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Centers for Medicare & Medicaid Services

Department of Health and Human Services

P. O. Box 8016

Baltimore, MD 21244

RE: CMS-2334-P

Addendum to Comments on Notice of Proposed Rulemaking: Medicaid, Children’s Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals, and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing.

Dear Secretary Sebelius:

We appreciate the opportunity to provide this addendum to comments on the proposed rule for Medicaid, the Children’s Health Insurance Program (CHIP), and the Exchanges that implements important provisions of the Affordable Care Act (ACA). This addendum is focused on proposed rules of concern specifically to the over 22 million non-citizens in the U.S. and their families. Disproportionate numbers of immigrants and their family members are uninsured, despite their high levels of participation in the nation’s workforce, and immigrant eligibility rules differ from those of citizens.

The interpretation and implementation of immigrant eligibility rules affects not only immigrants but many citizens as well. There are an estimated 5.5 million children living in mixed-status immigrant households,[[1]](#footnote-1) three-quarters of whom are citizens, and one in four of whom is uninsured. The presence of an ineligible, undocumented person in the family affects the willingness of the other family members to enroll in coverage. One million children are undocumented, and of the ten million undocumented adults in the U.S., nearly one-half are parents of children.

In addition, 24.5 million citizens and immigrants are limited-English proficient (LEP), speaking English “less than very well.” Language barriers have been found to be as significant as the lack of insurance in predicting use of health services. Title VI of the Civil Rights Act of 1964 protects against discrimination based on race, color and national origin, including national origin minorities with LEP, by entities providing federally-funded and federally-assisted services. The ACA in §1557 extended the protections of Title VI to Exchanges. These factors warrant comment on proposed rules through the lens of immigrants’ and LEP persons’ special circumstances regarding access to coverage and care. With the implementation of the ACA, it is critical to ensure that the Medicaid, CHIP and Exchange rules provide robust access to affordable health coverage for all eligible residents, especially vulnerable populations such as immigrant and LEP 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 Notice of Proposed Rulemaking (NPRM) for 42 CFR Parts 430, 431, 433, 435, 440, 447, and 457, and for 45 CFR Part 155 in hopes of ensuring that the unique needs of children in mixed-status immigrant and limited-English proficient families are addressed.

We thank the Department of Health and Human Services for your consideration of these comments and recommendations. For more information, please contact Dinah Wiley at [dinahwiley@gmail.com](mailto:dinahwiley@gmail.com); 703 402 2665.

**ELIGIBILITY**

**1. Definition of lawfully present, other definitions**

**§435.4, §155.20** (Definitions and use of terms)

The NPRM provides that the term, *non-citizen,* has the same meaning as the term “alien,” as defined in 8 USC §1101(a)(3). It also provides that the term *qualified non-citizen* has the same meaning as the term “qualified alien” as defined at 8 USC §1641(b) and (c). And finally, the NPRM defines *citizenship* as including both citizens of the U.S. and non-citizen nationals of the U.S.

The term “alien,” dating from the nineteenth century and used throughout the Immigration and Nationality Act, 8 U.S.C., has declined in usage. It is particularly inappropriate in a health and public benefits context, where to encourage the wellbeing of all, governments must strive to overcome barriers to immigrant participation and encourage their inclusion in services for which they are eligible. We support the change to “non-citizen” as well as the NPRM’s inclusion of “nationals” as part of the definition of “citizenship.” The latter may be helpful in ensuring rights when careless drafting confers eligibility on “citizens” but neglects to specifically include “nationals.”

* **We support the replacement of the term “alien” with the preferable term “non-citizen” which can now be used as a technical term of art in health care, increasing the effectiveness of outreach efforts to enroll immigrant families.**

* **We support including “nationals” within the term “citizenship.”**

**42 CFR §435.4, 45 CFR §155.20** (Definition of *lawfully present*)

The definition of the term “lawfully present” can be a life-or-death matter, determining which immigrants will be eligible for coverage through the Exchanges, which children and pregnant women will be eligible for federal Medicaid and CHIP in about half the states, and which immigrants will be left with no option for affordable health coverage. We support the most inclusive definition possible, that all who are lawfully present for immigration purposes should be considered lawfully present for purposes of health care and coverage.  We do not believe that considerations of administrative burden, such as ease of electronic verification through the DHS SAVE system, should be weighed heavily by HHS in determining whether a lawful immigration status is interpreted inclusively or restrictively in the final definition.  An inclusive definition, of all those who are lawfully present, best fulfills the ACA goals of expanding access to affordable health coverage, and spreading risk across a large pool of covered individuals to decrease costs for everyone and for the health system in general.

The NPRM’s point of departure is the definition included in the July 1, 2010 SHO letter regarding the CHIPRA state option to provide federal Medicaid and CHIP to lawfully residing children and pregnant women. Compared to the SHO, the NPRM has expanded the definition in modest ways, but also codifies a new restriction which is harsh and unjustifiable. HHS will apply the same definition of “lawfully present” to Medicaid, CHIP and the Exchanges, which will help to streamline eligibility determinations for immigrants, as well as outreach and education to immigrant communities, and will make the program rules easier to learn and understand. We also recommend that the final rule provide flexibility to states to include new lawfully present categories as they become designated by Congress or the Administration.

