



October 31, 2011

The Honorable Kathleen Sebelius, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

RE: Addendum to Comments on Proposed Rule on Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers – CMS-9974-P – Pertaining to Immigrant Children and Families

Dear Secretary Sebelius:

We appreciate the opportunity to provide this addendum to comments on the proposed rule regarding the Exchange functions in the individual market, including eligibility determinations, that implements important parts of the Patient Protection and Affordable Care Act (ACA). This addendum is focused on proposed rules and recommendations of concern specifically to mixed-status immigrant families in the U.S. There are an estimated 3.5 to 5.5 million children living in mixed-status immigrant households.<sup>1</sup> Three-quarters of the children are citizens, one in four of whom is uninsured. Immigrant eligibility rules differ from those of citizens, warranting review and comment through the lens of their special circumstances regarding access to coverage and care. With the implementation of the ACA, it is critical to ensure that the state based Exchanges provide robust access to affordable, quality health coverage for all eligible residents, especially vulnerable populations such as immigrant families.

Georgetown University's Center for Children and Families (CCF) is an independent, nonpartisan policy and research center whose mission is to expand and improve health coverage for America's children and families. CCF is providing this comment addendum on the Exchange establishment standards included in the Notice of Proposed Rulemaking (NPRM) for 45 CFR Parts 155 and 156 in hopes of ensuring that the unique needs of children in mixed-status immigrant families are addressed by various aspects of the ACA as it continues to unfold. Specifically, CCF is providing comments on the following sections and

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<sup>1</sup> J. Passel, D.Cohn, "A Portrait of Unauthorized Immigrants in the United States," (April 14, 2009), Pew Hispanic Center, available at <http://www.pewhispanic.org/reports/report.php?ReportID=107>. See also S. McMorrow, G.M. Kenney, & C. Coyer, "Addressing Coverage Challenges for Children under the Affordable Care Act," Urban Institute (May 2011), available at [http://www.urban.org/uploaded\\_pdf/412341-Affordable-Care-Act.pdf](http://www.urban.org/uploaded_pdf/412341-Affordable-Care-Act.pdf).

we urge the Department of Health and Human Services (HHS) to consider the recommendations.

Areas of concern and comment:

155.300 Definitions and general standards for eligibility determinations

155.305 Eligibility standards

155.310 Eligibility determination process

155.315 Verification process related to eligibility for enrollment in a QHP through the Exchange

155.320 Verification process related to eligibility for insurance affordability programs

155.330 Eligibility redetermination during a benefit year

155.335 Annual eligibility redetermination

155.340 Administration of advance payments of the premium tax credit and cost-sharing reductions

155.345 Coordination with Medicaid, CHIP, the Basic Health Program, and the Pre-Existing Condition Insurance Program

## **INTRODUCTION**

Under the ACA, eligibility for members of mixed-status immigrant families is complex. Undocumented family members are restricted from the tax credits and even the purchase of health insurance through the Exchange at full cost. For other family members who are lawfully present, eligibility rules include waiting periods for public programs, and Medicaid and CHIP coverage for immigrant children in some states but not in others. As a further complication, the ACA immigrant restrictions apply only to access to the individual markets. The ACA left largely undisturbed the current system of employer-sponsored insurance because employers already verify the authorized immigration status of their employees at the time of hiring.

To connect immigrants and their family members to coverage and care, the Exchange must overcome barriers and concerns about complexity of eligibility rules and privacy of personal information. HHS regulations must provide an opportunity for applicants to attest to eligibility and to document eligibility in flexible ways. The Exchange must be able to proactively encourage the applications of hard-to-reach populations and to help each low-income family to pursue coverage that is affordable through tax credits, Medicaid, CHIP, Medicare, BHP where appropriate, and the health care safety net. Effective Exchange policies and procedures will address and overcome barriers such as limited-English proficiency (LEP) and distrust of government. We commend the NPRM's codification of ACA § 1411(g), at 45 CFR § 155.315(g), prohibiting Exchange from requiring an applicant to provide information beyond what is necessary to support the eligibility and enrollment processes. We urge HHS to give careful consideration as to how this requirement will be enforced.

