. Department of Health and Human Services  
Centers for Medicare and Medicaid Services  
Office of Strategic Operations and Regulatory Affairs  
Division of Regulations Development  
Attn: CMS-10438, CMS-10439 and CMS-10440  
Room C4-20-05  
75 Security Boulevard  
Baltimore, MD 21244-1850

**Re: CMS-10440 – Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Affordable Insurance Exchanges, Medicaid and Children’s Health Insurance Program Agencies**

**CMS-10438 – Data Collection to Support Eligibility Determinations and Enrollment for Employees in the Small Business Health Options Program**

**CMS-10439 – Data Collection to Support Eligibility Determinations and Enrollment for Small Businesses in the Small Business Health Options Program**

**77 Federal Register 40061 (July 6, 2012)**

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. To ensure the full and successful implementation of The Affordable Care Act (ACA), it is critical that the single, streamlined application for the Affordable Insurance Exchanges (Exchanges) and the employer and employee applications for the Small Business Health Options Program (SHOP) are accessible and simple for eligible individuals and small businesses to complete, particularly for low-income and working immigrant families and small business owners.

Thank you for the opportunity to comment on the proposed data elements for the single, streamlined application and the employer and employee SHOP applications released on July 6, 2012.

**GENERAL PRINCIPLES.** In order to meet the goal of a single, streamlined application and ensure access for eligible immigrants, there are a number of general principles that should be incorporated as it is developed. The following general principles should also apply to the SHOP employer and employee applications as well as any state application certified by HHS.

The application, whether online, paper, or by telephone, should be consumer centric, simple, welcoming and accessible. It should:

- Provide welcoming and reassuring messages that address immigrants’ unique concerns to encourage eligible individuals to apply;
- Be offered in multiple languages, meeting the meaningful access standards for persons with limited English proficiency;
- Provide reassuring language around privacy and security of information;
- Provide information about civil rights and non-discrimination protections and conform to rules ensuring equal access to all persons regardless of race, color, national origin (including language spoken and limited English proficiency), sex, age or disability;
- Proactively address immigrants’ concerns about “public charge” – whether applying for health insurance or help paying for health insurance will affect an individual’s ability to become a permanent resident (get a “green card”) or U.S. citizen;
- Notify how to obtain and help connect individuals to assistance with the application, including in her/his preferred language;
- Collect only information necessary to determine an applicant’s eligibility and enroll her/him in health insurance and clearly distinguish data that is optional or not required;
- Be able to be submitted when a core set of information is completed, but not necessarily the entire application;
- Be consumer-tested for readability and comprehension with groups from hard-to-reach communities, including diverse groups of immigrants and limited-English proficient (LEP) persons (including non-Spanish speakers).

**Welcoming and Reassuring Messages.** Information accompanying the application should provide consumers with information about who may qualify for coverage and the value of the coverage. It should use reassuring language to encourage individuals who may have fears or concerns to apply and should overcome barriers such as limited-English proficiency and distrust of government. For example, in order to connect immigrants and their family members to coverage and care, the Exchanges must overcome immigrants’ concerns about the privacy of personal information and the heightened complexity of eligibility rules pertaining to immigrant and mixed-status families. Online and paper forms should encourage the applications of eligible family members, even if doing so requires a somewhat longer and more complicated application.

Applications should also help ensure that each member of a low-income family can connect to affordable health care, even if only through the health care safety net. Non-applicants who apply for coverage on behalf of eligible family members, as well as individuals who are determined to be ineligible for health insurance, should be informed of options for accessing affordable health care, including referrals to free or low-cost health care at local hospitals, clinics, community health centers, and public health departments; information about free public health services, such as immunizations and substance abuse treatment; and information about other health programs that may be applicable, such as medical assistance for the treatment of an emergency medical condition and other state or local health programs.

**RECOMMENDATION:** Include the following reassuring statements on all modalities of applications and test them in focus groups of diverse immigrant and LEP consumers for literacy and culturally and linguistically appropriateness:

**IMPORTANT:** *You can get an interpreter at no cost to talk to you about getting health insurance. To get an interpreter or to ask about written information in [your language], call 1-XXX-XXX-XXXX. Someone who speaks [your language] can help you. If you need more help, call the State Ombudsman Office at XXX-XXX-XXXX.*

(This tagline should be translated into the most prevalent languages of the Exchange area.)

*Families that include immigrants are welcome to apply for help with the cost of health insurance.*

*You may file applications for families that include some members applying for health coverage and others who are not. You do not have to provide a Social Security number (SSN) or citizenship or immigration status for individuals who are not seeking coverage for themselves. We will not delay or deny health coverage because there are family members who are not seeking coverage. For those who do not apply, we can give you information about other ways to get health care.*

**Meaningful Access to Limited-English Proficient Individuals.** Language barriers remain among the most prevalent barriers to health insurance for LEP individuals. Nearly one in ten people (9% of the U.S. population) is LEP and speaks English less than very well.<sup>1</sup> Although Spanish speakers are the majority of LEP persons at 66% of the LEP population,<sup>2</sup> HHS and state Exchanges must provide oral interpretation services in-person and by phone to *all* LEP individuals, include translated taglines on all modalities of the application, and translate vital documents, including online and paper applications, into the most common languages spoken by the residents in the Exchange's service area. The application should also be written in plain language at an appropriate reading level to accommodate people with low literacy and facilitate translation into languages other than English.

Taking the steps above will assist applicants, applicant assisters, navigators, and others who will provide consumer assistance to limited-English proficient (LEP) individuals. Since HHS's single, streamlined application should be used as a template for applications in state Exchanges, translating the paper and online application into multiple languages will also facilitate states' compliance with their obligations to provide culturally and linguistically appropriate services under the ACA and to provide meaningful access regardless of national origin under Title VI of the Civil Rights Act and ACA § 1557.

The on-line application homepage or landing page must have translated taglines that inform LEP individuals how to obtain assistance via phone, email, in-person and online. The taglines should explain to LEP individuals how to access information that is not

---

<sup>1</sup> Pandya, Chhandasi, Jeanne Batalova, and Margie McHugh. 2011. "Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity." Washington, DC: Migration Policy Institute. Available at

<http://www.migrationinformation.org/integration/LEPdatabrief.pdf>.

<sup>2</sup> *Id.*

translated and direct consumers to call the Exchange to access oral interpretation of the application content and assistance with submitting an application.

RECOMMENDATION: HHS should translate the tagline below and require state Exchanges to translate the tagline into at least the top 15 language groups likely to use the application, using state Census data or other relevant data.

***IMPORTANT:*** *You can get an interpreter at no cost to talk to you about getting health insurance. To get an interpreter or to ask about written information in [your language], call 1-XXX-XXX-XXXX. Someone who speaks [your language] can help you. If you need more help, call the State Ombudsman Office at XXX-XXX-XXXX.*

Ideally the entire tagline should be on the opening webpage of the application. But if it is not, then the homepage should include a direct link to the taglines and could use the name of the language as the link. For example, SSA’s “Multilingual Gateway” (<http://ssa.gov/multilanguage/>) includes the names of 15 languages in English and the non-English language, and when a consumer clicks on the language, the consumer is taken to a webpage with information in that language. For the paper application, HHS should ensure the taglines are clearly visible in a prominent location so applicants and potential applicants understand how to seek assistance.

