



POLICY & ACTION FROM CONSUMER REPORTS

Via: www.regulations.gov

October 31, 2011

Center for Medicare and Medicaid Services
Department of Health and Human Services,
Attention: CMS-9974-P
P.O. Box 8010
Baltimore, Maryland 21244-8010

Re: File code **CMS-9974-P** - Exchange Functions in the Individual Market:
Eligibility Determinations; Exchange Standards for Employers

Dear Madam or Sir:

Consumers Union, the advocacy division of Consumer Reports, writes today to share our thoughts regarding the proposed rule implementing eligibility determinations for Exchange participation and insurance affordability programs and standards for employer participation in the SHOP.

We commend HHS and its agency partners in crafting draft provisions that strive to implement the Affordable Care Act (ACA) and promote a streamlined eligibility and enrollment process that enables consumers to access coverage accurately, smoothly, and efficiently. To that end, we see a number of laudable principles incorporated throughout the draft Exchange eligibility regulations:

- Treatment of non-applicants – Consumers Union supports the provisions in the proposed regulations that prohibit Exchanges from requiring non-applicants to disclose immigration status or Social Security Number (SSN);
- Self-attestation – Consumers Union applauds the provisions that require Exchanges to accept self-attestation to verify facts that are not used to determine eligibility for the Exchange or insurance affordability programs, including family size and whether the applicant is eligible for employer-sponsored coverage;
- Minimum necessary information – Consumers Union is pleased with the requirement that Exchanges may only request the minimum amount of information necessary for determining eligibility for the Exchange or insurance affordability programs. As articulated below, we call on HHS to define the “minimum amount of information necessary for determining eligibility” rather than leave the definition to States’ discretion;
- Federal electronic data hub – Consumers Union commends the move toward paperless verification, which not only reduces administrative burden, but also should provide for faster, “real-time” eligibility determinations. We also support the provisions that call for pre-populating information based on information obtained from the federal electronic data hub, which an applicant can later affirm, amend, or deny, subject to privacy and security safeguards and the limitation on requesting only the minimum information necessary for determining eligibility;
- Education and assistance – Consumers Union agrees with the explicit requirement on Exchanges to provide education and assistance for verifications and insurance affordability programs (tax credits, cost sharing, Medicaid, CHIP, and the Basic Health Plan);

- Notification – Consumers Union appreciates the preamble language that clarifies that notices should be provided in plain language and in a manner that meets the needs of diverse populations by providing meaningful access. As our comments below indicate, we would like to see the preamble language codified directly into the regulations; and
- Verification time for applicants – Consumers Union endorses the requirement that Exchanges must provide 90 days (with the option for States to provide more) for an applicant to respond to and provide satisfactory evidence to resolve factual inconsistencies.

In addition to the items that we welcome above, there also are a number of provisions that we are concerned about, which we have detailed below.

§155.305(f) - Eligibility for advance payments of the premium tax credit: Compliance with filing requirement

The proposed regulations (§155.310(d)(2)) require the Exchange to permit an enrollee to accept less than the full amount of the advance payment of premium tax credit. In some instances, however, enrollees may choose to opt out of the advance payment altogether and instead obtain the tax credit when federal income tax returns are filed, to avoid unexpected tax liabilities and the reconciliation process. The rule should clarify that consumers are not required to take the tax credit as an advance payment. Without penalty, consumers can wait until their end-of-tax year filing to claim the credit and avert the potential liability during reconciliation with no adverse impact on their eligibility or cost-sharing reductions.

CU Recommendation: Add an additional provision to §155.305(f)(7) to state “Nothing in these provisions shall prevent an eligible enrollee from opting out of advance payment of the premium tax credit. Declining advance payment of the tax credit does not affect the applicant’s ability to file for the credit at the end of the tax year, nor does it adversely affect her or his eligibility for cost-sharing reductions.”

§155.310(d)(2) – Determination of eligibility – Special rules relating to the advance payments of premium tax credit

As articulated in our comments to §155.305(f), the proposed regulations require the Exchange to permit an enrollee to accept less than the full amount of the advance payment of premium tax credit. In some instances, however, enrollees may choose to opt out of the advance payment altogether and instead obtain the tax credit at the end of the year, to avoid any reconciliation. Section 155.305(f) should provide a new sub-section that would explicitly allow the enrollee to opt out of the advance payment altogether.

CU Recommendation: Edit §155.310(d)(2) to include new language (*in italics*) “The Exchange must permit an enrollee to accept less than the full amount, *including opting out altogether*, of advance payment of premium tax credits for which he or she is determined eligible.”

In addition **§155.310(d)(2)** needs to be accompanied by stronger requirements for Exchanges to play a more active role in educating consumers about advance payment of tax credits and the risk of reconciliation payments at the end of the year. In particular, Exchanges should be required to provide sufficient information to applicants on how the advance payment tax credit works, information about the reconciliation process at the end of the tax year, and other pros and cons of deferring some or all of the tax credit.