In general, we support the inclusion of the categories in the NPRM definition, with the addition of recommendations and comments on certain categories below.

* **We support the consistent application of the definition of “lawfully present” across programs (Medicaid, CHIP, and the Exchanges).**
* **Recommendation: Include language in the regulation recognizing that the list of categories in the definition is not exhaustive.**

**§435.4(2)** (Nonimmigrant visa-holders)

With regard to individuals with nonimmigrant visas, the NPRM includes all who are “in a valid nonimmigrant status, as defined by 8 USC 1101(a)(15) or otherwise under the immigration laws (as defined in 8 USC 1101(a)(17).” This wording is inclusive of nonimmigrants and also converts the requirement in the SHO that agencies determine that the applicant has “not violated the terms of the visa,” to a requirement that the agency determine the visa to be “valid.” We support this change as eliminating a need for the agency to determine the terms of the visa and whether or not the terms have been violated. The change will assist states by easing administrative burden and will assist consumers by preventing enrollment delays.

* **We support the simplification in the definition of “nonimmigrants” considered to be lawfully present.**

**§435.4(4)(ii)**  (Temporary protected status)

The NPRM includes as lawfully present non-citizens granted Temporary Protected Status (TPS), as well as those with pending TPS applications who have been granted employment authorization. Under the authorizing statute referenced by the NPRM, 8 USC §1254a, the Administration may designate a country’s nationals, who are in the U.S., eligible for TPS because of armed conflict or natural disaster in their home country, making it dangerous for them to return. If an immigrant is from a TPS-designated country, and otherwise eligible for TPS (e.g., has physical presence and is admissible), then the immigrant may register for TPS and obtain an employment authorization document (EAD, or “work permit”). One well-known example of TPS-designated country is Honduras, whose nationals fled north after Hurricane Mitch devastated their country.

An immigrant with TPS may have an emergent need for health care. We recommend that HHS not require immigrants applying for TPS to wait until they have the EAD before they may apply for health coverage. As noted below, the EAD is expensive and takes time to obtain. The HHS proposal at §435.4(4)(ii) to require the TPS-applicant to also have the EAD, is unnecessary, creates additional administrative burden, and may result in serious health consequences for some immigrants.

* **Recommendation: Amend §435.4(4)(ii) to delete at the end: “~~who have been granted employment authorization~~.”**

**§435.4(4)(iii)** (Work-authorized immigrants)

The NPRM includes in the definition, non-citizens who are “granted employment authorization under 8 CFR 274a.12(c).” This category is inaccurate and restrictive, and places an undue burden on consumers, especially vulnerable applicants including children and persons with disabilities. Instead, the definition should include all individuals *whose immigration status makes them eligible* for an EAD *regardless of whether they have secured a work permit*.  An immigrant’s lawful status does not depend on whether he or she has an EAD in-hand.  The EAD requirement imposes particular burdens on low-income children and persons with disabilities who cannot work.  Low-income families and individuals cannot easily afford the high fee to apply for and obtain a work permit, particularly if they do not otherwise need it. The time that it takes to obtain the document also results in delay in enrollment of vital health coverage. The final rule should eliminate this requirement.

* **Recommendation: Amend §434.4(4)(iii) to insert after the word, “granted” and before the words “employment authorization”, the following words: “an immigration status that confers eligibility for”, providing inclusion for those whose status makes them eligible for the EAD but who are not employed and cannot afford the EAD.**

**§435.4(4)(vii)** (Immigrants granted a stay of removal)

We support the inclusion in the NPRM definition of immigrants granted an administrative stay of removal by DHS, but the definition should also include administrative stays of removal under the Department of Justice and by a court. These judicially-ordered stays, whether by an Immigration Judge (IJ), the Board of Immigration Appeals (BIA), or a federal court, also confer lawful presence in the U.S. for the period of time that the stay is in effect. There is no basis for distinguishing between these categories in terms of the form of relief the immigrants receive. The concern expressed in the Preamble that some IJ or BIA stays may be automatic, is misplaced. In some instances a stay may issue automatically, but only as a matter of due process; substantively, the stay of removal means the individual cannot be removed and has been granted permission to remain because he or she may ultimately prevail in the pending appeal or motion to reopen.

* **Recommendation: Amend §435.4(4)(vii) to read “Granted a stay of removal by the Department of Homeland Security, an Immigration Judge, the Board of Immigration Appeals, or a federal court.”**

**§435.4(5)(i)**  (Applicants for asylum or withholding of removal or the Convention Against Torture)

The NPRM requires immigrants applying for asylum or withholding of removal or the Convention Against Torture (CAT) to specifically also have an EAD before they can be considered lawfully present under the ACA. Similar to the discussion of TPS, above, individuals in the asylum category often have an emergent need for health care. In these immigration categories, the individual demonstrates a well-founded fear of persecution in their home country. Many of these immigrants or their family members have been tortured or otherwise persecuted by the home country government or someone under that government’s control, creating a situation of grave danger should they return home. These immigrants often suffer from mental trauma as well. Filing one of these three immigration applications confers eligibility for the EAD. For HHS to require that the immigrants also *obtain* the EAD before obtaining health insurance, is unnecessary, burdensome, and may result in dire health consequences. We believe this additional requirement should be omitted.

