May 11, 2012

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-9989-F

RE: CMS-9989-F
Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers

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.

We are pleased to see that the final rule "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers," includes many provisions that will help to ensure that all eligible individuals may apply and easily enroll in the Exchange for the appropriate coverage and affordability program. In particular, the final rule includes key provisions that will help eliminate or reduce barriers to enrollment for immigrant and mixed-status families applying for affordable health coverage for their eligible family members such as: clarifying which information is required only of applicants and what information should not be requested from someone who is not seeking coverage and who may be applying on behalf of another family member (non-applicants) and strengthening existing privacy and security protections to safeguard the collection, use and disclosure of any information provided by both applicants and non-applicants.

Of the interim provisions that are open for comment, NILC would like to provide comments on the following two sections:

- the affordability of cost-sharing for low-income lawfully present non-citizen (Section 155.305(g));
- the special exception to the inconsistency procedure allowing for self-attestation of information (Section 155.315(g)).

To fulfill the goals of the Affordable Care Act of 2010, it is important that these two provisions will be implemented in a manner that will ensure eligible individuals can truly afford private insurance in the Exchange and that individuals can easily enroll in the Exchange without unnecessary delay.

§ 155.305(g) Eligibility for cost-sharing reductions

NILC generally supports the regulatory language of §155.305(g) but recommends an amendment to ensure affordability and meaningful access for the lowest income individuals seeking private coverage in the Exchange.

The current rule provides that lawfully present immigrants who are eligible for premium tax credits and whose household income is less than 100% of the Federal Poverty Level (FPL) will be found eligible for the same cost-sharing reductions provided to individuals with household incomes between 100% to 150% FPL. See Section 155.305(g)(2)(i). As such, individuals whose household income is below 100% FPL will be assumed to have household incomes above 100% FPL and will be provided cost-sharing reductions that are based on an artificial income level of 100% FPL and above, rather than based on their actual income.

In order to ensure coverage is truly affordable to all eligible individuals, we strongly recommend lawfully present non-citizens with household incomes of less than 100% of the FPL who would be eligible for Medicaid but for immigration status, should be determined eligible for affordability programs based on their actual household income, similar to all other eligible individuals. As currently drafted, this provision places an unfair burden on the lowest income individuals who will be seeking coverage because the rule wrongly assumes this population has incomes between 100% and 150% of the FPL, when they in fact have incomes below 100% FPL. For the reasons below, the cost-sharing reductions for individuals with incomes below 100% FPL should be based on their actual income and a separate eligibility category for cost-sharing reductions should be added for this population to ensure affordability.

First, without adjusting the current rule, eligible, lawfully present individuals with incomes below 100% FPL are more likely to be unable to afford cost-sharing in a qualified health plan and as a result, may remain uninsured. For example, similarly situated individuals with household incomes of less than 100% of the FPL will be enrolled in Medicaid with nominal cost-sharing. By expanding eligibility for Medicaid to individuals under 138% of the FPL, Congress recognized that individuals with an annual income below 138% of the FPL ($14,856 for an individual, $25,390 for a family of three) simply cannot afford copayments and deductibles that higher income families could. Indeed, there is a growing body of research demonstrating that individuals and families at this income level have very little disposable income for out of pocket expenses and thus, are incredibly price sensitive, choosing to delay or forgo needed medical care

rather than risk having to pay out-of-pocket or accrue medical debt. As written, if the cost-sharing reductions for this population are the same as individuals with incomes between 100% FPL and 150% FPL, the provision would likely result in individuals with incomes below 100% FPL choosing not to enroll or being unable to use their insurance because they cannot afford the copayments or deductibles. This population of lawfully present non-citizens under 100% of the FPL faces the same economic barriers as individuals in Medicaid and also should not be forced to bear the unfair burden of higher cost-sharing expected of individuals with higher incomes.

Second, the cost-sharing reductions rule as currently drafted is inconsistent with the eligibility rules for correlating premium tax credits. According to the U.S. Department of Treasury's proposed rule on health insurance premium tax credits, an individual taxpayer whose income is below 100% FPL shall be determined eligible for a premium tax credit based on the taxpayer's ***actual*** household income.[1] It should follow that an eligible individual whose household income is below 100% FPL who receives a premium tax credit based on his or her actual income should expect to be determined eligible for the related cost-sharing reductions also based on his or her actual income. This is the only methodology that would help ensure the affordability provisions in the ACA are affordable to the individual based on his or her income.

