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February 28, 2014

Office of the Clerk
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Jacqueline Halbig et al. v. Kathleen Sebelius et al.* (No. 14-5018)

Dear Clerk of the Court:

On February 27, 2014, the Centers for Medicare and Medicaid Services, a division within Defendant-Appellee U.S. Department of Health and Human Services ("HHS"), issued a bulletin relevant to the issues presented on this appeal. (*See* Exh. A.)

This case involves IRS regulations purporting to extend federal subsidies under the ACA to health coverage purchased through insurance Exchanges established by HHS under § 1321 of the Act, even though the ACA's plain text limits such subsidies to coverage purchased "through an Exchange established by the State under section 1311" of the Act. (App.Br.17-26.)

In its new bulletin, HHS has now eliminated even the requirement that, to be eligible for a subsidy, the coverage must be purchased "through an Exchange." The bulletin provides that if someone enrolled in "coverage offered outside of the Marketplace [Exchange]," the Exchange may nonetheless later "deem the individual to have been enrolled … through the Marketplace." (Exh. A, at 2.) In such cases, the individual "will be treated for all purposes as having been enrolled through the Marketplace since the initial enrollment date," and so will be eligible on a "retroactive" basis for federal subsidies under 26 U.S.C. § 36B. (*Id.*)

This bulletin is notable for two reasons. *First*, it further illustrates the Government's lack of fidelity to the conditions that Congress included in § 36B. Not only does the Government believe that it may simply "deem" HHS-established Exchanges to be established "by the State" notwithstanding the lack of any statutory authority for such transmogrification, but that it may also "deem" individuals who buy coverage *outside* an Exchange to have purchased it *on* an Exchange. If such administrative revision—simply "deeming" A to be B—were permitted, there is literally nothing in the ACA (or any other statute) that could not be reversed by agency fiat. *Second*, the bulletin was issued by HHS, not the IRS. This further demonstrates the intertwined nature of Titles 26 and 42 of the U.S. Code with respect to eligibility for the ACA's subsidies, and thus the impropriety of according deference to either agency. (App.Br.46-49.)

Sincerely,

/s/ Michael A. Carvin__

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Counsel for Appellants

cc: All counsel of record, whom the above-signing attorney certifies were served with this letter on February 28, 2014, via ECF at their respective email addresses.

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

Date: February 27, 2014

Subject: CMS Bulletin to Marketplaces on Availability of Retroactive Advance Payments of the PTC and CSRs in 2014 Due to Exceptional Circumstances

Background

This guidance is being provided to Marketplaces that, due to technical issues in establishing automated eligibility and enrollment functionality, have had difficulty in providing timely eligibility determinations to applicants and enrolling qualified individuals in Qualified Health Plans (QHPs) through the Marketplace during the initial open enrollment period for the 2014 coverage year. Such a circumstance may be considered an exceptional circumstance for individuals who were unable to enroll in a QHP through the Marketplace due to these issues. In this guidance, we discuss the availability of advance payments of the premium tax credit (APTC) and advance payments of cost-sharing reductions (CSRs) on a retroactive basis to an issuer once the Marketplace has provided a qualified individual with an appropriate eligibility determination and has determined that the individual is eligible for such assistance and the individual has enrolled in a QHP through the Marketplace. We also clarify the attendant responsibilities of the QHP issuer in this circumstance.

Provision of APTCs and CSRs

In accordance with applicable Federal regulations under 45 CFR 155, Subpart D, individuals must receive an eligibility determination from the Marketplace to enroll in a QHP offered through the Marketplace and in order to receive CSRs and the premium tax credit (PTC) made available through the Affordable Care Act. In order for the Marketplace to perform a determination of eligibility for coverage offered through the Marketplace, an individual must have submitted an application for coverage to the Marketplace using an HHS-approved single, streamlined application during the open enrollment period.

Not otherwise enrolled in coverage

First, if an individual in the exceptional circumstance described above has *not* been enrolled in any health coverage continuously since January 1, 2014, including QHP coverage offered outside of the Marketplace or otherwise, before a successful eligibility determination is obtained, when he or she receives a determination of eligibility for coverage through the Marketplace and enrolls in a QHP through the Marketplace, the Marketplace may allow for coverage retroactive to the date, established by the Marketplace, on which coverage would have been effective absent the exceptional circumstance described above, as provided under 45 CFR 155.310(f)(1) and 45 CFR 155.420(b)(2)(iii). For instance, the Marketplace may establish an effective enrollment date based on the date that the individual originally submitted an application for coverage to the Marketplace. The individual will be treated for all purposes as having been enrolled in the QHP since the effective enrollment date. The individual will be responsible for the enrollee's portion of the premium for the retroactive coverage period. If the Marketplace determines the individual eligible for APTCs and CSRs, and assigns the individual to a cost-sharing reduction plan variation, CMS will pay advance payments of the PTC and CSRs to the Marketplace QHP issuer on a retroactive basis, based on the effective enrollment date established by the Marketplace. The Marketplace QHP issuer must collect and adjudicate the claims incurred by the individual starting from the retroactive enrollment date as if the individual had been enrolled in the applicable plan variation since that date, and then must credit or refund any excess cost sharing as further detailed below. Cost-sharing reduction reconciliation will occur with respect to the Marketplace QHP for all cost-sharing reductions provided beginning with the (retroactive) effective date of coverage.