Given the reliance on the electronic collection and disclosure of information throughout the functioning of the Exchange, from the determination of an applicant's eligibility, to the verification of information on the application and enrollment in a QHP, CCF supports the

reminder in the preamble that the standards specified in §155.260 and §155.270 regarding privacy and security apply to any data-sharing processes and agreements under this subpart.

## **DEFINITIONS AND GENERAL STANDARDS FOR ELIGIBILITY DETERMINATIONS (155.300)**

### **155.300(a) Definitions and (c) Attestation**

The NPRM definition of “application filer” is helpful in clarifying that such a filer need not be seeking health insurance coverage for him or herself and may make attestations on behalf of an applicant. In some immigrant families, an ineligible parent will be applying on behalf of an eligible child or children. CCF also supports the NPRM’s distinction between an application filer and a “primary taxpayer” such that they could be the same or different individuals.

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

## **ELIGIBILITY STANDARDS (155.305)**

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

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

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

To advance the goals of streamlining and reducing administrative burdens, evidence of lawful presence combined with state residency should establish a presumption that the applicant reasonably expects to be lawfully present during the enrollment period. If this proposal is not adopted, the Exchange could accept a self-attestation indicating that the

applicant reasonably expects to be lawfully present throughout the enrollment period. Because the proposed rule already requires enrollees to report any change in circumstances (§ 155.330(b)(1)), non-citizen enrollees would be required to report any changes in immigration status or state residency. Thus there is a mechanism in place to address any changes in eligibility that may occur.

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

### **155.305(a)(3) Residency**

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

The preamble at 51206 states the intention of HHS to align the Exchange residency standard with that of Medicaid, yet the Exchange standard omits two provisions from the residency standard as proposed in the Medicaid NPRM. First, the Medicaid NPRM at § 435.403(h)(1)(ii), proposes defining the State of residence, or the Exchange service area of residence, as where the individual has entered with a job commitment or seeking employment, whether or not currently employed. Second, under § 457.320(d)(2)(i) of the Medicaid NPRM, a state may not impose a durational residency requirement. CCF suggests that the Exchange final rules incorporate these two Medicaid standards so that those seeking employment in a new geographic area may apply for health coverage there. Including these standards in the Exchange rule will also promote consistency with Medicaid and effectuate the intent of the Exchange NPRM preamble to align the two regulatory schemes.

- **Recommendation:** Support the practical and reasonable standard for establishing state residency, at § 155.305(a)(3).
- **Recommendation:** To refine the applicability of the residency standard (§ 155.305(a)(3)) to seasonal workers and individuals seeking employment, recommend that HHS create a pilot project allowing an individual to enroll in one Exchange area with a QHP that can reimburse for services received in another Exchange area.
- **Recommendation:** Amend the standard at § 155.305(a)(3) to align with the Medicaid NPRM to, first, define the State or Exchange area of residence as where the

individual has entered with a job commitment or seeking employment, and second, to prohibit an Exchange from imposing a durational residency requirement.

**155.305(f)(2) Special rule for non-citizens lawfully present who are ineligible for Medicaid**

CCF supports the NPRM at § 155.305(f)(2), providing the essential clarification that lawfully present non-citizens who are ineligible for Medicaid but who have income below 100 percent FPL are eligible for an appropriate tax credit based on their income. This proposed rule facilitates the eligibility of all lawfully present immigrants for the Exchange, including those with very low income who cannot receive Medicaid due to restrictions on the eligibility of newly arrived immigrants and other lawfully present non-citizens. It also facilitates consistency with the Treasury-IRS NPRM on the Health Insurance Premium Tax Credit (131491-10), which mirrors this special rule at § 1.36B(2)(5).

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

**155.305(f)(1)(ii)(B)(6) Collection of Social Security numbers**

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

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

- **Recommendation:** Support § 155.305(f)(1)(ii)(B)(6) requiring the Exchange to collect the SSN of the primary taxpayer only if an application filer has attested that the taxpayer has an SSN and filed a tax return for the relevant tax year.