* **Recommendation: Amend §435.4(5) by deleting subsection (i): “~~has been granted employment authorization.~~”**

**§435.4(8)** (Immigrants lawfully present in American Samoa)

Individuals who are lawfully present in American Samoa under the laws of American Samoa were previously eligible for Medicaid and CHIP through the SHO, but lacked explicit inclusion in eligibility for the Exchange. The provision at 45 CFR §155.20, incorporating the same definition for the health insurance Exchanges as is found at 42 CFR §435.4 for Medicaid, ensures the eligibility of individuals in the Exchange and across the insurance affordability programs.

* **We support the inclusion in the health insurance Exchanges, through 45 CFR §155.20, of individuals who are lawfully present in American Samoa under the laws of American Samoa.**

**§435.4(9)** (Immigrant victims of trafficking)

The NPRM includes all victims of trafficking in persons pursuant to the Victims of Trafficking and Violence Protection Act (TVPA) of 2000. TVPA authorizes the Department of Homeland Security (DHS) to grant trafficking victims continued presence in the U.S. for the purpose of aiding in the prosecution of traffickers. This category of non-citizens already was eligible for Medicaid and CHIP under separate statute, 22 U.S.C. §7105(b), and therefore did not appear in the SHO. The NPRM correctly lists them for purposes of consistent implementation of eligibility for all victims of trafficking under the TVPA across Medicaid, CHIP, and the Exchanges.

* **We support the inclusion of all victims of trafficking in persons, in accordance with the TVPA, in the definition of individuals who are lawfully present for purposes of eligibility for Medicaid, CHIP, and the Exchanges.**

**§435.4**(**10**)(Ineligibility of DACA beneficiaries)

Under §435.4(vi), individuals with Deferred Action status are within the definition of lawful presence and are thus eligible for health coverage under Medicaid, CHIP, and the Exchanges. However, the NPRM §435.4(10) prohibits eligibility of young people granted deferred action under the DHS Deferred Action for Childhood Arrivals (DACA) program. Preventing these young people from obtaining health coverage through the ACA is inequitable, undermines sound public health policy, undermines the ACA’s goal of streamlined health care administration, and will result in increased health care costs for everyone. The restriction should be deleted. For full comments opposing the DACA restriction, please see Georgetown University Health Policy Institute Center for Children and Families: “CMS-9995-IFC2 – Comments on CMS’ Interim Final Rule Changes to Definition of ‘Lawfully Present’ in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010,” October 29, 2012.

* **Recommendation: Delete §435.4(10).**

**Deletion:** Non-citizen lawfully present in the Commonwealth of the Northern Mariana Islands (CNMI)

Until recently, the Commonwealth of the Northern Mariana Islands (CNMI) controlled their own immigration process and border. On November 28, 2011 under the Consolidated Natural Resources Act (CNRA) of 2008 (PL 110-229), local control ended and the CNMI federalized its immigration system and border. Prior to this law, the CNMI had the ability to determine who was lawfully present, putting it in a unique position to determine who would be eligible for federal programs consistent with existing statutes.

 The proposed rule seeks to remove the category of “lawfully present individuals in CNMI” that was previously listed in the July 2010 SHO guidance letter implementing section 214 of CHIPRA. Since the SHO letter was issued before November 28, 2011, this category was needed to clarify eligibility for this category of individuals. With the federalization of the immigration system in effect, we agree that lawfully present individuals in CNMI will be covered by other lawfully present categories.

* **We support the proposal to remove the CNMI category in the regulations, as lawfully present individuals in CNMI will be included as eligible individuals within other lawfully present categories in §435.4.**

**2. Declaration of immigration status**

**§§435.406(a)(3), 457.320(d)**

The NPRM provides that in addition to the applicant, the declaration may be made by an adult member of the individual’s family or household, or an authorized representative. The rule further provides that when the applicant is a child or is incapacitated, a person acting responsibly for the applicant may declare the applicant’s immigration status, provided the responsible person attests to having a reasonable basis to make the declaration. We strongly support the provision that the declaration may be made by someone other than the applicant, and especially the proposal that someone acting responsibly for an applicant child may make the declaration for the child, as crucial flexibility for enrolling immigrant children and incapacitated individuals in coverage.

* **We support the provision at §435.406(a)(3), §457.320(d) that the declaration may be made by an adult member of the individual’s household or an authorized representative, or someone acting responsibly for an applicant who is a child or is incapacitated may declare the applicant’s immigration status, as crucial for facilitating coverage and care for vulnerable immigrants.**

**3. ICHIA state option, §214 of CHIPRA**

**§§435.406(b), 457.320(c)**

The NPRM implements the Immigrant Children’s Health Improvement Act (ICHIA), CHIPRA §214, which provides states the option to cover lawfully residing immigrant children and/or pregnant women in Medicaid and CHIP with no waiting period. The rule requires that states taking up the option must waive the federal five-year waiting period as well as sponsor deeming, and other now-obsolete restrictions enacted in the welfare law (limits on payments for not-qualified aliens who meet the lawfully present definition, state options to require 40 quarters of work credit). In addition, under the NPRM at §435.406(b)(2), states that take up the option must provide all the same services to lawfully present immigrants as the state provides to citizens.

