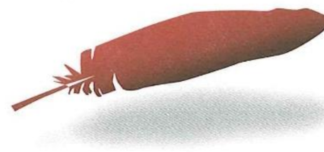
National Indian Health Board



Submitted online at http://www.regulations.gov

July 28, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS Desk Officer

RE: CMS-9941-P, Annual Eligibility Redeterminations for Exchange Participation and Insurance Affordability Programs and associated CMS Guidance on Annual Redeterminations for Coverage for 2015

I write on behalf of the National Indian Health Board (NIHB) to comment on the Centers for Medicare & Medicaid Services' (CMS) proposed regulations[1] and an associated guidance letter regarding annual eligibility redeterminations and re-enrollment in plans offered through the Marketplaces. We appreciate the opportunity to provide comments.

Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives. The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service ("IHS") Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act ("ISDEAA"), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

Summary of Recommendations

This comment letter from the NIHB includes, in part, the following recommendations:

- We strongly recommend that CMS more fully engage in tribal consultation on these matters by reviewing with the Tribal Technical Advisory Group (TTAG) the proposed redetermination procedures and notices for people with Indian status prior to finalizing the proposed rule and the related guidance document and notices.

[1] 79 Fed. Reg. 37262 (July 1, 2014)

- We recommend that Exchanges issue notification letters to people currently enrolled in zero cost sharing plan variations and limited cost sharing plan variations that contain information that is pertinent to persons enrolled in these plans and excludes conflicting information and information that is not applicable to enrollees in these plan variations.

    - For example, we recommend that statements indicating that all enrollees, including American Indians and Alaska Natives (AI/ANs), must enroll in silver level coverage to maintain cost sharing protections be removed from any notices to AI/ANs.

- Establish an algorithm for the auto-enrollment of AI/AN enrollees in plans for 2015 that recognizes the preference of AI/ANs to secure bronze level coverage and to maintain access to cost sharing protections.

- Include in one or more notices to enrollees information that clearly indicates and explains the eligibility determination (*e.g.*, eligible for limited cost sharing plan variation) and clearly presents key changes from 2014 to 2015 (*e.g.*, include table showing changes in premium tax credits and net premiums from 2014 to 2015) under the plan selected for auto-enrollment.

- Increase the number of and accessibility to Call Center staff who have expertise in Indian-specific provisions contained in the Affordable Care Act.

Tribal Consultation and CMS Internal Processes for Review

The proposed regulation states in the background section under *B. Stakeholder consultation and Input:*

> HHS has consulted with stakeholders on a number of policies related to the operation of Exchanges, including eligibility redetermination. HHS consulted with stakeholders through regular meetings with the National Association of Insurance Commissioners (NAIC), regular contact with States through the Exchange grant process, and **meetings with tribal leaders and representatives**, health insurance issuers, trade groups consumer advocates, employers, and other interested parties. We considered all of the public input as we developed the policies in this proposed rule. [*emphasis added*]

On June 26, 2014 CMS announced that it would host a call that day with the topic of an update on the Affordable Care Act. The call, which covered the just-released information on redeterminations and re-enrollment, was open to all "stakeholders": there was no Indian-specific information and no questions from or to representatives of Tribes and Tribal Organizations. An All Tribes Call was held on this subject on July 21, three weeks after the Notice of Proposed Rulemaking (NPRM) was issued.

While the statement in the background section appears to be boiler plate wording, it is disingenuous at best and flatly false at worst. Furthermore, it violates the CMS Tribal Consultation policy and is emblematic of the on-going problem of CCIIO issuing regulations without any pre-release review or revisions from groups with expertise in Indian health care. If Tribes had been consulted, they would have been able to identify serious inaccuracies concerning the rights of American Indians and Alaska Natives (AI/AN or Indians) under the Affordable Care Act. For example, the NPRM erroneously states in section 156.1255 that issuer letters must include:

> (d) For an enrollment group that includes an enrollee with cost sharing reductions, but for whom no QHP under the product remains available for renewal at the silver level, an explanation that unless the enrollment group selects a silver-level AHP through the Exchange, no cost-sharing reductions will be provided.

This is incorrect because people with Indian status have access to zero cost sharing and limited cost sharing plan variations for every plan at every metallic level.

<u>Information and Procedures are Needed for People with Indian Status Enrolled in Zero Cost Sharing Plans and Limited Cost Sharing Plans</u>

On the June 26 teleconference, CMS representatives explained that the purpose of the proposed policy was to keep people who had enrolled in insurance plans through the marketplace in 2014 from dropping out of insurance in 2015. The NIHB supports this goal. However, we recommend that **Exchanges issue notification letters to people currently enrolled in Indian-specific zero cost sharing and limited cost sharing plan variations that contains information pertinent to persons enrolled in these plans.** As an alternative, CMS should consider adding language specific to American Indians and Alaska Natives (AI/ANs) to the standard letters; however, we believe that approach would result in making the letters confusing to AI/ANs, as well as others who receive it, if these letters do not exclude non-applicable and possibly conflicting "standard" language.