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

CCF also supports § 155.305(g)(1)(ii) requiring the Exchange to find an applicant eligible for cost-sharing reductions if the applicant meets the requirements for eligibility for an advance payment of the premium tax credit, the rules for which are proposed at § 155.305(f), as discussed above. We support this rule, especially the eligibility for cost-sharing reductions of very low income immigrant applicants in a primary taxpayer's household with incomes under 100 percent FPL who are not eligible for Medicaid and for whom such subsidies are critical to health care access.

- **Recommendation:** Support § 155.305(g)(1)(ii) providing cost-sharing reductions to low income individuals including lawfully present immigrant applicants with incomes below 100 percent FPL who are not eligible for Medicaid, and for whom the rules provide corresponding eligibility to the premium tax credit at § 155.305(f)(2).

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

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

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

**ELIGIBILITY DETERMINATION PROCESS (155.310)****155.310(a)(2) Information collection from non-applicants**

The proposed rule at § 155.310(a)(2) is critically important to mixed-status immigrant families; CCF strongly supports its inclusion in the final rule. The rule codifies what has long been federal policy, to protect fairness and privacy by strictly limiting the personal information that may be required as a condition of eligibility from an individual who is not seeking any benefit for himself or herself (a “non-applicant”). The proposed rule states that the Exchange may not require a non-applicant to provide information regarding citizenship or immigration status on any application or supplemental form. Also, it restricts the Exchange from requiring a non-applicant to provide a SSN (except in the situation where the non-applicant is also a primary taxpayer, about whom the application filer has attested has an SSN and tax data on file, and who is applying for tax credit). The policy codified in § 155.310(a)(2) is grounded in Title VI of the Civil Rights Act, the Privacy Act, and Medicaid confidentiality provisions at § 1902(a)(7) of the Social Security Act, and it conforms to ACA

§ 1411(g). To encourage coordination and a streamlined processes, the Exchange final rule should reference the corresponding rule for Medicaid at § 435.907(e)(1).

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

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

CCF supports the proposed special rules providing flexibility for taxpayers to limit their repayment liability, and setting out conditions for authorizing advance payments, and we suggest an amendment. To effectuate the affordability mechanisms for eligible mixed-status immigrant families who pay taxes under an ITIN rather than a SSN, a primary taxpayer who is not eligible for an SSN must be able to receive a tax credit for applicants in his or her household who are eligible for coverage. To avoid confusion and administrative burden, we recommend such flexibility be codified as a special rule.

- **Recommendation:** Amend § 155.310(d)(2) to add a new subsection (iii) stating that “The Exchange must authorize advance payments to an otherwise-eligible primary taxpayer notwithstanding ineligibility for a Social Security number.”

#### **155.310(f) – Notification of eligibility determination**

The proposed rule at § 155.310(f) requires the Exchange to provide timely notification of an eligibility determination. The preamble at 51210 clarifies that the notice, intended to provide the applicant with a record of the actions taken and still needed, as well as information about appeal rights, should be in writing. The rule does not require that the notice be in writing, but should do so to protect the applicant. In addition, the preamble states that the notice should be provided in a manner that meets the needs of diverse populations by, *inter alia*, providing meaningful access to limited English proficient (LEP) individuals. CCF recommends that this preamble statement be codified in the final regulation, with specific standards for promoting “meaningful access” through translation of notices.

- **Recommendation:** Amend § 155.310(f) to require the notice to be in writing and translated into other languages when there is a threshold of 500 LEP individuals or five percent of those eligible to be served by the Exchange, whichever is less. Further amend to require Exchanges to provide taglines in at least 15 languages that inform LEP applicants and enrollees how to access language services.

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

The NPRM at § 155.310(g) requires the Exchange to notify an employer that an identified employee has been determined eligible for an affordability credit or reductions. The proposed rule places no restrictions on the circumstances of the notice nor does it provide safeguards for employees who could be vulnerable to retaliation as a result of the notice. CCF recommends that the final rule limit the circumstances precipitating such a notice, limit

the information that appears on the notice, and require the notice to specify that employers cannot retaliate against the employee.