In addition to ensuring HHS’ compliance with civil rights laws and the ACA, the investment to provide language assistance services reaps another important reward – eligible LEP families and individuals will gain access to affordable health insurance and health care, overcoming what is arguably the most persistent barrier for immigrant and LEP individuals.

**Reassuring Language Regarding Privacy and Security of Information.** There is a great deal of personal information that will be gathered on the application. It will be important that consumers are confident that their personal data is secure and will be kept confidential. Privacy concerns are paramount especially for immigrant and mixed-status families. Unless immigrant and mixed-status families understand and trust that the information they provide will be used only for eligibility and enrollment purposes and will not be shared with law enforcement or immigration officials for immigration enforcement purposes, it is unlikely eligible immigrants will complete the application process.

Furthermore, federal rulemaking requires adherence to robust privacy and security standards, including the collection, use and disclosure of information only for the purpose of determining eligibility for and enrolling in health insurance. 45 CFR §§ 155.260, 155.210(c)(1)(v), 155.220(d), 155.305(f)(6), 155.310(a), 155.705(a), 155.730(g). Final Medicaid rules also extend confidentiality protections to non-applicant information and to the use of an SSN, applying privacy restrictions broadly to the renewal and verification processes. 42 CFR §§ 431.10, 431.300, 431.305, 435.916, 435.945, 435.907, 435.908.

RECOMMENDATION: Include this or a similar statement at the outset of the application process:

*We will keep all the information you provide private and secure as required by law. We will use it only to check if you are eligible for health insurance.*

*You may file applications for families that include some members applying for health coverage and others who are not. You do not have to provide a Social Security number (SSN) or citizenship or immigration status for individuals who are not seeking coverage for themselves. We will not delay or deny health coverage because there are family members who are not seeking coverage. For those who do not apply, we can give you information about other ways to get health care.*

**Civil Rights and Non-discrimination Protections.** As entities established under Title I of the ACA, the Exchanges must comply with the non-discrimination provisions of § 1557 of the ACA, including the application process. Section 1557 of the ACA forbids discrimination on the grounds of race, color, national origin, sex, age or disability in health programs or activities that are receiving federal financial assistance or by programs administered by an Executive Agency or any entity established under Title I of the ACA. Because Title I of the ACA requires the establishment of the Exchanges, all Exchange activities, whether administered by the federal government or by the states, must comply with § 1557. In addition most, if not all, plans offered through the Exchanges, will be subject to § 1557, by virtue of receiving federal financial assistance, including credits, subsidies, or contracts of insurance.

Since 49 states and the District of Columbia received federal funds to plan and implement their Exchanges, Title VI of the Civil Rights Act of 1964 and § 504 of the Rehabilitation Act should also apply (and § 508 of the Rehabilitation Act with regard to accessible websites). These should apply regardless of the type of Exchange.

Under Title VI of the Civil Rights Act of 1964,<sup>3</sup> no federal funds can be used in a discriminatory manner, whether intentionally, or, pursuant to federal regulations, through disparate impact. Title VI applies to all programs receiving federal financial assistance, including private entities. Discrimination under Title VI has been determined to include preventing meaningful access to federally funded services for “national origin minorities” with limited English proficiency. Further, under Executive Order 13166, HHS should require that Exchanges comply with HHS’ “LEP Guidance” issued by OCR and work with OCR to determine the most effective ways to assist Exchanges in complying with these laws.<sup>4</sup>

Similarly, § 504 of the Rehabilitation Act prevents discrimination against otherwise qualified people with disabilities under any program or activity that receives federal funds. For example, Exchanges should provide sign language interpreters or other augmentative or auxiliary assistance to applicants or enrollees who are Deaf or hard of hearing or have other hearing impairments to comply with § 504.

Finally, HHS must comply with guidance issued jointly with the US Department of Justice, Office of Civil Rights and the US Department of Agriculture regarding “Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance

---

<sup>3</sup> See 42 U.S.C. § 2000d (2006).

<sup>4</sup> See *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons (HHS LEP Guidance)*, available at <http://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20179.pdf>.

for Needy Families (TANF), and Food Stamp Benefits.<sup>5</sup> The “Tri-Agency Guidance” notes that “to the extent that states’ application requirements and processes have the effect of deterring eligible applicants and recipients who live in immigrant families from enjoying equal participation in and access to these benefit programs based on their national origin, states inadvertently may be violating Title VI.”

Therefore, HHS should consider the nondiscrimination requirements of § 1557, Title VI (including the Tri-Agency Guidance) and § 504 as it develops the application (and approves any state-developed alternatives). Specifically, HHS should work to ensure that the application and application process do not discriminate and provide equitable access to all groups, including mixed-status families, individuals with limited English proficiency and individuals with disabilities.

Finally, the application should also provide information on civil rights protections, including how to file complaints both generally and regarding discrimination. State agencies and their contractors, including navigators and brokers, also are required to comply with non-discrimination laws in all activities, including marketing, outreach, and enrollment. 45 CFR §§ 155.120(c), 155.205, 155.210, 155.220, 155.1055(b), 156.200(e), 156.220. Informing consumers at the outset of their civil rights protections will encourage individuals to apply who would otherwise be reluctant, such as immigrant, mixed-status and/or LEP families and individuals.

**RECOMMENDATION:**

Include the following or similar reassuring statement on all modalities of the application:

*Under federal law, discrimination is not permitted on the basis of race, color, national origin (including language spoken or limited English proficiency), sex, or disability. To file a complaint of discrimination, go to [www.hhs.gov/ocr/office/file](http://www.hhs.gov/ocr/office/file).*

***Proactively Addressing Immigrants’ Concerns about Public Charge.*** The application should also reassure immigrant families that applying for health insurance and applying for help paying for health insurance will not affect an individual’s immigration status, her/his ability to apply for permanent residency (a green card) or her/his ability to naturalize and become a U.S. citizen. Despite longstanding guidance from the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), stating that Medicaid, CHIP and other health insurance and health care services, except for Medicaid for long-term care such as in an institutional setting, are not subject to the public charge determination,<sup>6</sup> public charge concerns remain one of the most persistent reasons eligible immigrant families do not apply for health insurance programs.

---

<sup>5</sup> Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits available at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html>.

<sup>6</sup> See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds [64 FR 28689] [FR 27-99] available at <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html>. USCIS fact sheet on public charge available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=775d23cbea6bf210VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD>.

**RECOMMENDATION:** Individuals filling out the application should be notified how to access the USCIS guidance and fact sheet on public charge. Application assisters, consumer assistance programs, navigators, brokers and agents should be trained on the USCIS guidance and know how to access the guidance and USCIS fact sheet both for their own information and to share with immigrant families. We also recommend HHS include the following reassuring statements in each modality of its application:

*Applying for health insurance or getting help with health insurance costs will not make you a “public charge”\* and won’t affect your immigration status or chances of becoming a permanent resident (getting a “green card”). Applying for health benefits also won’t prevent you from becoming a citizen, as long as you tell the truth on the application.*

*\* People receiving long-term care in an institution at the government’s expense may face barriers getting a green card. If you have concerns or questions about this, you should talk to an agency that helps immigrants with legal questions.*

**Connecting Applicants with Available Assistance.** The new coverage world of the Affordable Care Act (ACA) is complicated and will likely draw many to apply who are unfamiliar with health insurance, both public and private. The health care and coverage system is and will be particularly confusing for immigrants, especially mixed-status families. To begin with, immigrants, even those who are lawful permanent residents (green card holders), generally assume they are not eligible for any kind of assistance, including help paying for health insurance. Furthermore, the eligibility rules for immigrants are extremely complicated, with rules varying from one affordability program to another and from state to state. For instance, many permanent residents are ineligible, and will remain ineligible after 2014, for federal Medicaid or CHIP because of federal eligibility rules requiring them to wait five years. However, in many states, their permanent resident children may be eligible for federal Medicaid or CHIP through the CHIPRA option to provide federal Medicaid or CHIP coverage to lawfully residing children. On the other hand, if not eligible for Medicaid or CHIP, they and other “lawfully present” immigrants are eligible for the advance premium tax credits (APTC), cost-sharing reductions (CSR), and Basic Health Plan established by the ACA.