CU Recommendation: Add an additional provision (iii) that states “*Exchanges must provide education and assistance to applicants regarding advance payment of tax credits, including information about the reconciliation process and the option to decline an advance payment and instead receive the tax credit as part of filing their federal income tax return.*”

§155.310(d)(3) – Special rule relating to Medicaid and CHIP

In this section, the proposed rule requires that Exchanges communicate with the Medicaid and/or CHIP agencies “promptly and without undue delay.” Consumers Union urges HHS to require more precise timeliness standards for Exchanges to communicate information quickly and efficiently. The standard of “promptly and without undue delay” is too broad and ambiguous. Federal standards should provide protections to ensure that Exchanges act in a timely fashion and do not prevent people in need of health coverage from obtaining eligibility determinations as quickly as possible. The timeliness standards should not be left up to individual states, which could result in a variety of standards depending on what state the applicant lives in.

The effort to encourage electronic data exchange of information will facilitate more timely determinations, yet explicit federal standards should be in place that require data transfers between the Exchange and other state agencies to occur no later than X business days.” It would be our suggestion that electronic data transfers could happen “no later than one business day.”

CU Recommendation: Add additional language (*in italics*) to the provision that states “...promptly and without undue delay, *but no later than an average of one business day.*”

§155.310(f) – Notification of eligibility determination

We support the requirement that Exchanges must provide timely notice to applicants of any eligibility determination. The preamble, however, includes specific language that requires that the notice be provided in writing and be one single notice at the end of the eligibility determination process for all programs. The preamble also states that the notice should include information for the applicant that details the steps taken, any additional action needed to complete the process, and information about appeal rights. We believe the preamble language should be explicitly included in this regulatory provision. Additionally, we recommend that states be required to use a template notice that HHS has consumer-tested to ensure that the information is understandable.

CU Recommendation: Add the following language from the preamble to §155.310(f) (*in italics*): "... timely written notice to an applicant of any eligibility determination ..., *which shall include a record of the steps taken and remaining actions needed to complete the eligibility and enrollment process, as well as information regarding his or her right to appeal. Notice shall be written in plain language and available in all languages where the lesser of 5 percent of the population, or 500 LEP individuals in a service area, speak a language. Oral language assistance should also be provided for those seeking in-person or telephone assistance. Applicants may affirmatively indicate they prefer to receive this notice by another means, such as email, fax or telephone call.*"

§155.310(g) - Notice of an Employee's Eligibility for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions to an Employer

We are very concerned that §155.310(g) is overly broad, dismissive of consumer privacy, and could expose workers to retaliatory action by employers who face employer responsibility penalties. The proposed rule is too broad because employers with fewer than 50 "full-time equivalent employees" do not face penalties and do not require a notice. In addition, penalties are not assessed for part-time employees who receive tax credits and/or cost-sharing reductions in the Exchange. Any employer notice provided should be restricted to employers with 50 or more "full-time equivalent employees" and only be required for full-time employees receiving tax credits or cost-sharing reductions in the Exchange.

Moreover, the regulations should be explicit that the Exchange should only provide to the employer the minimal information required to evaluate its liability for employer responsibility payments. Finally, the final rule should require that the notice to the employer specifically state that employers cannot retaliate against employees receiving tax credits or cost-sharing reductions.

CU Recommendation: Revise §155.310(g) to limit the notices to employers with 50 or more "full-time equivalent employees" and require it only for full-time employees receiving tax credits or cost-sharing reductions in the Exchange. Minimize the personally identifiable information that is transmitted to the employer and strengthen the rule's language to require privacy and security safeguards regarding personal information. Add a provision that requires Exchanges to notify employers that they cannot retaliate against employees receiving tax credits of cost-sharing reductions.

§155.315 (g) - Applicant information

As stated above, Consumers Union is pleased with the requirement that Exchanges may only request the minimum amount of information necessary for determining eligibility. However, we believe that there should be a federal standard to define "minimum amount of information necessary for determining eligibility," rather than leave the definition to States' discretion.

CU Recommendation: Add a provision to §155.300(a) that defines “minimum amount of information necessary for determining eligibility” to create a federal standard that all States must comply with.

§155.320(c)(3)(i)(B) – Verification process for advance payments of the premium tax credit and cost-sharing reductions

As stated above, we support the requirement that Exchanges must verify the family size of an applicant by accepting an applicant’s attestation without further verification. We understand that Exchanges may have access to other information that may be different from an applicant’s self-attestation. The Exchange is required to determine if the other information is “reasonably compatible” with the applicant’s self attestation.

The standard for determining what is “reasonably compatible” should be defined by HHS, rather than leave it up to each individual state to define. Otherwise, there will be fifty different meanings for “reasonably compatible.”

CU Recommendation: Add a provision to §155.300(a) that defines “reasonably compatible” to create a federal standard that all States must comply with.

§155.320(c)(4) – Education and Assistance

We applaud HHS for including a responsibility on Exchanges to provide education and assistance to an application filer regarding the verification process related to eligibility for insurance affordability programs. We believe this provision should be broadened to define an enumerated list of what might be covered under education and assistance. As well, the requirements for education and assistance should not be limited to those working with insurance affordability programs, but should be extended to all individuals applying for coverage in the Exchange.