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

## **VERIFICATION PROCESS RELATED TO ELIGIBILITY FOR ENROLLMENT IN A QHP (155.315)**

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

CCF supports §155.315(b) generally with amendments to facilitate enrollment of immigrant families. We particularly support the NPRM's clarifications in § 155.315(b)(3) regarding inconsistencies and inability to verify information. The rule helps to ensure that an applicant whose information cannot be verified by SSA or DHS be given a reasonable opportunity to obtain the relevant documentation or resolve the inconsistency. The NPRM directs the Exchange to the "Inconsistencies" provision at § 155.315(e) which requires determination of eligibility for, and enrollment in, a QHP; eligibility for the affordability programs; and provision of advance payments of the tax credit during the 90-day reasonable opportunity period. To facilitate electronic verification and promote real time efficiency, CCF recommends that that in addition, the final rule provide that an applicant who attests to being a citizen, national, or lawfully present non-citizen have the option of submitting their SSN, an Alien Registration Number (or "A-Number") if they have it, or a paper documenting their status. The A-Number can easily facilitate electronic verification with the DHS, via the HHS data hub as provided for in § 155.315(b)(2).

In addition, CCF suggests that for an applicant who attests to citizenship or lawful presence but who is not in immediate possession of their SSN, A-Number or immigration document, HHS should require the Exchange to provide not only a 90-day period to obtain the relevant document, as proposed, but should also make a determination of eligibility for enrollment in a QHP and for affordability programs without delay. Such a final rule would better align the Exchange rules with Medicaid rules as well as with 42 USC § 1320b-7. For further alignment, the final rule should clarify that enrollment in a QHP and provision of advance payments of the tax credit during this time of reasonable opportunity should begin when the application is submitted, even if documentation of lawful presence is being gathered, rather than after the application filer has received notice, as directed in the inconsistencies provision at paragraph (e). This amendment would ensure that the final rule accurately reflects § 1411(e)(3) of the ACA, and is truly consistent with the Medicaid procedures under § 1902(ee) of the Social Security Act.

CCF notes that the preamble at 51213 indicates that future rulemaking will address the standards the Exchange will use to adjudicate documentary evidence of citizenship provided by an applicant within this consistency process. We suggest that future rulemaking also address the standards to adjudicate documentary evidence of lawful presence. To ensure that



all eligible applicants have an opportunity to establish lawful presence, HHS and the Exchange should be instructed to accept a broad range of documents that may establish evidence of immigration status, including documents that cannot be verified electronically with DHS. Any such list must not be exclusive, given the range of evidence that a lawfully present applicant may have, as well as the fact that immigration statuses and documents continue to evolve.

Immigrant families are frequently disadvantaged by the use of SSNs as a proxy for immigration status, and they also have heightened concerns about attempts in several states to enact legislation requiring intrusive, and likely unlawful, inquiries into immigration status. In the final rule at §155.315(b), we recommend that HHS emphasize protections regarding the receipt, use and disclosure of applicant information required by ACA § 1411(g)(2), as well as the penalties prescribed by § 1411(h) for the improper use or disclosure of such information, and implemented in §§ 155.260 and 155.270. CCF also recommends that HHS monitor the Exchanges' compliance with these privacy and civil rights protections.

- **Recommendation:** Amend § 155.315(b)(2) to allow an applicant who attests to being a citizen or lawfully present non-citizen to submit their Alien Registration Number (“A-Number”) if they have one, or a paper document, in addition to the SSN, and to clarify that if an applicant’s status of lawful presence can be verified using the applicant’s A-number, additional paper documentation may not be required.  
**Alternative Recommendation:** In the absence of the recommended amendment, the final rule should specify that the procedures for resolving inconsistencies in information § 155.315(b)(3), which direct the Exchange to follow the procedures in § 155.315(e), also cover situations in which an applicant does not have a SSN, as confirmed in the preamble at 51211, as well as situations in which the applicant does not have an A-Number, or does not have documentation of lawful presence that can be verified with DHS, including having no documentation readily available.
- **Recommendation:** Amend § 155.305(b)(3) to align the Exchange rule with the Medicaid rules to prohibit the Exchange from delaying or denying enrollment in a QHP or provision of advance payments of the tax credit, pending verification of information on the application, beginning from the time the application is submitted.
- **Recommendation:** In future rulemaking, address the standards which the Exchange must use for adjudication of documentation of lawful presence, incorporating flexibility necessitated by the limitations of verification through the DHS electronic database, and by the continually evolving nature of immigration status documentation.
- **Recommendation:** Amend §155.315(b) to emphasize applicant confidentiality protections required by ACA §§ 1411(g)(2) and (h), implemented in 45 CFR §§ 155.260 and 155.270.