Inevitably, this complexity will lead to complex coverage situations in a single immigrant family, including in the millions of mixed-status families in the U.S., as well as in families in which all members have the same immigration status, as in the example above. In another example, one parent may be ineligible for any coverage, or may be applying on behalf of eligible family members, while her spouse may be eligible for the APTC and their children for Medicaid or CHIP. The successful enrollment of these families will depend on consumer assistance from individuals who are trained in, sensitive to and conscientious of immigrants’ concerns and eligibility.

Information accompanying the application must let families know how they can get personalized assistance, including the availability of free language services. Additionally, HHS should require states to comply with requirements to provide application assistance in a culturally competent manner to communicate effectively with immigrant families.

The application should inform the household contact at the beginning of the application that assistance is available, in her/his preferred language. Particularly in an online setting, the application should also remind the household contact that assistance is

available at other key sections of the application, such as at the questions regarding help paying for health insurance, household composition, eligible immigration status, and income.

**Distinguishing Non-Essential Data and Collecting Only Necessary Information.**

Certain questions may be important to ask, such as race, sexual orientation and gender identity, but have no bearing on the eligibility determination. Other unnecessary questions, such as asking non-applicants for their SSN or citizenship or immigration status, may actually deter mixed-status families from applying on behalf of eligible family members and be in violation of the Tri-Agency Guidance, Title VI of the Civil Rights Act and the ACA.

Therefore, the application should clearly inform consumers when questions are optional, for example by including “optional” or “not required” next to the question, or by color-coding or putting an asterisk with a drop-down explanation next to the question in an online application, otherwise consumers may believe erroneously that they must provide the information as a condition of eligibility. As these questions have no bearing on eligibility, applicants should be allowed to proceed and submit an application without providing answers, either electronically or otherwise. In an online environment, the business rules governing the online application must be written accordingly. Specific recommendations are provided in the following section on specific data elements.

**Allowing Submission of a Partially Completed Application.** Allowing consumers to complete an application to the best of his/her ability and to sign and submit the application with missing information is an important consumer protection. It will also likely lead to fewer errors, as applicants will not feel they must provide guesses even when the data points are unknown. HHS should establish a minimum level of information or core data elements that are required to constitute a “valid” application, which could potentially include only minimal information about the applicants and signature. If these elements are completed, a consumer can sign and submit the application in order to preserve their date of application while they continue to gather additional information. If a limited set of core elements is not established, having a check box for applicants to say “I don’t know” to questions that are not required could be helpful.

The submission of a partially completed application (regardless of whether all data needed to establish an official application date is provided) should trigger follow-up procedures to assist the applicant in gathering missing information and provide a set timeframe for providing such information. Consumers should be informed that delays in completing and submitting the application may have an effect on the start time of their benefit and that they may complete the application to the best of their ability and submit it while gathering additional information or seeking help in understanding questions. If an eligibility determination can be made without the missing data, or while verification is pending when allowed by law (e.g., citizenship and immigration status), it should proceed and coverage should begin during this period.

In addition, applicants should have the ability to start, stop, and return to an application, both when applying online, over the telephone or in person. The amount of information needed to complete an application is substantial, complicated, and in some cases will require consumers to track down documents and other information not readily available



to them. Regardless of the manner of application, consumers should be able to submit partially completed applications so that they can get the appropriate level of assistance and gather any relevant information. Consumers, should not, however, be forced to risk their date of eligibility in order to do so.

**Consumer Testing with Diverse Immigrant and LEP Consumers .** We appreciate that HHS has sought stakeholder input in the development of the application, including through ongoing consumer testing. Such efforts should continue and be structured to include families at all income levels, as well as those living in more complex coverage situations. For example, it will be very important to test the application on families in situations where the parents are covered in the exchange and the children are covered under Medicaid or CHIP, to ensure that families can provide the information necessary to be enrolled in the appropriate source of coverage. Additionally, any language that is developed for the instructions, welcome messages, etc., should be field tested to be sure that applicants understand what HHS is attempting to convey. Also, HHS should test how consumers react to the use of pre-populated applications or “helpful hints” to determine the best way to present readily available data to applicants.

As discussed above, immigrant and LEP communities face unique barriers to navigating the health insurance system and applying for coverage. Non-citizens are disproportionately uninsured, as are citizen children living with at least one immigrant parent. Immigrant and mixed-status families have unique concerns about the privacy and security of the information on their application and whether applying for health insurance may affect their ability to become a permanent resident or naturalize, and are less informed about the health insurance and health care options that are available to them. To be successful, the application, as well as the assistors, consumer assistance programs, navigators, brokers, agents and other individuals who help immigrant families fill out the application and enroll, must be sensitive to and proactively allay these concerns.

In addition to recommending language to be included on any application to reassure immigrant families and put them at ease, we also strongly recommend that HHS test such language and the whole application with diverse immigrant and LEP communities to further inform and tweak the messages and ensure they achieve the desired goals.

Additionally, like outreach and education efforts targeted at immigrant communities, such consumer testing is done best in close collaboration with immigrant-serving organizations. Consumer testing should be conducted in multiple languages by individuals at organizations that are embedded in and/or trusted by immigrant communities. NILC has robust relationships with immigrant-serving organizations across the country and would be happy to connect HHS with appropriate organizations to test the application with diverse immigrant communities.

**Certifying Alternative Applications.** States are allowed to develop their own applications, with Secretary approval, as long as they are not more cumbersome than the model application developed by HHS. In reviewing these applications, the Secretary should ensure that this standard applies to all features of the application, including the use of plain language and reassuring statements. HHS should also certify that the application is accessible for immigrant and LEP individuals and avoids asking unnecessary questions, such as SSN and citizenship or immigration status, from non-applicants.

This is a critical step, as we know that states have a persistently poor record of compliance with similar, existing guidance regarding Medicaid applications. Despite issuing the Tri-Agency Guidance in 2000 directing state agencies to refrain from asking non-applicants unnecessary information regarding their SSN, citizenship and immigration status, many states' applications still do not comply with this guidance. Helpfully, the ACA codifies this guidance at 42 CFR § 435.907 and 45 CFR §§ 155.260, 155.305(f)(6), 155.310(a), and 155.315(i), providing a critical consumer and civil rights protection for immigrant and mixed-status families.

HHS should fulfill its oversight and enforcement responsibilities by certifying a state's alternative application only if it comports with the standards expressed above in General Principles.

