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Part III

Department of Health and Human Services

45 CFR Parts 155 and 157
Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 155 and 157

[CMS–9974–P]

RIN 0938–AR25

Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers

AGENCY: Department of Health and Human Services.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement certain functions of the new Affordable Insurance Exchanges ("Exchanges"), consistent with title I of the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010, referred to collectively as the Affordable Care Act. The Exchanges will provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options on the basis of price, quality, and other factors. The Exchanges, which will become operational by January 1, 2014, will help enhance competition in the health insurance market, improve choice of affordable health insurance, and give small businesses the same purchasing clout as large businesses. The specific Exchange functions proposed in this rule include: Eligibility determinations for Exchange participation and insurance affordability programs and standards for employer participation in SHOP.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. Eastern Standard Time (EST) on October 31, 2011.

ADDRESSES: In commenting, please refer to file code CMS–9974–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9974–P, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9974–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document. For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Laurie McWright at (301) 492–4372 for general information matters.

Alissa DeBoy at (301) 492–4428 for general information and matters related to part 155.

Michelle Strollo at (301) 492–4429 for matters related to eligibility.

Naomi Senkeeto at (301) 492–4419 for matters related to part 157.

SUPPLEMENTARY INFORMATION: A detailed Preliminary Regulatory Impact Analysis associated with this proposed rule is available at *http://cciio.cms.gov* under "Regulations and Guidance." A summary of the aforementioned analysis is included as part of this proposed rule.

Abbreviations

CHIP Children's Health Insurance Program
CMS Centers for Medicare & Medicaid Services
DOL U.S. Department of Labor
ERISA Employee Retirement Income Security Act (29 U.S.C. section 1001, *et seq.*)
FPL Federal Poverty Level
HHS U.S. Department of Health and Human Services
HMO Health Maintenance Organization
IHS Indian Health Service
IRS Internal Revenue Service
NAIC National Association of Insurance Commissioners
OMB Office of Management and Budget
OPM Office of Personnel Management
PHS Act Public Health Service Act
QHP Qualified Health Plan
SHOP Small Business Health Options Program
SSA Social Security Administration
The Act Social Security Act
The Code Internal Revenue Code of 1986

Executive Summary: Starting in 2014, individuals and small businesses will be able to purchase private health insurance through State-based competitive marketplaces called Affordable Insurance Exchanges, or "Exchanges." Exchanges will offer Americans competition, choice, and clout. Insurance companies will compete for business on a level playing field, driving down costs. Consumers will have a choice of health plans to fit their needs. And Exchanges will give individuals and small businesses the same purchasing clout as big businesses. The Departments of Health and Human Services, Labor and the Treasury (the Departments) are working in close coordination to release guidance related to Exchanges. The first in this series was a Request for Comment relating to Exchanges, published in the **Federal Register** on August 3, 2010 (75 FR 45584). Second, Initial Guidance to States on Exchanges was issued on November 18, 2010. Third, a proposed rule for the application, review, and reporting process for waivers for State innovation was published in the **Federal Register** on March 14, 2011 (76 FR 13553). Fourth, two proposed regulations were published in the **Federal Register** on July 15, 2011 (76 FR 41866 and 76 FR 41930) to implement components of the Exchange and health insurance premium stabilization policies in the Affordable Care Act. Fifth, a proposed regulation for the

individual cannot attest, the attestation of a parent, caretaker, or someone acting responsibly on behalf of such an individual. In paragraph (c)(2), we propose that the attestations specified in § 155.310(d)(2)(ii) and § 155.315(e)(4)(ii), which result in the authorization of advance payments of the premium tax credit, must be made by the primary taxpayer. This is because these attestations are designed to ensure that the primary taxpayer appreciates and accepts the tax consequences that follow from receipt of advance payments.

b. Eligibility Standards (§ 155.305)

In § 155.305, we propose to codify the eligibility standards for enrollment in a QHP and for insurance affordability programs.

In paragraph (a), we propose that the Exchange determine an applicant eligible for enrollment in a QHP if he or she meets the basic standards for enrollment in a QHP, which are taken from section 1312(f) of the Affordable Care Act. First, in paragraph (a)(1), we propose to codify section 1312(f)(3) that in order to be eligible for enrollment in a QHP, an individual must be a citizen, national, or a non-citizen lawfully present, and be reasonably expected to remain so for the entire period for which enrollment is sought. In proposed § 155.20, the term "lawfully present" is adopted as defined in 45 CFR 152.2. Since the Exchange will also be determining eligibility for Medicaid and CHIP, we intend to align the requirements for lawful presence with that of the State option for Medicaid and CHIP under section 1903(v)(4) of the Act, as added by section 214 of the Children's Health Insurance Program Reauthorization Act (Pub. L. 111–3, 123 Stat. 8); to the extent that the Secretary amends the definition for Medicaid and CHIP in future rulemaking, we intend to adjust the Exchange rules accordingly.