* **We support this regulatory implementation of CHIPRA §214.**

**4. Eligibility services for LEP persons**

**§435.905(b)(1) and (3)** (Availability of program information to LEP persons and notice to LEP persons of the availability of language services)

The NPRM requires program information to be available to LEP persons at no cost to the individual, to include oral interpretation, written translations, and taglines in non-English languages, and requires the state to inform individuals of the availability of services and how to access services. We appreciate this vital provision and support its effective implementation to ensure that all LEP individuals can fully access the benefits of health reform. A minimum standard for taglines in 15 languages would provide essential implementation guidance to states. Given that bilingual (and bicultural) staff is the most effective manner of providing language services, we believe the rule should be strengthened with the addition of competent bilingual staff in the list of language services. Because states must have flexibility to accommodate differences in populations and languages spoken, it is important to encourage the use of staff who can provide services directly to an LEP individual in his/her language, in addition to interpreting.

* **We support §435.905(b)(1) and (3) requiring that program information be provided at no cost to LEP persons, that language services include interpretation, translations and taglines, and that individuals be informed of the availability of language services.**
* **Recommendation: Amend §435.905(b)(1) by adding, after the word “including”: “competent bilingual staff who provide services directly in a non-English language”; and after the words “taglines in”, add the words: “at least 15”.**

**§457.110(a)** (Accessibility of CHIP enrollment assistance and information to LEP persons)

The NPRM requires the state to make information and enrollment assistance available and accessible to LEP applicants, enrollees, and families of potential applicants, a requirement we support and appreciate. The rule is strengthened by cross-reference to §435.905(b), which provides a list of three specific language services: interpretation, translation, and taglines.

* **We support §457.110(a), requiring that CHIP program information and enrollment assistance be accessible to persons who are LEP.**

**§435.911(c)(1)** (Promptness in determining eligibility)

We appreciate the requirement that the Medicaid agency must determine eligibility “promptly and without undue delay consistent with the timeliness standards established under §435.912….” This reaffirms §1137(d) of the Social Security Act, a long-standing requirement of the Medicaid program. However, in practice, there have been reports that despite an applicant providing all relevant eligibility documentation, including immigration status, there is an extended delay or no action taken by the Medicaid agency on non-citizens’ applications without notice. This results in eligible individuals in immigrant families unnecessarily remaining uninsured or unable to seek required medical assistance at the time needed.

* **We support the requirement at §435.911(c)(1) that the agency must determine eligibility promptly and without undue delay.**
* **Recommendation: To ensure more effective implementation of the timeliness standard, we recommend that HHS issue sub-regulatory guidance to state Medicaid agencies affirming this long-standing requirement and clarifying the agencies’ notice and timeliness obligations to non-citizen applicants.**

**§§435.917(a)(2), 457.340(e)** (Accessibility of eligibility determination notice to LEP persons)

The NPRM requires eligibility determination notices to be accessible to individuals who are limited English proficient. This rule is vital for protecting civil rights. The notice and any actions taken pursuant to the notice should be valid only when the state provides the notice in an accessible manner, that is in an LEP individual’s preferred written language. HHS should ensure that for any individual the agency knows or should reasonably know is LEP, the agency should provide the notice in that individual’s language.

* **We support §§435.917(a)(2) and 457.340(e) requiring an eligibility determination notice to be accessible to LEP persons.**

**5. Presumptive eligibility**

**§§435.1100-1103**

To find presumptive eligible for Medicaid, the NPRM at §435.1102 provides that the agency has the option to require an attestation by a child applicant that she or he is a citizen or has a satisfactory immigration status and is a State resident, or the attestation of another person who additionally attests that they have reasonable knowledge of the individual’s status and residency. We note that the option for this new requirement is applied to adults also by the NPRM to §435.1103. The rule prohibits qualified entities from delegating their authority to other entities, §435.1102(b)(2)(vi), and from requiring verification, §435.1110(d). Verification is contrary to the concept of “presumed” eligibility based on preliminary information, per §435.1102(d)(2). Often individuals need urgent access to health care, and additional requirements would potentially delay care and create additional health and cost consequences.

In this regard, we note there is no statutory basis for assessing presumptive eligibility on any basis other than income, such as requiring attestation of citizenship, immigration status, or State residency. The Social Security Act, §§1920(b)(1)(A) and 1920A(b)(2)(A) indicate that the qualified provider or entity determines eligibility for the pregnant woman or child on the “basis of preliminary information, that the family income of the (woman or child) does not exceed the applicable income level of eligibility under the State plan.” Furthermore, §2001(a)(4) of the ACA adds a new §1920(e) of the Act and extends presumptive eligibility to other groups “in the same manner as the State provides for such a period under this section or section 1920A.”