These standards should also apply to multi-benefit applications and eligibility and renewal notices. States should also be required to perform consumer testing, including with immigrant and LEP communities, and undergo a public process to ensure that the application is an appropriate substitute for the model version.

HHS should also require states to collect the same demographic data, such as sex and race, using the same fields and standards, in order to protect consumers, promote standardized data collection, and ensure consistency and comparability in future analysis.

Finally, we urge HHS to finalize the notices that Exchanges will use to notify applicants of eligibility and submit these to formal notice and comment rulemaking. If a state seeks to use alternates, we recommend that the Secretary also approve the notices using the same transparency requirements as for § 1115 waivers.

**DATA ELEMENTS.** In the sections below, we offer comments on the specific data elements outlined by HHS.

### **Baseline Applicant Information**

1. ***Household contact information.*** The application must provide an explanation about who should be listed in this section, and the difference between the household contact and an authorized representative. This is particularly important for immigrant and mixed-status families in which the household contact may be applying on behalf of eligible family members and not for health insurance for her/himself. Also many immigrant and LEP families will seek assistance with the application, either through the various application assistors contracted with the Exchange or through friends or relatives not part of the household, both to make sure they understand and complete correctly the application and also to avoid language barriers. Thus it should be clear both to the consumer and the assistor who to identify as the household contact and authorized representative.

The application should specify the roles and responsibilities of the household contact and authorized representative and answer such questions as whether the household contact must be an actual member of the applicant's household or whether it can be a person outside of the applicant's household, such as a relative who has been designated as the main contact for the application. The explanation should also describe why the contact information is needed – will the household contact receive

notice with regard to questions about or inconsistencies with the application, will the person receive eligibility notices or communications from the health plan itself?

- a. Name: The name fields on the online and paper applications should allow for long names with many characters, including multiple and hyphenated first and last names that may be more common in immigrant communities (e.g. Balasubramaniam, Juan Carlos, Mary Catherine, Shiu-Ming, Escobar García, Stuart-Robertson). The field should also allow for last names that start with a lower case letter and contain spaces or punctuation (e.g., de la Torre, deJung, von Persie, D'Souza).
- b. Address: Consumers should have the option to indicate they are homeless or otherwise do not have a stable address so that special considerations can be made in the event that the address provided is not a traditional residential one. It should be clear whether the address requested is a physical or mailing address, particularly if the household contact may reside outside of the applicant's household.
- c. Phone numbers: Similar to address, having a phone number is not an eligibility requirement and thus the household contact should be made aware that providing one is optional. If one is not provided, processing of the application should proceed.
- d. Preferred language(s): We strongly support asking the household contact for their preferred language; however, the question should be expanded to get both the language(s) he prefers to speak and to read. Assuming the household contact is the individual with whom the Exchange will communicate about the application unless an authorized representative is identified, accurate language data will provide the Exchange with the information it needs to communicate effectively about the application, and fulfill its obligations under Title VI and the ACA. For instance, if the household contact indicates she prefers Spanish, translated written notices and materials should be provided to her in Spanish and Spanish-speaking personnel or oral interpretation services in Spanish should be utilized for oral communication.
- e. Race and ethnicity: Along with preferred language, we recommend adding an optional request for race and ethnicity data from the household contact, using the standards put forth by the Institute of Medicine (IOM) in its 2009 report, *Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement*.<sup>7</sup> Having this data is critical so the exchange can ensure its compliance with the ACA and the Civil Rights Act of 1964, as well as transmit this information to qualified health plans (QHPs) for their compliance. Comprehensive collection of race and ethnicity data is needed to address health care disparities by improving access and accountability and reducing discrimination across all sectors of the healthcare arena. All individuals on the

---

<sup>7</sup> Institute of Medicine. August 2009. "Report Brief: Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement." Available at <http://www.iom.edu/~media/Files/Report%20Files/2009/RaceEthnicityData/Race%20Ethnicity%20report%20brief%20FINAL%20for%20web.pdf>.

application, whether they are the household contact, a non-applicant or applicant, should be informed that race and ethnicity information is not required and how such information will be used.

**RECOMMENDATION:** To encourage individuals to provide this data, we believe HHS should include a statement on the application explaining the need for this data. We suggest the following:

*We ask for your race and ethnicity so that we can review application information to make sure that everyone gets the same access to health care. This information is confidential and it will not be used to decide what health program you or an applicant are eligible for. You do not have to provide your race and ethnicity to complete the application.*

- f. Applying for coverage for self. We support asking the household contact whether she is applying for coverage for herself. If a household contact is not an applicant, then the application must not ask for their citizenship or immigration status, or other information not necessary to determining the eligibility of an applicant, and may ask the contact's SSN only as a request/option, not a requirement if the applicants are not eligible for the APTC.
2. **Authorized Representative.** We urge HHS to clarify the role of an authorized representative. It is vitally important that applicants and assistors understand the differences between being an applicant, an application filer, household contact, "person acting responsibly," and authorized representative. One individual may serve in one, two or three of those roles. It will also be important in this section to highlight the difference between an authorized representative and a navigator or other application assister, who may help the family apply for and renew coverage, but who does not have the authority to act on their behalf.

The scope and duration of representation should be made clear to the applicant, as well as the ability to change or revoke authorization at any time. Willful, informed consent should be documented at the signature page of the application. Exchanges must also ensure this information is accurately and effectively communicated to low-literacy individuals who may not understand the terminology and in a culturally and linguistically appropriate manner for individuals who are limited English proficient or the designation may not be informed and legal.

3. **Seeking help paying for health insurance and Privacy Statement.**

- a. Seeking help paying for health insurance: Asking if an individual is seeking help in paying for the cost of coverage should be paired with the questions that ask whether an individual is applying for coverage. As an individual could apply for coverage in the Exchange without applying for an APTC and would still need to provide answers to a number of questions (as laid out in Appendix B), the coupling of these questions would help prevent an applicant who is not seeking financial assistance from inadvertently skipping important data points. Additionally, grouping together "applying for coverage" and "seeking help paying for coverage" by applicant allows families to apply for coverage on one

form, even if some may not be seeking financial assistance while others are. It also seems to flow more logically by having them appear side-by-side.

- b. Privacy Statement: We support the inclusion of a privacy statement, however it should come at the very beginning of the application before the consumer begins entering any personal information. Privacy is a distinct issue and applies regardless of whether the applicant is seeking financial assistance, thus it should be kept separate from this question. The privacy statement should make it clear what information will be collected, how it will be used, who it will be shared with, how it will be stored and for how long. This information should be written in plain English.

The Privacy Statement should be paired with information on civil rights and non-discrimination protections. Please see our recommendations in the previous General Principles section on *Reassuring Language Regarding Privacy and Security of Information* and *Civil Rights and Non-discrimination Protections* on pages 4-6.

4. ***Build your household***. This section is likely to be one of most difficult for applicants, as it will require that they provide information on their tax-filing unit, as anticipated for the following year. Who files taxes together is pursuant to IRS rules and can include unrelated people or relatives (such as an aunt who lives with family). These households differ from current Medicaid household and will likely cause confusion for those who are familiar with the Medicaid rules, but are less knowledgeable about tax-filing units. In addition, there are other features of the new MAGI approach, such as children being considered in the household of whoever claims them, regardless of where they reside, as well as differences between Medicaid and the APTC determinations, which increase the difficulty and the importance of accurately eliciting information from applicants.