**155.315(c)(4) Verification of residency**

CCF supports the clarification at § 155.315(c)(4) that documents providing information regarding an individual's immigration status may not be used alone to demonstrate a lack of state residency, and we suggest strengthening this rule by deleting the word, "alone." As noted in the preamble and reinforced at §§ 435.403, 457.320, and 435.956, determinations of state residency are independent from determinations of citizenship or immigration status, and further, the rules should provide each individual with an opportunity to establish that he or she resides in a state.

- **Recommendation:** Amend § 155.315(c)(4) to delete the word "alone," to ensure that residency determinations and immigration status determinations are made independently.

**155.315(e) Inconsistencies**

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

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

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

- **Recommendation:** Support and amend § 155.315(e)(2), supporting notification by the Exchange of any inconsistency and providing the application filer with 90 days to resolve the inconsistency; and amend to add new § (iii) requiring Exchanges to translate notices for each eligible LEP language group in the service area that constitutes 500 individuals or 5 percent, whichever is less, and ensure that notices include taglines in at least 15 languages informing individuals how to obtain assistance in their language.
- **Recommendation:** Support §§ 155.315(e)(3) and (4), permitting an extension of the 90-day period and a determination of eligibility during the period based on the application filer's attestation, including enrollment and advance tax credit payments.

- **Recommendation:** Support and amend § 155.315(e)(5), supporting allowance the Exchange to determine eligibility based on electronic data sources if still unable to verify the attestation; and amending to allow a determination based on the attestation if there is no information in electronic data sources.
- **Recommendation:** Amend §§ 155.315(e)(2), (3), and (5), to include application filer along with applicant in communications to resolve inconsistencies:
  - In § (e)(2)(i): *the applicant and application filer should be notified that the Exchange is unable to resolve the inconsistency after making a reasonable effort to do so.*
  - In § (e)(2)(ii): *the Exchange should provide the applicant and application filer with a period of 90 days from the date on which the notice is sent to the applicant and application filer.*
  - In § (e)(3): add “application filer” and replace the reference to (e)(3) with (e)(2)(ii): *the Exchange may extend the period described in paragraph (e)(2)(ii) for an applicant and application filer if the applicant and application filer demonstrates that a good faith effort has been made.*
  - In § (e)(5)(i): add “application filer” to “applicant” in the second instance of “applicant”: *the Exchange must determine the applicant’s eligibility based on the information available...and notify the applicant and application filer of such determination.*

#### **155.315(f) Flexibility in information collection and verification**

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

- **Recommendation:** Support § 155.315(f) providing that HHS will not approve an alternative verification system unless it reduces the administrative costs and burdens on the individual while maintaining accuracy and minimizing delay, and unless it complies with §§ 155.260 and 155.270 with respect to the confidentiality, disclosure, maintenance or use of information.

#### **155.315(g) Applicant information**

CCF supports the codification of ACA § 1411(g) prohibiting an Exchange from requiring an applicant to provide information beyond what is necessary to support the eligibility and enrollment processes. We urge HHS to give careful consideration as to how this requirement will be enforced. We particularly appreciate the emphasis of the NPRM that the rule applies also to the process for resolving inconsistencies in § 155.315(e). This important provision simplifies and facilitates the eligibility and enrollment process.