Ensuring this population had access to affordability credits based on their actual income is also Congress' intent. According to the colloquy (excerpted below) between Senators Robert Menendez (D-NJ) and Max Baucus (D-MT) on the Senate floor on March 25, 2010, Congress' intent with regards to the statutory language directing such low-income lawfully present immigrants under 100% of the FPL who are ineligible for Medicaid is that these individuals be treated as having a household income equal to 100% pertains only to their ***eligibility for, but not the actual size of, the benefit***:

> Mr. MENENDEZ. I believe it is important to clarify that the Senate bill's treatment of certain lawfully present immigrants as having an income at 100 percent of the Federal poverty level was intended to pertain only to their eligibility for the affordability credit— not the size of the actual tax credit. **Plainly put, a legal immigrant whose income is at 50 percent of the poverty line should not have to pay the same premium amount as someone whose income is at 100 percent of the poverty line.** Was this the intent of this provision in the health reform legislation?
>
> Mr. BAUCUS. The Senator is exactly right. The health reform legislation that was signed into law allows immigrants who are here lawfully, who are otherwise ineligible for Medicaid to receive tax credits in the exchange. **However, the size of those tax credits should be based on the families' actual income, not an artificial level of 100 percent of the poverty line. I expect this provision will be implemented as such.** [2] (emphasis added).

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[1] See specifically, 26 Code of Federal Regulations Section 1.36B–2(7), *Computation of premium assistance amounts for taxpayers with household income below 100 percent of the federal poverty line*, "Health Insurance Premium Tax Credit," 76 Federal Register 50931, 50940 (August 17, 2011)

[2] See CONG. REC., S2079 (daily ed. March 25, 2010)(Statements of Senators Menendez and Baucus).

While the colloquy makes reference to the premium tax credit, the same reasoning should apply to the cost-sharing reductions as another type of "affordability credit" within the ACA. First, the premium tax credit and cost-sharing reduction requirements are designed to help make health coverage affordable and are intended to work together to reduce out of pocket costs incurred by individuals when purchasing and using health insurance through the Exchange. It does not stand to reason that one might be able to afford the annual health insurance premium yet not be able to afford the cost-sharing required under the plan thereby making one's coverage unusable. Moreover, the statutory language in section 1401(c)(1)(B)(ii) relating to this population's eligibility for the refundable tax credits and section 1402(b)(2) relating to their eligibility for cost-sharing reductions are nearly identical. Thus, Congress' intent on how these two provisions must be implemented should also be consistent.

For these reasons, we recommend aligning the eligibility for cost-sharing reductions with the eligibility for premium tax credits and determining the cost-sharing reductions based on the household's <u>actual</u> income for lawfully present individuals who are otherwise ineligible for Medicaid and eligible to enroll in a qualified health plan in the Exchange.

RECOMMENDATION

Amend §155.305(g)(2) by adding a separate eligibility category for individuals with household incomes below 100% FPL as follows:

(2) <u>Eligibility categories.</u> The Exchange must use the following eligibility categories for cost-sharing reductions when making eligibility determinations under this section –

(i) An individual who is eligible for advance payments of the premium tax credit under paragraph (f)(2) of this section, a household income less than 100 percent of the FPL for the benefit year for which coverage is requested;

~~(i)~~ *(ii)* An individual who is expected to have a household income greater than or equal to 100 percent of the FPL and less than or equal to 150 percent of the FPL for the benefit year for which coverage is requested~~, or for an individual who is eligible for advance payments of the premium tax credit under part agraph (f)(2) of this section, a household income less than 100 percent of the FPL for the benefit year for which coverage is requested~~;

§ 155.315(g) Exception for special circumstances

NILC applauds the inclusion of a verification exception process in this final rule. Section 155.315(g) requires the Exchange to accept the applicant's (or application filer's) attestation of information in certain circumstances, such as when the information cannot be verified electronically, or if the documentation does not exist or is not available. This is a critical requirement in order to ensure all eligible individuals can easily enroll in a qualified health plan without undue burden and delay. NILC fully supports inclusion of this provision in the final

regulations, including the use of the term "must." NILC also recommends the following changes to strengthen the provision and ensure it is consumer-friendly.

First, the provision as currently drafted, allows for an exception to accept an applicant's attestation if documentation of information is "not reasonably available." We are concerned that a "reasonably available" standard is too vague and leaves much discretion to the Exchange to determine reasonability. This could result in the Exchange demanding documentation from individuals who are simply not able to provide the documentation, even with their best efforts, and ultimately resulting in improper denials of eligible individuals for lack of documentation despite this exception process. We recommend striking "reasonably" from the language of the provision so that the standard is whether the information is simply available or not to the applicant or application filer.