Because of these complexities, it will be important to provide clear instructions, definitions, and an easy-to-understand explanation of who should be included and why. For example, definitions of “primary tax payer,” “dependent,” and “household” are a must. **It should also be emphasized that individuals can still apply and may be eligible for coverage even if they did not file taxes the last year. Additionally, an individual may have filed taxes in the last year, but may not attest to having an SSN.**

For those who did file, it will also be helpful to encourage them to gather last year’s tax return ahead of time, to help guide them through the process. While their family structure may be different in the year to come, this will at minimum provide them a starting point. Questions should also be included to determine whether they anticipate any changes (e.g., Do you plan on getting married in the upcoming year?).

Finally, an explanation of family relationship will also be necessary – is the application asking for the individual’s relationship vis-à-vis an applicant, the household contact (if that person is a member of the family), or the primary tax filer? In a mixed-immigration status family, the person filling out the application may be a non-applicant, who may be distinct from the primary tax filer who may also be a non-applicant, while the sole applicant may be a dependent child. HHS should consider

the use of check boxes to indicate the individual's relationship in the tax household in addition to the individual's family relationship.

5. ***Applicant/Non-Applicant information.*** We support the identification of each household member as either an applicant or a non-applicant, so that non-applicants are not asked unnecessary questions pursuant federal regulations. An applicant should be required to provide only that information which is necessary to make an eligibility determination (whether for the Exchange, Medicaid, or CHIP), or for a purpose directly connected to administration of the program. Similarly, a non-applicant may not be asked for an SSN (unless the applicant is applying for APTC, and the non-applicant is the primary tax filer and attests to having an SSN) or for their citizenship or immigration status. See 45 CFR §§ 155.260, 155.305(f)(6), 155.310(a), 155.715(c)(3); 42 CFR §§ 431.300, 435.907(e). Throughout the application, it should be made clear which information is required and which is not.
  - a. **SSN:** Appendix A states that SSNs are optional for non-applicants, implying that they are never optional for applicants. That implication is incorrect, because the SSN may be required of applicants only if they are eligible for an SSN. See 42 CFR §435.910(h), §457.340(b); 45 CFR §155.310(a)(3)(i). This exception is important for immigrant families, who may have family members who are eligible for the affordability programs, but are not eligible for SSNs or are eligible only for non-work SSNs, such as applicants for asylum and certain victims of domestic violence. Additionally, individuals who are eligible only for emergency Medicaid or for prenatal care under CHIP may not be eligible for an SSN. The regulations specify that these individuals may enroll using a unique identifier. 42 CFR § 435.910(h).

Therefore, it should be clear, both at the request for an SSN and in any accompanying documents or instruction booklet, that SSNs can only be required of applicants who have or are eligible for SSNs, and explain, that other applicants may be assigned a unique identifier if required by the program for purposes of enrollment in coverage. It should also be explained that help is available in obtaining an SSN, for those who are eligible and do not have one. To further allay applicants' concerns and comply with the Privacy Act, it should be made clear that SSNs are used to check the applicant's income and to verify an attestation of citizenship.

While non-applicants' SSNs are optional in many circumstances, including them on the application could speed up the income verification and eligibility process. However, the manner in which they are requested could deter families, especially those with mixed-immigration statuses, from applying. Requests of non-applicant SSNs must accord with Privacy Act standards, accompanied by notice that the SSN is optional, the authority for the request, and how the SSN will be used.

**RECOMMENDATION:** HHS should include specific language, as follows, to explain the request for an SSN:

*To complete this application you only need to give SSNs of family members who are applying for health insurance and have SSNs. We use SSNs to check the*

*amount of money you make (your income) to see if you and/or your family can get help with health insurance costs. Providing SSNs may speed up your application process. If you don't have an SSN, we can help you apply for one [call (XXX) XXX-XXXX].*

*You do not have to give an SSN or immigration status for anyone who is applying for Emergency Medicaid or [state funded program].*

Eligible immigration status: We support requiring information on eligible immigration status only of applicants in accordance with the regulations. To encourage eligible individuals in mixed-status families to apply, the application should clarify that the immigration status of a non-applicant is not needed and does not affect the eligibility of other family members. When asking if the applicant has an “eligible immigration status,” there should be a clear definition of that term based on a broader definition of “lawfully present.” The term should be defined in a list, accessible in a drop down menu or link in an online application, or in an accompanying document or instruction booklet in a paper application, that clearly shows the categories of eligible immigration statuses. **See Appendix A for an example.** HHS should update the application as new categories of immigration status are authorized. This will help applicants and their assisters answer accurately.

In general, we recommend that the questions eliciting immigration information be as simple as possible. For instance, we recommend that any additional information needed to determine whether an individual meets the immigration eligibility standards under Medicaid and CHIP (e.g. whether an individual has met the five-year bar) be ascertained through the verification process, such as through the SAVE program, rather than through additional questions on the application. However, if additional information is requested on the application to facilitate a Medicaid/CHIP determination, on a dynamic online application, such information should only be requested from individuals who appear to be eligible for Medicaid or CHIP.

Further, it is imperative that the phrasing and supplemental information provided regarding “eligible immigration status” be consumer tested, including alternative phrasing of the question (e.g. “satisfactory immigration status”). The goal of consumer testing should be both to test for whether the question is understood by immigrant applicants, whether it elicits an accurate response, and whether it reassures immigrants sufficiently so they feel comfortable applying.

Although the current definition of “lawfully present” at 45 CFR § 152.2 provides a helpful starting point, we re-submit our recommendation in the National Immigration Law Center’s comments to the Notice of Proposed Rulemaking for Health Premium Tax Credits (76 Fed. Reg. 50931 (August 17, 2011)) to expand the definition of lawfully present. Specifically, we recommend that three other lawfully present immigration categories be added to the definition of lawfully present at 1.36B-1(g), as described in more detail below: (a) individuals whose status makes them eligible to apply for work authorization; (b) individuals granted a stay of removal; (c) certain victims of trafficking; and (b) certain applicants for asylum.

At a minimum, we request HHS include individuals who are lawfully present in the Commonwealth of the Mariana Islands and American Samoa because they were omitted in the definition at 45 CFR §152.2 due to a technicality – 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).

The lawfully present immigration status of some applicants may not be verifiable by the DHS SAVE program (which will be accessible through the federal data services hub), only by submission of documentary evidence. The agency must accept any documentation required to establish eligibility, an essential protection for immigrants and others who have evidence of eligibility that is not verifiable electronically. In an online environment, there should be the capability of uploading this document; in a paper or phone application, the filer will need the opportunity to bring or mail in, fax, or scan and e-mail such a document. Whether the opportunity to upload a document occurs at the point where immigration status is requested or at the end of the application will depend on when in the process the electronic verification occurs. In addition, in an online application a link should be provided or, in a paper application, instructions on where to find a list of documents that lawfully present immigrants typically have that would be acceptable documentation of immigration status, such as the list available at NILC's website at <http://nilc.org/document.html?id=35>.