The current regulations detailing the redetermination and re-enrollment procedures allow an individual who is enrolled during the 2014 plan year in a Qualified Health Plan (QHP) through an Exchange (and whose QHP remains available) to renew coverage for the following year without reapplying or having to take other actions.

The NPRM outlines three types of notices that the Exchange could send to enrollees based on the information received:

1) <u>Standard Notice</u>**:** The Exchange is to provide a standard notice to all qualified individuals that includes, at a minimum, the content specified under the process described in 45 C.F.R. § 155.335(b). <u>For an enrollee who did *not* authorize the Exchange to request updated tax return information</u> for use in the annual redetermination process, and who received advance premium tax credits (APTCs) or cost sharing reductions

(CSRs), the Exchange would additionally explain that unless the individual contacts the Marketplace to obtain an updated eligibility determination by the last day on which a plan selection may be made for coverage effective January 1, 2015 in accordance with the effective dates specified in 45 CFR §155.410(f), APTC and CSR will end on December 31, 2014 and the Marketplace will renew the enrollee's coverage in a QHP for 2015 without APTC and CSR. **The problem with this standard notice is that AI/ANs do not have to have an income determination to enroll in a limited cost sharing plan variation. The standard notice would therefore likely confuse such AI/ANs and lead to errors in the reenrollment process.**

2) Income-Based Outreach Notice**:** The Exchange will provide an income-based outreach notice to individuals who are enrolled in a QHP, receive APTC and / or CSR, and authorized the Marketplace to request updated tax return information for use in the annual redetermination process. The income categories proposed in the NPRM do not correspond to categories of income that are relevant to AI/AN cost sharing reductions.

3) Special Notice**:** For individuals who are enrolled in a QHP with APTC or CSR and whose updated information reflects income in excess of 500 percent of the federal poverty level (500% FPL), the special notice will inform the enrollee that if he/she does not contact the Marketplace to obtain an updated eligibility determination, the Marketplace will discontinue his or her eligibility for APTC and CSR at the end of 2014 and renew the enrollee's coverage in a QHP for 2015 without APTC and CSR. **However, people with Indian status are statutorily eligible to retain their limited cost sharing plan regardless of their income level.**

In the published guidance and the NPRM, there are no special notifications for people with Indian status who are enrolled in zero cost sharing and limited cost sharing plans, which operate differently than the non-Indian APTC and CSR provisions. For example, people of any income level with Indian status can receive cost sharing reductions by enrolling in limited cost sharing plans (at any metal level) with no APTC, even if an income determination is not requested. Zero cost sharing plans are available for people with Indian status who have income up to 300% of FPL. Neither the NPRM nor the guidance address these nuances.

Furthermore, the letters to people with Indian status should clearly state that they can change plans during monthly special enrollment periods and that they must select a plan by the 15th of the month for coverage to begin on the first of the following month. It is similarly important that letters to people with Indian status do not contain threatening language about maintaining minimum essential coverage, as they are eligible for an exemption.

We strongly urge CMS to review the proposed redetermination procedures and notices for people with Indian status with the TTAG and its ACA Policy Subcommittee prior to finalizing the proposed rule and guidance document.

Indian-specific Rules are Needed for Auto-enrollment of AI/ANs in Plans

The NPRM offers the following algorithm for auto-enrollment of an enrollee into a plan offered by the same issuer if the product[2] that includes the QHP plan in which the individual is enrolled in 2014 is no longer available for 2015. Under the Proposed Rule, the issuer of the enrollee's current plan may reenroll the enrollee in a plan in the issuer's most similar product:

1. At the same metal level as the enrollee's current QHP.
2. If no plan available in same metal level, in a QHP one metal level higher or lower.
3. If no plan available in next metal level, l in any other QHP offered through the Exchange by the issuer.
4. In a similar product offered outside the Exchange by the issuer (without premium tax credits or cost sharing reductions).

The proposed guidance for selecting new plans for individuals simply does not work for people who have Indian status under the Affordable Care Act, as most AI/ANs have and will enroll in bronze-level coverage with either zero cost sharing or limited cost sharing plans and will want to stay in a bronze level plan. The algorithm for the person with Indian status should be:

1. Current plan.
2. Lowest cost bronze-level plan that is not a closed panel HMO plan[3] and that is offered by same issuer as the issuer of the enrollee's current plan.[4]
3. Lowest cost bronze-level plan that is not a closed panel HMO plan
4. Lowest cost silver-level plan that is not a closed panel HMO plan and that is offered by same issuer as the issuer of the enrollee's current plan.
5. Lowest cost silver-level plan that is not a closed panel HMO plan.

As discussed below, however, this algorithm must be supplemented with a notice letter to the AI/AN enrollee that encourages them to go back to the website to determine whether they could enroll in a more advantageous plan.