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

**VERIFICATION PROCESS RELATED TO ELIGIBILITY FOR INSURANCE AFFORDABILITY PROGRAMS (155.320)**

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

To ensure accuracy for vulnerable populations including mixed-status immigrant families and children applying for child-only coverage, it is critical that an Exchange provide applicants whose information cannot be verified electronically with an opportunity to submit other documentation, and to attest to income when documentation is not available. In § 155.315(c)(3)(vi), we suggest that the Exchange be required to accept one of a range of documents to demonstrate household income, including but not limited to pay stubs, a letter from an employer, or a deposit slip. Similar to the CCF recommendation for § 155.315(e)(5), if an applicant has not responded to the Exchange's notice, and there is no information in data sources, we recommend that the final rule direct the Exchange to determine eligibility based on the income information attested to on the application.

CCF strongly supports the requirement in § 155.320(c)(4) that the Exchange provide education and assistance to an application filer regarding the process for verifying eligibility for the insurance affordability programs. Particularly vulnerable among applicants and non-applicants are those who do not have SSNs or tax return data available. Education and assistance for this population will be necessary to ensure that the application filer has all the information he or she needs to complete the application process and ensure enrollment of eligible persons. We recommend that the rule specify that the education and assistance be provided to the application filer in a culturally and linguistically accessible manner, and the individual who provides the assistance should adhere to privacy and security provisions.

In § 155.320(f), CCF supports the clarification that lawfully present immigrants who would be eligible for Medicaid and CHIP were it not for immigrant eligibility restrictions are eligible for Medicaid for the treatment of an emergency medical condition. The preamble at 51217-18 contains helpful clarification that an individual found to be eligible only for Medicaid coverage restricted to emergency services based on their immigration status (such as a lawfully residing person within the five-year Medicaid waiting period), may nonetheless be eligible for a QHP in the Exchange. We recommend that the final rule clarify this point, to prevent confusion, and also require the Exchange to notify the individual if there is a determination of income eligibility for Medicaid for the treatment of a medical emergency.

CCF also supports the helpful reminders to states in the preamble that the immigration status standards for eligibility for enrollment in a QHP differ from those for Medicaid and CHIP, except for pregnant women and children in states that have taken up the CHIPRA option.

The preamble also confirms that the ‘reasonably expected’ element does not apply to any Medicaid or CHIP population. These clarifications simplify and facilitate the application and enrollment process for members of mixed-status immigrant families whose participation is often otherwise deterred by confusion over the eligibility rules.

- **Recommendation:** Support and amend §§ 155.320(c)(3)(iv) and (v), supporting alternative methods of verifying eligibility for affordability programs which help to facilitate the application and enrollment of eligible individuals.
- **Recommendation:** Amend § 155.315(c)(3)(vi), to require the Exchange to accept one of a range of documents to demonstrate household income, and if no documents are available, attestation of the income on the application.
- **Recommendation:** Support the requirement in § 155.320(c)(4) for outreach and education on the verification process; amend to require the Exchange to communicate in a culturally and linguistically accessible manner to provide meaningful access to LEP persons to the information, to communicate effectively with application filers in mixed-status immigrant families who face unique barriers to participation and complex eligibility and verification rules, and to adhere to privacy protections, including those at §§ 155.315(g), 155.310(a)(2), and 435.907(e).
- **Recommendation:** Support and amend § 155.320(f), supporting the clarifications of the proposed rule and the preamble that lawfully present immigrants who would be eligible for Medicaid and CHIP were it not for immigrant eligibility restrictions are eligible for Medicaid for the treatment of an emergency medical condition, that such individuals may nonetheless be eligible for a QHP in the Exchange, that immigration status standards for eligibility for enrollment in a QHP differ from those for Medicaid and CHIP, and that the ‘reasonably expected’ element does not apply to any Medicaid or CHIP population; amend to state in the final rule that such individuals may be eligible for a QHP.

## **REDETERMINATION (155.330, 155.335)**

### **155.330 Eligibility redetermination during a benefit year**

CCF supports the requirement in §155.330(a) that the Exchange must redetermine eligibility for an enrollee if it identifies updated information through data matching. In some cases a change in immigration status may result in an applicant’s eligibility for Medicaid or CHIP rather than the BHP or a QHP in the Exchange. In other cases an immigrant may be newly eligible for Medicaid or CHIP as a result of fulfillment of the five-year waiting period.