Additionally, submission of an "A Number" (alien registration number), including entry of an "A Number" on the application, should be considered sufficient documentary evidence to initiate verification through SAVE. Many, but not all, lawfully present individuals will be in possession of an A Number, readily facilitating verification of lawful presence through the SAVE program. Therefore, we recommend the application include the *optional* request for an immigrant applicant's A Number. If an A Number is provided, no further documentary evidence should be required; if an A Number is not provided, it should be treated as any other optional question and the individual should be able to move on with the application. See 77 FR 18361.

Finally, in accordance with sections 1903(x), 1902(ee) or 1137(d) of the Act and 45 CFR § 155.315(c)(3) pursuant Exchange and Medicaid regulations, when an applicant's immigration status cannot be immediately verified or the documentation of immigration status is not readily available, the applicant should be given a reasonable opportunity to resolve the inconsistency or provide further documentation, during which time the application should be processed, the applicant's eligibility for affordability programs should be determined, and the applicant should be enrolled in a health insurance plan. Depending on when the electronic verification occurs, the application should provide notice of this right to complete the application process and be enrolled in health insurance during the reasonable opportunity period.

RECOMMENDATIONS:



- Include reassuring language clarifying that the immigration status of a non-applicant is not needed and does not affect the eligibility of other family members.
  - Provide an explanation of which categories of immigrants are “lawfully present” and include reassuring language that the list is not exhaustive and new categories may be added.
  - Keep the question about eligible immigration status as simple as possible, but in an online application, if additional information is requested to facilitate a Medicaid/CHIP determination, request such information only from individuals who appear to be eligible for Medicaid.
  - Consumer test variations of the immigration status questions and reassuring language with groups of diverse immigrant consumers.
  - Add the following five categories of individuals to the definition of “lawfully present” who would be considered to have an eligible immigration status:
    1. Who are lawfully present in the Commonwealth of the Northern Mariana Islands under 48 USC § 1806(e);
    2. Who are lawfully present in American Samoa under the immigration laws of American Samoa;
    3. Whose status makes them eligible to apply for work authorization under 8 CFR §274a.12;
    4. Granted a stay of removal by administrative or court order, statute or regulations;
    5. Who are victims of human trafficking who have been granted continued presence;
  - Revise the current category pertaining to asylum applicants as follows:
    1. 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.
  - If an individual’s lawful presence cannot be immediately verified electronically, notify the individual they will be provided a reasonable opportunity to submit other documentation of their status. Also, provide notification that they may continue with the application, have their eligibility determined for the affordability programs, and enroll in a QHP while they collect the documentation.
  - Add a question for “*A Number*” after the question about “*eligible immigration status*” and make this question optional and for applicants only.
- b. Race/Ethnicity: To aid in protecting civil rights, we support asking for the race and ethnicity of applicants, as well as non-applicants, as long as the answer to the question remains optional. Applicants should be made aware that the data are being collected to ensure that everyone gets the same access to health insurance and that the information is confidential and will not be used to decide which program they are eligible for. Gathering this data will allow HHS to set national standards that allow for analysis and comparison of exchanges and QHPs. Exchanges can use the data to identify racial and ethnic disparities and to analyze their processes to ensure nondiscrimination. They can share this data with QHPs and navigators and encourage them to stratify their own data by race and ethnicity to identify any disparities in access or care. Please see above under

**Household Contact Information** for recommended language to precede any optional request for information about race and ethnicity.

- c. Preferred language(s): The model application should also request data on the preferred language of applicant and non-applicant household members. While the household contact may assist with an initial application, applicants and non-applicant household members likely will interact with the affordable health insurance program on an ongoing basis to get information, submit renewal applications, and file complaints. Furthermore, for applicants who are minors or have legal guardians, collecting language data from their parent/guardians as well is particularly important. Thus, the Exchange (as well as QHPs, navigators and healthcare providers) will benefit from having data on whether any applicant and non-applicant speaks or reads a non-English language or ASL or reads Braille to appropriately identify, plan, and provide appropriate assistance.

If the household contact's language preference differs from that of an applicant, information should be provided in multiple languages to ensure understanding by all parties. For example, if the household contact prefers Spanish, but the applicant prefers English, all materials should be provided in both Spanish and English. Preferred language questions should be included early in the application and not tied to the optional race/ethnicity questions.

### **Income and Additional Information**

As this is likely to be one of the most challenging section of the application, particularly for individuals working in the informal economy, irregularly or for multiple employers, piece rate, or whose income cannot be immediately verified electronically. Therefore we strongly urge HHS to continue testing questions regarding income with consumers with diverse employment circumstances. Testing should not be limited to consumer preference for wording, but should also identify whether questions produce accurate responses.

1. **Projected Annual Income**. Consumers should be allowed to report their income as it appears on their paystub, regardless of how frequently they are paid. Any calculation of that income should be done by rules engines and/or eligibility workers, not by consumers. Additionally, it will be vital to provide clear guidance to applicants regarding which wage information (i.e., pre-tax) is required, perhaps by showing a picture of a sample pay stub or using common terms to reference the appropriate income amount, such as "gross income." Technical terms should be avoided if at all possible and consumers should be provided with concise, easy-to-understand definitions.

People who are self-employed, those working for multiple employers, those who have irregular employment or those who get paid by the piece (such as by the bushel) may not have access to a pay stub that allows for easy reference, so accommodations should be made to allow these individuals to provide accurate information without undue burden. These accommodations could include tools to aid in calculating income such as worksheets that can help consumers record their earnings from multiple employers and forms for the self-employed to record their income and expenses.

Consumers need to understand why providing accurate information is important. Households who are likely to be eligible for premium tax credits must know that they may have to pay back a portion of the premium credit if their income ends up being higher than projected and conversely, that they may be eligible for a refund if income is below what was projected. It will be important to convey this information in a manner that does not discourage individuals from applying for health insurance affordability programs. These reassuring, yet cautionary messages, should be repeated during the enrollment process when the applicant decides how much of the premium tax credit to take in advance.

People who work steady hours and whose income is fairly stable will likely be able to project their annual income, but many others whose income is variable will have difficulty. People who work irregular shifts, have seasonal employment, change jobs, work on commission, or are self-employed, may find it difficult to accurately “project” their earnings for the coming year. Applicants should not be required to provide annual income if it is not readily available. HHS should conduct extensive consumer research to identify strategies that will best estimate incomes for individuals with irregular circumstances.

2. ***Current monthly income, if applicable.*** As noted, determining income for a particular time period can be accurately accomplished by asking applicants to provide their income as reported on their paystub along with the frequency of payment. The exchange or Medicaid agency can then make the appropriate calculation.

Inquiries concerning sources of income that do not come from employment should follow a similar process. We recommend asking consumers to provide the amount and frequency of other income such as Social Security and unemployment benefits. Additionally, in an online application, questions regarding the amount and frequency of a particular source of income should appear only if the applicant reported having that type of income.

Additionally, the proposed option of “don’t know” should be retained for applicants who have difficulty calculating their projected annual income. It will also be important for the application to provide toll-free help lines and encourage applicants to call as they encounter questions at this and other difficult points in the application.

3. ***Discrepancies.*** An online environment tied to a data hub provides will help in collecting income information. As the applicant works through the process, information should be verified, and if discrepancies are found, the applicant should be immediately alerted and asked to provide an explanation or additional information. This process will allow consumers to provide explanations for discrepancies and/or correct any mistakes. In addition, regardless of the method that consumers use to apply they should be asked if they have experienced or anticipate change in their family structure or income.
4. ***Additional Information of All Household Members.***
  - a. **Pregnancy:** We support asking all female applicants whether or not they are pregnant because it is relevant to determining the number of people in the

household of other applicants. In determining Medicaid/CHIP eligibility for members of a household that includes a pregnant woman, states have the option of counting the pregnant woman as a single person or as more than one person (depending on the number of babies expected).