Without eliminating the term "reasonably" from the exception process, applicants will face inconsistent eligibility determinations simply based on how an agency interprets "reasonably available" for different types of eligibility criteria or chooses to limit acceptance of self-attestation of information. Based on current experience with Medicaid and CHIP applications, without more specific guidance as to when an exception process should be made available and other alternatives of documentation should be permitted, it is more than likely that an applicant will be forced to abandon the application process or that eligible individuals will be wrongfully denied for an alleged "failure to comply" when the individual simply does not have nor can obtain the documentation requested.

A common example of this is in obtaining proof of income from non-applicants on behalf of applicants in a family. Many individuals today work in non-traditional employment and may also be working multiple part-time jobs to make ends meet. As such, the individual's wages may not be easily and accurately determined through electronic verification and the individual may not easily be able to obtain specific documentation such as a paycheck stub or W-2 form to verify his or her wages. If in most circumstances, it is "reasonable" to assume a worker can obtain documentation of his or her income, an Exchange may refuse to allow self-attestation of income for a non-traditional worker. As a result, the individual would not be provided the exception process to make a good faith effort to obtain some other type of documentation to prove income, and instead could be simply denied for failure to provide the "right" kind of verification. In addition to improper denials, leaving so much discretion to the Exchange to determine what is reasonably available can have unintended consequences. We are aware of cases where a benefit agency's attempt to verify employment, without the applicant's or application filer's consent, because this verification should have been "reasonably available" from an employer, resulted in the employee being fired by an unscrupulous employer. For all these reasons, the word "reasonably" in this provision invites errors and inconsistencies in interpretation and ultimately harms consumers. Assuming the goal of this provision is to simplify enrollment and ensure all eligible individuals are provided the opportunity to provide whatever documentation they may have, we recommend the provision be drafted so that it is clear that the Exchange must provide an exception process to the applicant whenever his or her

information is not available. We recommend that HHS remove the word "reasonably" from sub-section (g).

Second, the provision's instruction to provide an exception "on a case-by-case basis" is redundant and also could result an Exchange denying the use of the exception in a case where verification documentation indisputably does not exist. We see no reason why circumstances where information is clearly not available should be subject to case-by-case discretion as it leaves open the door to misinterpretation, leads to inconsistencies as to how this discretion is actually applied, and may ultimately subvert the purpose behind the exception requirement. Since there is no adjudicatory standard for the "case-by-case" decisions, the term "case by case basis" essentially negates the requirement to provide an exception and instead turns it into an arbitrary, discretionary power for the Exchange and individual eligibility workers. We recommend HHS delete the "case-by-case" language.

Finally, HHS should clarify what is the burden of proof that the Exchange may require of an applicant before invoking the exception process. In order to promote a consumer friendly experience and simplify enrollment, the exception process should be provided more often than not and should not require a consumer to "move mountains" before the Exchange permits an exception. If the applicant declares certain documentation is not available or obtainable, the Exchange should accept an applicant's explanation of the circumstances as to why the applicant does not have documentation without placing an undue burden on the applicant. It would be helpful for HHS to clarify that the threshold to allow an exception process should be low and that there should be a fundamental shift in culture, away from an assumption of fraud by a consumer to a realization that today's workers, families, household situations and everyday lives may not fit some fictional "traditional" mode where everyone has easy access to all the same kind of information. Shifting the burden of proof from the applicant and allowing the exception process whenever needed is also consistent, and in fact required, by the existing privacy and security standards at Title 45 Code of Federal Regulations Section 155.206 in that only the information that is strictly necessary should be required of an applicant. We have included below suggested changes to the language to help ensure applicants have access to this exception process when necessary.

RECOMMENDATION

Amend § 155.315(g) as follows:

(g) *Exception for special circumstances.* For an applicant who does not have documentation with which to resolve the inconsistency through the process described in paragraph (f)(2) of this section because ***the applicant declares that*** such documentation does not exist or is not ~~reasonably~~ available and for whom the Exchange is unable to otherwise resolve the inconsistency, with the exception of an inconsistency related to citizenship or immigration status, the Exchange must provide an exception~~, on a case-by-case basis,~~ to accept an applicant's attestation as to the information which cannot otherwise be verified along with a~~n~~ ***brief*** explanation of circumstances as to why the applicant does not have documentation.

The National Immigration Law Center appreciates the opportunity to comment on proposed regulation CMS-9989-F. We hope these comments and recommendations are helpful. For more information, please contact Jenny Rejeske at 202-683-1994 or rejeske@nilc.org or Sonal Ambegaokar at 213-639-3900 ext. 114 or ambegaokar@nilc.org.

Sincerely,

/s/
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/s/
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