Enrolled in a QHP outside the Marketplace

Additionally, if an individual in the exceptional circumstance described above *is* enrolled in QHP coverage offered outside of the Marketplace, when he or she receives a determination of eligibility for coverage through the Marketplace, the Marketplace may deem the individual to have been enrolled in the QHP through the Marketplace retroactive to the date on which the individual first enrolled in the QHP outside of the Marketplace. In that case, the individual will be treated for all purposes as having been enrolled through the Marketplace since the initial enrollment date. The individual will be responsible for the enrollee's portion of the premium for the retroactive coverage period. If the Marketplace determines that the individual is eligible for APTCs and CSRs, and the individual is assigned to a cost-sharing reduction plan variation, CMS will provide advance payments of the PTC and CSRs to the issuer on a retroactive basis back to the effective date of Marketplace enrollment. In addition, the issuer must re-adjudicate the claims incurred by the individual starting from the retroactive enrollment date under the QHP as if the individual had been assigned to the applicable plan variation since that date, and then must credit or refund any excess cost sharing or premium amounts, as further detailed below. Cost-sharing reduction reconciliation will occur for all cost-sharing reductions provided beginning with the (retroactive) effective date of coverage.

In this case, the Marketplace will also provide a special enrollment period (SEP) under 45 CFR 155.420(d)(9) to allow these individuals the opportunity to change QHPs prospectively at the time the eligibility determination is received. When this SEP is made available, and should an individual elect to change QHP issuers, CMS would provide advance payments of the PTCs and CSRs to the new issuer prospectively based on the coverage effective date provided under the SEP.

Reimbursement of the enrollee for premiums and cost-sharing paid

In both of the situations described above, if an individual is determined eligible for retroactive CSRs or advance payments of the PTC, the issuer of the QHP will be required to adjudicate or re-adjudicate, as applicable, the enrollee's claims incurred during the retroactive period, and refund or credit to the enrollee any excess cost sharing or premiums paid if applicable, and ensure the provision of refunds or credits of any excess payments made by or for the enrollee for covered benefits and services incurred during the retroactive coverage period. Unless the individual requests the issuer provide a refund, the issuer may elect to provide a credit toward the individual's premium payment for each subsequent month for the remainder of the period of enrollment or benefit year until the credit is fully applied. Any refund or credit for any excess cost-sharing or premium paid for or on behalf of the individual must be provided (or begin to be provided in the case of a credit) within 45 calendar days of the date of discovery of the excess cost-sharing or premium paid, as detailed in 45 CFR 156.410(c)(1). If a credit remains at the end of the period of enrollment or benefit year, the issuer must refund the enrollee any remaining excess cost sharing or premium paid by or for the enrollee within 45 calendar days of the end of the period of enrollment or benefit year, whichever comes first.

Arrangements between the State and the QHP issuer

If the State has been providing premium or cost-sharing subsidies to an individual who has existing QHP coverage outside of the Marketplace, upon the individual receiving an eligibility determination, any reimbursement to the State for premium subsidies and reductions in out-of-pocket expenses provided on behalf of the individual prior to the individual's enrollment in the QHP through the Marketplace will be the responsibility of the QHP issuer and the State.

Information reporting regarding APTCs

It is anticipated future guidance by the Treasury Department and the Internal Revenue Service will provide that the reporting under section 36B(f)(3) of the Internal Revenue Code of any APTCs paid on a retroactive basis must show the APTC amounts properly allocated to the month(s) for which they were paid. For example, if in April 2014 an individual is enrolled with a retroactive enrollment date of January 1, 2014, and APTCs are paid for retroactively for January through March, then the reporting would show the retroactive APTC amount properly allocated among January, February, and March.

Nondiscrimination

The Marketplace must not discriminate among issuers participating in the Marketplace, and should be consistent in its treatment of issuers when applying effective date rules. In accordance with 45 CFR 155.120(c), the Marketplace must treat enrollees in similar circumstances in a consistent manner and ensure that accessibility requirements under 45 CFR 155.205(c) are met.