- b. Other addresses including intended change in residency: We question the reason for asking residency questions of all household members, both applicants and non-applicants. However, applicants should be asked if they are a resident of the same address as the household contact so that eligibility can be determined for the appropriate location. For example, a student could be a resident of another state, but be part of his parent's household and the eligibility determination would need to take into account this disparate residency. There is no need to ask applicants or non-applicants whether or not they intend to remain in the state, as recipients are required to report any changes, including moving to the health insurance affordability program. Applicants should be made aware of this and other requirements in the notice of eligibility determination.

### **Program Specific Questions**

Online and telephone applications should require answers to program specific questions only for those who appear eligible for the specific program. This will not be possible in a paper application and all questions may need to be asked of all applicants, unless the information can be collected post-eligibility. For questions that are program-specific, HHS should consider which, if any, should be required of all applicants prior to submission of the paper application. For instance, complex questions, such as those related to the availability of affordable, minimum value coverage, should be asked post-eligibility or are best ascertained through other sources (e.g. the employer). Questions that are retained should be asked as simply as possible.

1. ***Exchange.***
  - a. SSNs of tax filer(s) if not provided: Regulations require the collection of a non-applicant's SSN only if the non-applicant has an SSN, is a tax filer, and has filed a tax return for the year for which tax data would be used by the exchange in making an eligibility determination. 45 CFR 155.305(f)(6). Otherwise, the exchange may not require individuals not seeking coverage for themselves to provide a SSN. It should be made clear that this is required for determining eligibility for APTCs, to verify income through tax data and other available data sources.
  - b. Special enrollment period: If an applicant is applying for APTCs during a non-open enrollment period, he/she should be given a list of qualifying events that would trigger eligibility for coverage. Applicants should also have the option of selecting "other" and providing an explanation as to why they are applying for coverage outside the typical enrollment season.
2. ***Medicaid.*** As mentioned earlier, the immigration eligibility standards for Medicaid and CHIP and the Exchange may differ, depending on the state and the applicant's age. In some cases, additional information will be needed to determine whether a lawfully present individual is eligible for Medicaid or CHIP (e.g. whether an individual has a status that is exempt from the five-year bar, such as refugee, or for

how long the individual has had an eligible status). We recommend that any additional information needed to determine whether an individual meets the immigration eligibility standards under Medicaid and CHIP be ascertained through the verification process, such as through the SAVE program, rather than through additional questions on the application. However, if additional information is requested on the application to facilitate a Medicaid/CHIP determination, on a dynamic online application, such information should only be requested from individuals who appear to be eligible for Medicaid or CHIP.

3. **CHIP.**

- a. Past health coverage end date and reason for termination: Generally, CHIP requires that children must be uninsured in order to qualify. State policies vary regarding how long children must be uninsured and most states provide “good cause” exemptions for children to qualify for coverage under CHIP when these durational limits are not met. CHIP waiting periods will no longer make sense in 2014 because everyone is expected to enroll in coverage and can face penalties for failing to do so. If states can still impose waiting periods, applicants should be asked about their ongoing coverage, any recent coverage they had (within the timeframe of the state’s waiting period), as well as the reason for termination.

**Confirmation and Eligibility Determination**

1. **Application Summary.** In the online application environment, we support a federal requirement that states establish a personal account (or “my account”) internet function with strong privacy and security protections. We also strongly support providing families with the ability to review and make changes to their applications prior to submission. The design of any of the application modalities should provide consumers with final control over the application information before turning it over to the government. Such consumer control would permit application filers to investigate options before formally submitting their application for insurance. This control would encourage participation by immigrant families, who may wish to seek advice from trusted sources or gain additional assistance after familiarizing themselves with the health care application, but before actually submitting the application on behalf of their household.

The proposed data elements note that this is the section that provides an “opportunity to make edits if needed.” The agency must accept any documentation required to establish eligibility, see 42 CFR § 435.907(a). This is essential for individuals who have evidence of eligibility that is not verifiable electronically, e.g. citizenship, immigration status, or income, or who require a reasonable opportunity to collect such evidence. For example, certain lawfully present individuals are not immediately verifiable by the DHS SAVE database, but rather only by submission of documentary evidence. Thus, in an online environment, the ability to upload a document should be provided. In a paper or phone application, the filer will need the opportunity to bring in or mail a document.

States are prohibited as well from denying or delaying services to an otherwise eligible individual pending issuance or verification of an SSN by the Social Security Administration, an important protection for vulnerable families including immigrant and LEP families who often face problems obtaining SSNs. The Medicaid and

exchange rules incorporate due process protections to help individuals correct inaccuracies in their records or to provide a reasonable opportunity to compile necessary documentation without forfeiting critical coverage. 42 CFR §§ 435.910(a), 435.952, 435.956, 457.340(b); 457.380(f); 45 CFR §§ 155.315(c)(3), 155.315(f)(4). Notice that an applicant whose information cannot be verified immediately can nonetheless submit an application, be determined eligible for coverage if otherwise qualified, and receive the APTC, should be included here.

2. ***Rights & Responsibilities and Signatures.*** To best serve all applicants, the rights and responsibilities should be communicated in clear and simple language that is non-threatening. On both the application and the notice, families should be given information on how to appeal the agency's decision as well as file a complaint if they believe they have been discriminated against. See comments above recommending providing notice of civil rights protections with the notice of privacy protections at the beginning of the application to encourage participation of immigrant families. A clear and strong statement of civil rights protections could also be included here.
3. ***Determination and notice(s).*** Families should receive a full and complete eligibility notice, regardless of whether or not the members are all eligible for the same program. The notice should clearly lay out what each family member is eligible for, as opposed to starting with what they are ineligible for, and should also provide the basis behind the determination. Additionally, if families are split between various programs, an explanation of each should be provided. In situations where eligibility has been determined for some, but cannot be determined for all family members, the same type of notice could be used, highlighting whose eligibility is pending and the reason for it. Any additional verification or documentation requirements could then be listed on the person-specific sheet. All notices should include information on the right to appeal an eligibility decision, including the ability to request a full Medicaid determination, which is discussed more below.

Some individuals, including those in immigrant families, will not be eligible for coverage under the exchanges, full-scope Medicaid, or CHIP. However, they should be connected to the limited options that are available to them. For example, some states and counties cover all children regardless of status. The health insurance affordability programs should help ease administrative costs by screening and enrolling for other state and local programs, as required by the ACA §1311(d)(4)(F). In addition, HHS allows states to contract with other entities such as federally-qualified health centers and public hospitals, to carry out one or more Exchange functions, as the safety net providers currently do with Medicaid functions. Thus, after eligible family members have been determined eligible, the exchange should screen and enroll ineligible family members who may qualify for emergency Medicaid, pre-natal care through CHIP, state and local coverage, and/or financial assistance programs and health care at community health centers and hospitals.