We suggest a requirement that states establish oversight mechanisms to ensure the integrity of presumptive eligibility (§435.1102(b)(3)). The two most important criteria for evaluating the effectiveness of the presumptive eligibility program are: 1) to evaluate the proportion of individuals determined presumptively eligible that submit a complete Medicaid application, and 2) the proportion of those who do apply who are determined eligible for Medicaid going forward. These two measures could be developed into standards that qualified entities are required to meet in order to maintain their authorization. This is similar to what is proposed under (§435.1110(d)) allowing states to disqualify hospitals that do not meet state-determined standards and additional comments are noted in that section.

* **We support §435.1102(b)(2)(vi), prohibiting qualified entities from delegating their authority to other entities.**
* **We support §435.1110(d) prohibiting qualified entities from requiring verification.**
* **Recommendation: Delete the additional options for making a presumptive eligibility determination at §435.1102(d)(1).**

**VERIFICATION**

**§435.910(g)** (Verification of Social Security number)

The NPRM requires that “the agency must verify the SSN furnished by an applicant or beneficiary with SSA to ensure the SSN was issued to that individual, and to determine whether any other SSNs were issued to that individual.” If verification indicates that other SSNs were issued to the individual, then we believe the agency should provide the individual with a reasonable opportunity to resolve the inconsistency and instructions on how to correct SSA records.

* **Recommendation: Amend §435.910(g) by requiring the agency, in the event that another SSN is found to have been issued to the individual, to provide a reasonable opportunity to resolve the inconsistency and instructions on how to correct SSA records.**
* **Recommendation: Amend §435.956(g)(1) to add the words “or Social Security number” at the end of the following phrase: “The agency must provide a reasonable opportunity period to individuals for whom the agency is unable to promptly verify citizenship or satisfactory immigration status . . . .”**

**§435.952(c)(2)(ii)** (Requirement of original document evidencing immigration status)

Under §435.952(c)(2)(ii), if electronic data is not available to verify immigration status, states may require documentary evidence. However, if electronic data is not available to verify citizenship, the NPRM at §435.407(f) removes the requirement that only an original document can be used, and proposes that the state must accept a photocopy, facsimile, scanned or other copy of a document. There should be a similar provision for demonstrating satisfactory immigration status.

* **Recommendation: Amend the final rule to provide that to verify immigration status, the state must accept a photocopy, facsimile, scanned or other copy of a document.**

**§435.952(c)(3)** (Verification of eligibility in special circumstances such as natural disaster)

The NPRM requires states to permit self-attestation for all eligibility criteria when documentation does not exist, such as for homelessness, domestic violence, or natural disaster, with the exception of citizenship and immigration status. For these eligibility criteria, the rule requires documentation, with the rationale that documentation is specifically required under title XIX. This proposal is likely to create severe consequences to individuals needing access to health care in an emergency. Immigrants caught in a natural disaster such as a devastating hurricane, or those who quickly flee home because of domestic violence, may present themselves for health coverage and care without documentation of their immigration status. They should be permitted to attest to their status and obtain benefits until such time as the status can be verified.

The requirement of immigration status documentation in special circumstances is harsh and is inconsistent with other elements of the ACA regulatory scheme. The ACA’s policy of administrative streamlining permits an applicant to declare immigration status by entering an identifying number into a web portal, so the requirement of documentation in special circumstances is unduly burdensome. Even when an applicant in special circumstances cannot provide an identifying immigration status number, the rules should allow attestation in an emergency, and prohibit delaying or denying benefits pending later verification of income and other eligibility criteria.

We suggest that to promote program integrity, HHS require states to establish oversight mechanism such as spot-check verification of eligibility, as permitted at §155.320(d) where attestations of eligibility for and enrollment in employer-sponsored insurance are allowed. At a minimum, the special circumstance of major disaster should be designated by HHS rules as an event triggering an automatic waiver of other statutory verification requirements, as is provided for by the Stafford Act of 1988 as implemented through widespread federal and state disaster assistance and emergency preparedness plans.

* **Recommendation: Amend §435.952©(3) to delete the exception that requires states to collect documentary evidence of eligible immigration status under special circumstances such as natural disaster, domestic violence, and homelessness.**

**§435.956(a)(1)** (Electronic verification of immigration status)

The NPRM provides that states must verify immigration status through the federal data services hub if available, and adds that if the hub is not available, states may verify directly with DHS in accordance with §1137d of the Act. It is helpful to non-citizen applicants that in the event of an interruption in federal hub service, a state has the option to verify immigration status directly with DHS. If the federal hub function is not available at all times, consumers could encounter undue delay in their ability to enroll in coverage. When states need to verify directly with DHS, we recommend that final rules condition verification on the existence of an agreement (MOU) that provides the applicant with the due process and privacy protections of §1137d of the Act.