CU Recommendation: Please see Consumers Union’s comments on Establishment of Exchanges and Qualified Health Plans (CMS-9989-P) for a detailed recommendation on Exchange education and assistance functions, including assistance with the verification process related to eligibility.

§155.335(a) – Annual eligibility redetermination

This provision requires the Exchange to redetermine eligibility on an annual basis, but does not indicate a timeframe for when the redetermination must occur. We recommend that HHS clarify the regulations to indicate that annual eligibility redeterminations must be conducted in concert with the annual open enrollment period. Consumers Union’s comments on annual open enrollment are incorporated here by reference to our comments in the notice of public rule making - CMS-9989-P.

CU Recommendations: Add to §155.335(a) language (*in italics*) as follows: “The Exchange must redetermine the eligibility of an enrollee in a QHP through the Exchange on an annual basis, *but redeterminations must be timed to provide notice with sufficient time for enrollees to avail themselves of the annual open enrollment period.*”

§155.335(f) – Response to redetermination notice

This provision requires an enrollee to sign and return a redetermination notice, however it also permits an Exchange to move forward and redetermine eligibility for Exchange programs (including Exchange insurance affordability programs) even when an enrollee does not return the notice. It is unclear why enrollees whose information is current are required to sign and return. (We also note a typographical error in the reference at the bottom of (f)(2) which should refer to (g)(1), but in the proposed draft regulations refers to (h)(1).)

CU Recommendation: Delete §155.335(f)(1), the requirement that an enrollee sign and return a redetermination notice.

§155.345(b) – Responsibilities related to individuals potentially eligible for Medicaid based on other information or through other coverage groups

In this provision, the rule requires that the Exchange conduct a “basic screening,” but fails to provide any definition to guide Exchanges. HHS should establish a definition for “basic screening,” as well as federal standards for what is required of an Exchange when conducting such a screening. The standard should be rigorous, especially given circumstances where a state provides a different benefit package for the MAGI population as compared to the non-MAGI population.

Moreover, HHS should require that the Exchange inform applicants that a “basic screening” is simply a preliminary collection of information and is not an eligibility determination. The notice to applicants should provide that the applicant is entitled to a full eligibility determination from the Medicaid agency.

CU Recommendation: Add a provision to §155.300(a) that defines “basic screening” to create a federal standard that all States must comply with.

§155.345(c) – Individuals requesting additional screening

The proposed language requires the Exchange to provide the opportunity for a full Medicaid eligibility determination without having to resubmit information or re-apply, but fails to require the Exchange to notify applicants of this important option. HHS should require that Exchanges provide information to applicants about this right, including information that informs them of how to request a full Medicaid eligibility determination.

The proposed rule requires that when an applicant requests a full determination, the Exchange must transmit “promptly and without undue delay” applicant information to the Medicaid agency. HHS should establish a precise timeliness standard, similar to the requirement we supported in our comments for §155.310(d)(3) above.

Additionally, the rules should allow an applicant to enroll in Exchange coverage and obtain temporary cost-sharing reductions or tax credits that they are eligible for, while awaiting a full Medicaid determination.

CU Recommendation: Add a provision to §155.345(c) that states that an Exchange must *"Provide adequate notice to individuals that they have a right to request a full Medicaid determination. The Exchange shall include in the notice detailed information about the steps required to initiate the full eligibility determination process. Notice shall be written in plain language and available in all languages where the lesser of 5 percent of the population, or 500 LEP individuals in a service area, speak a language. Oral language assistance should also be provided for those seeking in-person or telephone assistance."*

CU Recommendation: Add additional language (*in italics*) to the provision that states "...promptly and without undue delay, *but no later than one business day.*"

CU Recommendation: Add a provision to §155.345(c) that requires the Exchange to permit an applicant to enroll in Exchange coverage and obtain temporary cost-sharing reductions and/or tax credits while awaiting a full Medicaid determination.

Additional Recommendations

The act of making eligibility determinations will require significant data sharing between the Exchange, the Federal government, state agencies, QHPs, and employers. Much of this information is sensitive and/or includes individually identifiable information. Consumers Union calls on HHS to incorporate into all of its Exchange regulations the strongest possible set of required administrative, physical and technical safeguards with respect to the collection, receipt, use, disclosure, and disposal of consumer information. Please see Consumers Union's comments on Establishment of Exchanges and Qualified Health Plans (CMS-9989-P) for a detailed recommendation on the privacy and security safeguards needed.

Consumers Union appreciates the preamble language that clarifies that all notices should be provided in plain language and in a manner that meets the needs of diverse populations by providing meaningful access. We call on HHS to incorporate the preamble language into this set of regulations to ensure that states adhere to this requirement.

On behalf of Consumers Union, we welcome the opportunity to comment on these important regulations and look forward to future NPRMs on such things as quality measures and due process rights.

Sincerely,

A handwritten signature in cursive script that reads "Julie Silas".

Julie L. Silas
Senior Policy Analyst
West Coast Office