**SHOP EMPLOYER AND EMPLOYEE APPLICATIONS.** We support the proposal that employees and employers will be able to complete and submit SHOP applications over the phone, online, or in person, as it's vital the consumers have an option to select the mode that best meets their needs. As mentioned above, the use of an online application

that uses dynamic questioning to reduce the number of questions that consumers will have to answer to complete an application for enrollment will help speed the process.

The strong privacy regulations, which apply to both individual market exchanges and to SHOP exchanges, require a SHOP to restrict any use and disclosure of the personally-identifiable information they collect or create to only those purposes necessary to carry out specified functions, and to never use such information to discriminate inappropriately. A privacy statement should appear at the beginning of the application and make it clear what information will be collected, how it will be used, who it will be shared with, how it will be stored and for how long. A strong civil rights statement, as explained above should also be included on the application.

In addition to helping many small businesses access coverage for their employees, the SHOP exchanges will link many uninsured immigrants and their children to care through family coverage. Currently, immigrants are disproportionately employed by small firms and in industries that are less likely to offer health insurance, and many small business owners and entrepreneurs are immigrants. The SHOP provides an important new avenue to coverage for immigrant employees and their families; as such the SHOP application should also incorporate the General Principles discussed above. We appreciate the separate applications for individual market exchange and employee and employer applications for the SHOP exchange. The ACA allows for a merger of the two exchanges but because the individual market exchange and the SHOP have different eligibility standards, there must be a clear distinction and separation between the two.

### ***1. SHOP Employee Application***

- a. **Options for coverage.** SHOP employee applications should inform consumers that they may qualify for subsidized health coverage through health insurance affordability programs, including Medicaid and CHIP, and link employees to the relevant state resources where they can get additional information and apply for coverage.
- b. **Race and ethnicity.** To aid in protecting civil rights, as mentioned above, we support asking for the race and ethnicity of applicants, as well as their dependents, as long as answering the question remains optional. Applicants should be made aware that the data are being collected to ensure that everyone gets the same access to health insurance and that the information is confidential and will not be used to decide which program they are eligible for. Please see our earlier recommendations on the collection of race and ethnicity.
- c. **Language preference.** As with the individual exchange application, the SHOP application should request data on the preferred language of applicants. As employees will need to communicate with the exchange, as well as their chosen QHP, knowing their preferred language, both to speak and to read, will help facilitate this interaction and ensure the SHOP complies with obligations under Title VI of the Civil Rights Act and the ACA. Please see our recommendations on the collection of preferred language data, as well as how the exchange can best provide meaningful access to limited-English proficient individuals above (e.g. oral interpretation services, written translations in multiple languages of the application, and translated taglines).

- d. **Dependent information.** We appreciate the careful limiting of information gathered on dependents to only that which is necessary to enroll the individual in a QHP. However, we support voluntary collection of information from all family members on their preferred language, race, and ethnicity. See above for rationales for collecting such data from all family members, including dependents of employees, in order to promote and protect civil rights.
- e. **Additional information.** Any subsequent information request should only ask applicants to include changes in information or additional information that is specific to their enrollment (for example, regarding their dependents). It should not require submission of any information pertaining to non-applicants or resubmission of any previously provided information.

## 2. *SHOP Employer Application*

- a. **Language preference.** We support collecting the preferred language, both to speak and to read, from the employer contact. Many small business owners are immigrants and many are limited-English proficient (LEP). Without knowing which employers are LEP, the SHOP cannot serve those individuals and cannot adequately plan to provide them with meaningful access to services as required by law.
- b. **Multi-site employer.** The employer application should also include a question allowing applicants to indicate if they have work-sites in other states served by a different SHOP(s) and which SHOP shall be serving each worksite. If this is the case, the employee application should also be able to indicate their work-site address so they are seeking coverage under the appropriate location.
- c. **Employee list.** Any request for an employee's SSN on the SHOP applications should be for a Tax Identification Number (TIN) rather than an SSN, to conform to statute and relevant regulations. ACA §§ 1502, 1514; 45 CFR § 155.730(b)(4).

Thank you for the opportunity to comment on the data elements. Well-designed applications that are accessible to immigrants and LEP individuals and proactively address their unique concerns and fears will increase equity in our health care system and transform access to health insurance and health care. We hope HHS will consider our suggestions regarding the data elements to improve your significant work on the applications. If you have any questions about these comments, please contact Jenny Rejeske at rejeske@nilc.org.

Sincerely,

/s/

Jenny Rejeske  
Health Policy Analyst



## Appendix A

### **Lawfully Present Categories (under CMS State Health Officials Letter July 1, 2010)**

Here is a list of potentially eligible immigration statuses. Please note this list may not be exhaustive and is subject to change. Immigration categories can be complicated and there are a variety of different documents that you can show to prove that you have an eligible immigration status. If you don't know whether you are an eligible immigrant, we can help. [Please call XXX, or see the list of Navigators, consumer assistance programs, and immigrant rights & legal services offices provided.]

- **Lawful Permanent Residents (LPRs)**
- **Applicants for Adjustment to LPR Status, with Approved Visa Petitions**
- **Refugees**
- **Conditional Entrants**
- **Asylees**
- **Granted Withholding of Deportation or Withholding of Removal, under the immigration laws or under the Convention against Torture (CAT)**
- **Applicants for Asylum or Withholding of Deportation/Removal**

*If over 14 years old, need work authorization. If under 14 years old, application for asylum or withholding of deportation/removal must have been pending for 180 days.*

- **Paroled into the U.S.**
- **Cuban and Haitian Entrants**  
*Includes a range of Cuban and Haitian nationals – e.g. who were paroled into the U.S., applied for asylum, were granted a special status for Cubans or Haitians, or have a pending exclusion or deportation cases.*
- **Temporary Protected Status (TPS) and Applicants for Temporary Protected Status (TPS)**  
*Applicants for TPS need work authorization.*
- **Deferred Enforced Departure (DED)**
- **Deferred Action Status**
- **Special Immigrant Juveniles and Applicants for Special Immigrant Juvenile Status**
- **Domestic Violence Survivors**

*With a prima facie case determination or approved (1) self-petition for an immigrant visa filed under the Violence Against Women Act (VAWA); or (2) immigrant visa petition filed for a spouse or child by a U.S. citizen or LPR, or (3) application for cancellation of removal/ suspension of deportation under VAWA. The parent and/or child of a battered spouse or child are also “lawfully present.”*

- **Victims of Trafficking and their Derivative Beneficiaries**  
*Certified by, or if a minor, with eligibility letter from the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR). Also includes trafficking survivors with a T visa or a prima facie case determination on a T visa application.*
- **Individuals with Nonimmigrant Status**  
*Nonimmigrants may have a status granted under 8 U.S.C. § 1101(a)(15)(A) through (V) or by a treaty such as the one described below.*
- **Citizens of Micronesia, the Marshall Islands, and Palau**  
*Citizens of the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau have special rights under Compacts of Free Association signed by the U.S. They are nonimmigrants who are allowed to enter, reside and work in the U.S. indefinitely, and are "lawfully present" in the U.S.*
- **Family Unity**
- **Lawful Temporary Residents**

**The following categories need work authorization in order to be considered "lawfully present" for this purpose:**

- **Applicants for Legalization under IRCA**
- **Legalization under the LIFE Act**
- **Applicants for Cancellation of Removal or Suspension of Deportation**
- **Order of Supervision**
- **Registry Applicants**