* **Recommendation: Support §435.956(a)(1)(ii) to permit states to verify an applicant’s immigration status directly with DHS in the event the federal hub is not available, and amend the rule to require states, before directly verifying information through DHS, to have in place MOUs with DHS that protect applicants’ due process and privacy rights under §1137d of the Act.**

**§435.956(a)(2)(i), §155.315(f)** (Promptness in providing reasonable opportunity period)

Under the NPRM at §435.956(a)(2)(i), if a Medicaid agency cannot promptly verify an applicant’s non-financial information, or if there are inconsistencies in the verification, the agency must then provide a reasonable opportunity to establish eligibility. The preamble, p. 4616, seeks comment on two options for the level of promptness in verification that should be required: 1) “promptly and without undue delay,” resulting in eligibility at the same level of ‘real time’ standard applied to applicants generally; and 2) promptness defined as a given number of business days. Enrollment in health coverage is too vital to allow the agency to delay several days. Therefore, we do not support defining the concept of “promptly” as an allowance of several business days. For consistency and under the same rationale, we believe the Exchange should be held to a standard of “promptly” in the same circumstance, and rather than being permitted, as in §155.315(f) to seek electronic verification for two days before providing a reasonable opportunity period to the applicant. The regulation as proposed reaffirms §1137(d) of the Social Security Act, a long-standing requirement of the Medicaid program.

* **We support finalizing the proposal at §435.956(a)(2) that the reasonable opportunity period is triggered if verification of citizenship or immigration status cannot be concluded “promptly.”**
* **Recommendation: Amend §155.315(f) to require the Exchange to provide the reasonable opportunity period if verification of citizenship or immigration status cannot be concluded “promptly.”**

**§§435.956(a)(2)(ii), 435.1008(c)** (Providing benefits during reasonable opportunity period)

The NPRM strengthens the language of the rule requiring provision of benefits during a reasonable opportunity period, making that consistent with §1137d of the Act, which mandates that the agency “may not delay, deny, reduce or terminate benefits . . . during the reasonable opportunity period….” In addition, the NPRM adds §435.1008(c), making FFP available to the State for this purpose. We support the incorporation into 42 CFR of these statutory rights that have long been critical to meeting the health care needs of non-citizens, who sometimes encounter delays in verification due to inaccurate databases, changes in status, and lost documents.

* **We support revised language of §435.956(a)(2)(ii)** **that is now consistent with longstanding statutory rights. We support §435.1008(c) providing FFP for this purpose.**

**§435.956(a)(3)** (Re-verification of immigration status at renewal)

We support the NPRM prohibition against re-verifying citizenship at renewal, and we also believe this prohibition should apply to immigration status re-verification as well. For most lawfully present immigrants, immigration status does not change from year to year. Furthermore, a beneficiary whose immigration status changes is already obligated under the regulations to report a change of status to the Medicaid agency, making re-verification of immigration status at renewal both unnecessary and inappropriate.

At p. 4616 of the Preamble, HHS seeks comment on whether, consistent with regulations at §431.17(c), Medicaid agencies should be expected to retain application records of an immigrant who has Temporary Protected Status or another temporary status indefinitely, or for a more limited period of time, such as 5 or 10 years. The Preamble, read with the NPRM, indicates that agencies are expected to retain records of immigration status indefinitely. We see no reason to carve out a special exception for any temporary immigration status. Enrollees have a duty to report a change of circumstances, which includes a change in immigration status.

* **Recommendation: Amend §435.956(a)(3) to prohibit the Medicaid agency from re-verifying immigration status at renewal.**
* **We support consistency in policies requiring indefinite record retention, including the record of an applicant’s immigration status, regardless of the temporal terms of an individual status.**

**§435.956(g)(i)** (Assistance with obtaining a Social Security number)

The NPRM reaffirms the existing Medicaid requirement that a state must “assist the individual in obtaining an SSN, in accordance with §435.910,” specifically applying this assistance requirement to the reasonable opportunity period.

* **We support §435.956(g)(1)(i) requiring assistance with obtaining a SSN during the reasonable opportunity period.**

**§435.956(g)(2)(i)** (Consistency of reasonable opportunity period across programs)

The NPRM provides a consistent 90-day period for resolving inconsistencies in verification of both citizenship and immigration status. Consistency will be simpler for states to administer, resulting in greater fairness for immigrant applicants.

* **We support the consistent timeframe of 90 days for resolving inconsistencies in verifying both citizenship and immigration status.**

**§435.956(g)** (LEP access to notice of reasonable opportunity period)

In providing an applicant with a reasonable opportunity to resolve an inconsistency in verification of citizenship or immigration status, the NPRM provides that the agency must provide notice of this opportunity accessibly to LEP persons. This is a critical rule for protecting the civil rights of all persons whom the agency knows or should reasonably know are LEP.

* **We support §435.956(g) requiring access of LEP persons to a notice of reasonable opportunity to resolve an inconsistency in verification of citizenship or satisfactory immigration status.**

**§155.305**  (Eligibility for exemption from the shared responsibility payment)

In the Preamble p. 4636, HHS announces that eligibility standards for exemptions under §5000A of the IRC will be discussed in future regulations.

* **Recommendation: Clarify in forthcoming regulations that the Exchange will not issue certificates of exemption from the shared responsibility payment for exempt noncitizens, consistent with 26 CFR §1.5000A-3(k), which provides that such claims will be available exclusively from the Internal Revenue Service through the tax-filing process.**

**ENROLLMENT**

**§§435.908, 457.340, 155.225** Certified Application Counselors

The NPRM provides for optional certified application counselors (CACs) at the discretion of the state to provide assistance to consumers with application and enrollment. We appreciate the protection of confidentiality, important to immigrant families, prohibiting disclosure of information by the counselor without authorization from the consumer. Application and enrollment assistance is critical to promoting participation of vulnerable, low-income immigrant families and limited-English proficient individuals. Such assistance, with trained and certified counselors, should be required by HHS.