In the special case of an enrollee who is a lawfully present immigrant who becomes eligible for Medicaid or CHIP as a result of completing the five-year waiting period, HHS must place the burden on the Exchange, not the immigrant enrollee, to ensure a seamless transition between a QHP or the BHP and Medicaid or CHIP. This change in eligibility would not reflect a change in immigration status (that the enrollee would be required to report to the Exchange under § 155.330(b)(1)), but rather the completion of a waiting period for these

programs. We suggest that the Exchange create a mechanism that would automatically trigger a lawfully present enrollee's redetermination for Medicaid and CHIP after an applicable five-year waiting period has been fulfilled. To facilitate this transition, when screening for Medicaid eligibility, the Exchange could place a "tickler" in its database, indicating the date when a five-year period of ineligibility is expected to end. However, these procedures must be tailored to a State's individual eligibility rules since, depending in part on a State's rules, some immigrants may be barred indefinitely, while others may become eligible without a waiting period.

- **Recommendation:** Support §§ 155.330(a) and issue post-regulatory guidance to States and Exchanges on redeterminations of eligibility for Medicaid and CHIP of enrollees who fulfill the five-year waiting period.

### 155.335 Annual redetermination process

CCF supports § 155.335 with amendments to add flexibility for enrollees who have no tax return data available electronically to verify income or compliance with the filing requirement of a primary taxpayer who received an advance payment. For LEP persons, it is critical that the notices provided in § 155.335(c) comply with the Exchange standards for ensuring that notices are linguistically accessible. For child-only applications or when an application filer is not the applicant/enrollee, it is important for the final rule to more carefully distinguish between "enrollee" and "application filer."

- **Recommendation:** Support § 155.335 and amend so that if the Exchange is unable to update the data electronically as directed in § 155.335(b), it must proceed to § 155.335(c) and provide notice to the application filer, with this notice initiating the "Inconsistencies" process of § 155.315(e) that directs the Exchange to request additional information from the application filer. As in §§ 155.315 and 155.320, amend the final rule to require the Exchange to give the application filer an opportunity to submit other documentation of income, including attestation of income.
- **Recommendation:** Amend § 155.335(c) to add a new subsection (4) requiring Exchanges to translate notices for each eligible LEP language group in the service area that constitutes 500 individuals or 5 percent, whichever is less, and ensure that notices include taglines in at least 15 languages informing individuals how to obtain assistance in their language.
- **Recommendation:** Amend §§ 155.335(c), (d), (e), (f), and (g) to include application filers in the process, along with enrollees, as follows:
  - In § (c): change title to "Notice to enrollee and application filer" and add "application filer" in the following phrase: (*The Exchange must provide an enrollee and an application filer with an annual redetermination notice...*).
  - In §§ (d), (e), and (f): add "and application filer" after all instances of "enrollee(s)."
  - In § (g)(i): "*as supplemented with an information reported by the enrollee and application filer...*"; and in § (g)(ii): add "and application filer" after

“enrollee;” and in § (g)(iii)(2): replace the first instance of “enrollee” with “application filer” (“*if an enrollee or application filer reports a change...*”).

#### **REQUIREMENT TO PROVIDE INFORMATION RELATED TO EMPLOYER RESPONSIBILITY (155.340)**

CCF is concerned about vagueness in the requirement of § 155.340(b) to report SSNs. We recommend amendment because the terminology is inexact and inconsistent with other parts of the rule (e.g. use of the terms "enrollee" and "individual" in the rule, and the term “applicant” in the preamble). We recommend clarification in the final rule as to whose SSN is required to be reported.

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

#### **COORDINATION WITH MEDICAID, CHIP, THE BASIC HEALTH PROGRAM, AND THE PRE-EXISTING CONDITION INSURANCE PROGRAM (155.345)**

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

- **Recommendation:** Support § 155.345 calling for coordination in general, specific coordination of eligibility determinations, rights of applicants to a full eligibility determination upon request, and requirements to use a secure electronic interface for determining eligibility.

We hope these comments and recommendations are helpful. For more information, contact Dinah Wiley at 703-402-2665 or by email at [dinahwiley@gmail.com](mailto:dinahwiley@gmail.com).