We solicit comments regarding the codified language in paragraph (a)(1) that an individual be "reasonably expected," for the entire period for which enrollment is sought, to be a citizen, national, or non-citizen lawfully present, which comes directly from section 1312(f)(3) of the Affordable Care Act. We clarify that the period for which enrollment is sought does not have to be an entire benefit year. In particular, we seek comment on how this policy can be implemented in a way that is straightforward for individuals to understand and for the Exchange to implement.

In paragraph (a)(2), we propose to codify section 1312(f)(1)(B) that in order to be eligible for enrollment in a QHP, an individual must not be incarcerated, with the exception of incarceration pending the disposition of charges.

In paragraph (a)(3), we propose the standard regarding residency. Section 1312(f) of the Affordable Care Act provides that in order to enroll in a QHP, an individual must reside in the State that established the Exchange. When discussing the residency standard for the Exchange, we use the term "service area of the Exchange" to account for regional or subsidiary Exchanges that serve broader or narrower geographic areas than a single State, as well as for situations in which a Federally-facilitated Exchange is operating in a State. We clarify that this residency standard is designed to apply to all Exchanges, including regional and subsidiary Exchanges. In order to codify the residency standard of section 1312(f) to take account of the options under sections 1311(f)(1) and 1311(f)(2), in paragraph (a)(3)(i), we propose that an individual aged 21 or older who is not institutionalized, is capable of indicating intent, and is not receiving a State supplementary payment (State-funded cash assistance for certain individuals receiving SSI) meets the residency standard for enrollment in a QHP if the applicant intends to reside in the State within the service area of the Exchange through which the individual is requesting coverage.

In general, we propose to align the Exchange residency standard with the residency standards proposed for Medicaid, which are proposed in 42 CFR 435.403 of the Medicaid proposed rule. Such Medicaid residency standards include an "intent to reside" standard. This "intent to reside" standard applies to individuals 21 and over who are seeking coverage through the Exchange and who intend to reside within the service area of the Exchange provided that an individual does not fall into special residency categories described in paragraph (a)(3)(iii). This phrase precludes visitors to the service area of an Exchange from meeting the residency standard, but accommodates those individuals who may transition between service areas of different Exchanges, such as seasonal workers and individuals seeking employment in the State or service area of the Exchange. This also allows individuals who are absent temporarily from the service area of an Exchange to remain within the same Exchange during the temporary absence. Furthermore, while we do not include the words "live" or "living" in the proposed residency requirements, we will interpret these proposed regulations such that an adult's residency will be based on where he or she is living, and expect that he or she must also maintain the present intent to reside in the State within the service area of the Exchange that is being claimed. Along these lines and in accordance with the language in section 1312(f)(3) of the Affordable Care Act, which we interpret to allow an applicant to request coverage for less than a full calendar year, we clarify that this residency standard does not require an individual to intend to reside for the entire benefit year. In paragraph (a)(3)(ii), we propose that an individual under age 21 who is not institutionalized, is not receiving payments under Title IV–E of the Act (such as foster care assistance and adoption assistance), is not emancipated, and is not receiving a State supplementary payment, meets the residency standard for enrollment in a QHP if he or she resides within the service area of the Exchange through which he or she is requesting coverage, to account for situations in which an individual under age 21 is unable to express intent.

We note that Medicaid has adopted a number of additional rules regarding residency for special populations, including institutionalized individuals, individuals receiving Title IV–E payments, individuals receiving State supplementary payments, individuals incapable of expressing intent, and emancipated minors. In paragraph (a)(3)(iii) of this section, we propose that the Exchange follow these Medicaid residency standards (which are proposed in the Medicaid proposed rule at 42 CFR 435.403) and the policy of the State Medicaid or CHIP agency to the extent that an individual is specifically described in that section and not in paragraphs (a)(3)(i) or (ii). We continue to work across HHS to ensure that the Exchange, Medicaid, and CHIP can reach a definition or set of definitions of residency that will enable a uniform eligibility determination process for the vast majority of individuals to reduce complexity and confusion for all involved parties; we solicit comments on this topic.

We also recognize that there are a number of situations in which a tax household may include members residing in different service areas served by different Exchanges. In paragraph (a)(3)(iv) of this section, we propose that for a spouse or a tax dependent who resides outside the service area of the primary taxpayer's Exchange, such as when a non-custodial parent claims a child as a tax dependent, the spouse or tax dependent will be permitted to either: (1) Enroll in a QHP through the Exchange that services the area in which