The rule also should mandate that the certification process include specific components that train CACs to provide culturally and linguistically appropriate assistance.  These components should address how to knowledgeably and sensitively assist limited-English proficient individuals and immigrant families. Training should address concerns of mixed immigration status families with confidentiality and with the impact that applying for ACA programs may have on a family-member’s application for adjustment of immigration status. Immigrant families often are concerned that applying for health care will result in a denial of an application for Lawful Permanent Residency (a “green card”) by USCIS on “public charge” grounds. Training is critical to ensure that the Exchanges, Medicaid and CHIP agencies are welcoming to all potential applicants and can encourage participation by appropriately assisting with their needs and addressing their concerns.

* **We support the requirement that certified application counselors be “trained in and subject to regulations relating to the safeguarding and confidentiality of information,” and the prohibitions against disclosure of applicant or beneficiary information by a counselor without authorization, at §§435.908(c)(3)(ii)(B) and (C), 457.340(a), and 155.225(d)(2).**
* **Recommendation: Amend the rule to require the state to certify Application Counselors, through a process that includes training in how to provide culturally and linguistically appropriate services, especially to vulnerable low-income immigrant families.**

**§155.205(d)**  (Navigator assistance)

We appreciate the NPRM requirement that the Exchange must provide consumer assistance, including Navigators, and that such assisters must be trained in QHP options, insurance affordability programs, eligibility, and benefits rules and regulations. Given that the complexity of immigrant eligibility rules often discourages participation of immigrant families, the training must be culturally-sensitive and linguistically-appropriate to address the needs of limited-English proficient consumers and the special rules pertaining to non-citizens, especially those of low-income. The training should cover how to address concerns of mixed-status immigrant families which tend to discourage enrollment by eligible members of those families.

We also appreciate the provision, §155.205(d)(2), requiring the Exchange to refer potential applicants to consumer assistance programs in the state when available and appropriate. If there are options in the state for immigrant families to receive assistance from trusted community-based organizations, the Exchange should have close referral relationships with these CBOs, understanding that such CBOs often lack capacity to provide additional services without compensation. The Exchange must not consider the CBO to be “available and appropriate” unless the CBO has indicated willingness and capacity to provide such assistance to consumers.

* **We support the requirement at §155.205(d)(1) that Navigators must be trained in affordability programs, eligibility, and benefits rules.**
* **Recommendation: Amend §155.205(d)(1) to require that any individual providing a consumer assistance function under this section be trained in provision of culturally-sensitive and linguistically-appropriate services, prior to providing such assistance.**
* **We support the requirement at §155.205(d)(2) that the Exchange must refer consumers to consumer assistance programs in the state when available and appropriate.**

**§155.345(f) and (g)** (Special rule for immigrants subject to the federal five-year waiting period**)**

The NPRM requires the Exchange to have procedures for enrolling, with APTC and cost sharing reductions, immigrants below 100 percent of the Federal Poverty Level (FPL) who are ineligible for Medicaid or CHIP due to the federal five-year bar. Under NPRM §155.345(g), when an individual applies directly to a Medicaid-, CHIP-, and/or BHP-administering agency, the Exchange enrollment procedures must include notice to that agency, must not duplicate any eligibility and verification findings already made by the transmitting agency, must not request information or documentation already provided to another agency, must determine eligibility without undue delay, and must follow a streamlined process.

* **We support the requirement at §155.345(f) for specific Exchange enrollment procedures for very low income immigrants barred from Medicaid by the federal five year waiting period. We also support the following rule at §155.345(g) proscribing detailed due process rights for Exchange-eligible individuals, such as these vulnerable low-income noncitizens, who apply first at an agency administering Medicaid, CHIP or BHP.**

**§155.420** Special enrollment upon acquiring lawful presence)

The NPRM requires the Exchange to enroll an individual when specified triggering events occur, including the granting of an eligible immigration status or becoming a naturalized U.S. citizen. This rule helps to ensure the immediate enrollment of a previously-ineligible and uninsured immigrant in health coverage as soon as lawful presence is acquired.

* **Support §155.420, protecting uninsured immigrants against undue delay in health insurance enrollment once they acquire a lawfully present immigration status.**

**CONFIDENTIALITY**

**§155.555(g) and (h)** Employer appeals process

In employer appeals, the NPRM provides that neither the Exchange nor the appeals entity may share any tax return information of an employee with the employer in relation to the employee’s eligibility for APTC or cost-sharing reductions. This is a vital protection limiting the personal employee information that can be provided to an employer by the Exchange, preserving the integrity of the taxpaying process and helping to protect an employee’s labor rights.

At §155.555(g)(iii), however, the rule gives the employer in an appeal the right to review data and information used to make the employee’s eligibility determination. We suggest that this proposal is too open-ended, possibly leading to employer knowledge or constructive knowledge of personal information about the employee – such as number of dependents, family income, or the filing of taxes with an ITIN – that could impact worker rights such as job promotion, gender discrimination, or even termination based on immigration status.