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[2] We understand "product" to mean a discrete package of benefits offered by an issuer using a particular network type (*e.g.*, HMO, PPO) within a particular service area. A product contains multiple QHPs with various metal levels and cost-sharing variations. We encourage CMS to provide a formal definition of "product" in regulations.
[3] For definition of "closed panel HMO" plan for these purposes, see CMS, "Frequently Asked Questions #3", released April 11, 2013.
[4] The NIHB restates an earlier recommendation that issuers be required to offer a bronze-level QHP, in addition to the current requirement to offer a silver-level and a gold-level QHP, for each product offered by the issuer.

Form and Content for Notification Letters from Issuers

Although we support the NPRM's suggestion that each individual receive a single letter that includes all the necessary reenrollment information, the NPRM and guidance do not give issuers enough specifics to assure that the letters will be clear and not confusing to the recipients.[5]

In order to better address these issues, at a minimum, the letter should have a table that compares the premiums and tax credits from 2014 to 2015, so that the recipient can clearly see what is changing. For example:

	Your current plan in 2014	The plan you are being enrolled in for 2015
Monthly Premium		
Advanced Payment of Tax Credits		
Amount you will pay monthly if you remain in this plan		

In addition, the notice should indicate whether enrollees are eligible for the "zero cost sharing plan variation" or the "limited cost sharing plan variation", rather than include a general statement of eligibility for "a plan with lower copayment, coinsurance, and deductibles (03)", and the notice should explain the cost sharing protections in simple terms. The notice should also include a Web link to a list of the providers in the plan network. This would allow AI/ANs to know whether their Indian health providers are included in the network of the plan.

The notice should also clearly state that the recipient could have a higher APTC, and therefore a lower amount to pay, if they contact the Exchange via the Web site or Call Center report any change in projected income for the following year and authorize the exchange to adjust their level of tax credits. And, it should tell them that they can see their other options on the Marketplace Web site.

In addition to sending the auto-enrollment letter to the enrollee, if there is an Indian health program assisting in payment of premiums for individuals, that sponsorship program should receive a copy of the notification regarding changes in plans, premiums and networks.

[5] For example, as noted above, the NPRM erroneously says that all individuals must enroll in a silver level plan in order to maintain eligibility for cost-sharing reductions, which is not true in the context of AI/ANs.

Redeterminations of MAGI

The NPRM proposes new rules regarding reporting income for purposes of redetermination of tax credits and cost sharing reductions. Under *II. Provisions of the Proposed Regulations, A. Part 155* the background information states:

> Unlike Sec. 155.330, we do not propose to allow the Exchange to establish a reasonable threshold for changes in income, such that a qualified individual who experiences a change in income that is below the threshold would not be required to report such change, since we believe that reporting of all income changes is important at the time of annual redetermination.[emphasis added]

It is not clear what is actually expected with regard to income changes. For Income reporting is not difficult for a person who is salaried or has a job with fixed hours and fixed pay, the income reporting is not difficult. However, many AI/ANs work seasonally, part-time, or intermittently and they may be unable to know their income for the past year during the November open enrollment period, as they would not receive their employer tax forms until March of the following year. Previously, it was understood that the reconciliation during the tax filing process would account for any deviations in the estimated income for the year.
A concern with the rule is the potential for the person to be prosecuted for false information on their application. Even if that prosecution is not intended, it could have a chilling effect on potential applicants.

Increased Role for Call Center

The NPRM states that Exchanges will be no longer required to permit changes to be reported via mail, and the FFM will no longer permit changes to be reported via mail, Enrollees will be encouraged to use the Call Center to update their information on income and family size, as well as to select a different plan. To avoid confusion, the plan issuer must state in the reenrollment letter that individuals can go to the Marketplace Web site or the Call Center for a redetermination of APTC and a different plan selection.

Because of the greater reliance on the Call Center, it is especially important that the Call Center have people available who are specialists in Indian-specific provisions of the Affordable Care Act. With a very limited number of Indian Navigator programs available, if there is not an increase in the number of and accessibility to Call Center staff who have expertise in Indian-specific provisions, already-overtaxed Tribal health programs will bear an unwarranted burden in assisting with reenrollments.

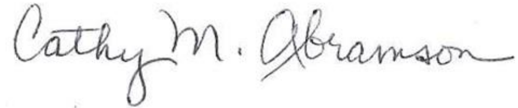
Additional Concerns

In 2015, several States with Tribes will be transitioning the eligibility and enrollment functions from Federal to State operation, or vice versa. The Proposed Rule does not include any special procedures or instructions for these circumstances.

Finally, we want to express concern about the low enrollment of AI/AN in Marketplace plans to date. Snafus at the end of the first year will make it more difficult to do outreach to

additional AI/AN and to encourage their enrollment. We encourage you to work with the TTAG to assure a smooth transition for American Indians and Alaska Natives.

Sincerely,



Cathy M. Abramson
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Cc:

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