* **We support the important protection of the confidentiality of an employee’s and his/her dependents’ personal information, at §155.555(h), which provides vital protection for the confidentiality of tax returns as required by IRC §6103.**
* **Recommendation: Delete §155.555(g)(iii)**

**APPEALS: LANGUAGE SERVICES**

**§ 431.205(e)** (LEP access to the hearing system)

The NPRM requires that the hearing system be accessible to LEP individuals. We appreciate this rule, and believe it could be improved and strengthened with specific implementation instructions to states, either in this regulation or in sub-regulatory guidance. To protect LEP and other vulnerable appellants, final rules or guidance should further specify that the hearing system must not discriminate against any individual on the basis of race, color, national origin, language, or any other prohibited ground.

* **We support §431.205(e) requiring accessibility of the hearing system to LEP persons.**
* **Recommendation: Amend the rule with specific standards for accessibility, and with prohibitions against discrimination based on race, color or national origin.**

**§431.206(b) and (e)** (LEP access to hearing notices)

The NPRM requires that hearing notices be in writing and be accessible to LEP individuals. We support this proposal and ask that it be strengthened with specific mandated translation standards, either in regulation or guidance. Further, since some agencies may not have comprehensive language data on all individuals, if HHS requires taglines in at least 15 languages on all notices, then many LEP individuals will be informed that the notice is important and how to access the information by requesting a written translation or receiving oral communication assistance. Taglines are cost-efficient for states.

* **We support the requirements at §431.206(b) and (e) that hearing and appeals notices be in writing and be accessible to individuals who are LEP.**
* **Recommendation: Amend §431.206(e) by adding the following specific requirements: for any individual the agency knows or should reasonably know is LEP, information must be provided in that individual’s language; and for all notices, the agency must provide taglines in at least 15 languages informing individuals of the availability of written translations or oral assistance to understand the information provided and a toll-free telephone number to request assistance.**

**§155.505(f)** (LEP access to the appeals process generally)

The preamble at 4649 requests comment on §155.505(f) of the proposed Exchange regulation that the appeals processes must be accessible to appellants who are limited-English proficient or who are living with disabilities. We strongly support these requirements as all individuals must be able to actively defend their rights and participate in the appeals process in a meaningful manner. The agency has a duty to provide LEP persons with meaningful access to the appeals process pursuant to Title VI of the Civil Rights Act of 1964 and ACA §1557. The legal duty, and the inclusive goals of health reform, dictate that HHS adopt in regulations specific detailed requirements to provide effective communication with LEP individuals.

The NPRM applies to appeals processes in the Exchange, the same requirement for accessibility of LEP individuals as is provided for Exchange programs and consumer assistance tools at §155.227, which also lists three specific language services: oral interpretation, written translation, and taglines. We appreciate this provision, which should be required of the Exchange for any individual the Exchange knows or should reasonably know is LEP. The description of taglines should be strengthened with a specific requirement that they be provided in at least 15 languages.

* **We support §155.505(f), applying the LEP accessibility requirements of §155.205(c) to Exchange appeals processes.**
* **Recommendation: Amend §155.505(f) to require specific language services including oral interpreting during any hearings and written translations of any documents that will be utilized during the hearing or appeals processes, and taglines in at least 15 languages.**

**§155.520(a)** (Opportunity to file an appeal request in a non-English language)

LEP individuals may need to file appeals in non-English languages, necessitating a requirement of Exchanges that they accept requests for appeals in languages other than English. Without such a requirement, Exchanges may create a barrier to filing an appeal that would result in discrimination against LEP applicants and enrollees.

* **Recommendation: Amend § 155.520(a) to delete “and” after subsection (iii), add “and” at the end of subsection (iv) and add new subsection (a)(i)(v): “In a non-English language from an LEP individual.”**

**§155.530** (LEP rights in a dismissal)

When an LEP individual files an appeal, it is essential to ensure that any withdrawal or failure to appeal is not due to a language barrier. Thus before allowing a withdrawal or failure to appeal, we believe the appeals entity should confirm that information was provided in a language the individual understands. If the individual (or a household contact) has indicated a preferred non-English language, the regulations should prohibit the appeals entity from allowing a withdrawal or dismissal based on a failure to appear without documenting in the individual’s record the appropriate language services that were provided.

* **Recommendation: Amend §155.530(a) by adding a proviso that, for an individual who has indicated a preferred non-English language, the agency must first document in the individual’s record what appropriate language services were provided.**

**§155.535(a)** (LEP access to informal resolution processes)

We recommend that the rules governing informal resolution and hearing also specifically include requirements for LEP accessibility. To comply with due process requirements, all individuals must have the ability to participate in the informal resolution process established by an Exchange. This may require the appeals entity to provide competent interpreters and translated materials.

* **Recommendation: Amend §155.535(a) by adding a new subsection (5) at the end, requiring the informal resolution process to comply with the accessibility requirements of §155.205(c).**
* **Recommendation: Amend §155.535(d) to add a new provision (6) at the end, requiring the Exchange to provide LEP individuals with appropriate language services including competent interpretation and translated materials at no cost.**

1. 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. Kennye, & 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%20pdf/412341-Affordable-Care-Act.pdf). [↑](#footnote-ref-1)