



February 28, 2013

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

Attention: CMS-10438

- **Appendix A: SHOP Employee List of Questions**

CMS-10440

- **Appendix A: Individual Questionnaire**
- **Appendix C: FA Paper Application**
- **Appendix D: Non-FA Paper Application**

Dear Sir/Madam:

We greatly appreciate the efforts of the Centers for Medicare & Medicaid Services to develop a single streamlined application to facilitate enrollment in Medicaid, CHIP, and the federal health insurance Marketplaces, all of which will be critical gateways to affordable health insurance coverage for consumers in numerous states. We appreciate the opportunity to comment on these draft applications, and we make the following recommendations to assist these programs in appropriately serving a large and diverse consumer population:

- We strongly support the proposed addition of “partner” alongside spouse in these applications. This appropriately recognizes that forms of relationship recognition aside from marriage, such as domestic partnerships, exist in the U.S. today. We do recommend that CMS-10440 Appendix A include help text similar to that in CMS-10440 Appendix C regarding partners and separate filing, and we further strongly recommend that guidance for Navigators and Marketplace staff include information about how to assist individuals who have a same-sex spouse or partner in applying for subsidies and purchasing family coverage.
- All applications should specify that they are requesting **legal** sex, and the online applications for individuals (CMS-10438 Appendix A and CMS-10440 Appendix A) should include help text for the definition of “legal sex.”
- The nondiscrimination statements at the end of the individual applications should include the full range of protected categories under the federal law governing the activities of the Marketplaces. The full list of categories under 45 CFR 155.120 includes age, sexual orientation, and gender identity in addition to race, color, national origin, sex, and disability.
- Where appropriate, the individual applications should collect a comprehensive range of demographic information, including sexual orientation and gender identity. This information is an important component of including the lesbian, gay, bisexual, and transgender (LGBT) population in Marketplace functions such as outreach planning, compliance with nondiscrimination requirements, and customer satisfaction evaluations.

Below, we discuss these recommendations in the context of each relevant document in CMS-10438 and 10440.

Recognition of same-sex partners and spouses

CMS-10440 Appendix C provides the following information on page 2:

“Here’s who you need to include on this application:

- Your spouse, if married
- Your children who live with you
- Your partner who lives with you (but only if you have children together who need health insurance)
- Anyone you include on your federal income tax return

Anyone else who lives with you will have to file their own application if they want insurance.”

The comparable section of CMS-10440 Appendix A (page 10), by contrast, refers only to spouses. We recommend that help text similar to the above be added to page 10 of CMS-10440 Appendix A to help individuals in domestic partnerships understand which family members they need to include on the application.

We also note that the individual applications (CMS-10440 Appendices A and C) are unclear about how same-sex partners and spouses can apply for subsidies and enroll in family coverage. Specifically, we understand that any couple whose marriage is not recognized under federal law, including same-sex spouses and partners, will need to apply individually for subsidies. To ensure that individuals who have a same-sex spouse or partner receive the assistance they need to correctly calculate their subsidies, guidance for Navigators and Marketplace staff should note that numerous states extend relationship recognition to same-sex partners and/or spouses, even though federal law does not currently recognize these couples for federal tax purposes. Navigators and Marketplace staff should thus be prepared to competently and respectfully assist individuals with same-sex spouses or partners in filing the appropriate paperwork to apply for subsidies. **This guidance should also note that federal regulations released in February 2013 do not preclude same-sex spouses or partners from using their subsidy dollars to purchase family plans.**

Questions about legal sex

We support collecting data on the sex of applicants on all applications. We note, however, that this question may not be straightforward for transgender individuals to answer, given the degree of difficulty frequently involved in changing the sex designation on various forms of identification such as driver’s licenses, passports, birth certificates, and Social Security cards. As such, we recommend that this question read as follows on all applications:

What is your legal sex?

- *Male*
- *Female*

To further assist individuals in answering this question accurately according to their records with the Social Security Administration, which is the form of identification most closely tied to taxpayer status and income eligibility testing, the online applications (CMS-10438 Appendix A and CMS-10440 Appendix A) should include the following help text:

“This question asks for your legal sex, which, in this context, means the sex on your Social Security record. We need this information to check whether you are eligible for Medicaid in your state or for subsidies to help you purchase coverage through the Health Insurance Marketplace. Your answer to this question will not affect the benefits you receive through Medicaid or any Marketplace plan that you purchase.”

Nondiscrimination statements

CMS-10440 Appendices A, C, and D all include a statement of nondiscrimination at the end. This statement is an important part of ensuring that all individuals are informed of their rights and aware of their options to appeal in the event that they experience discrimination. We note, however, that the statement on these three applications does not include all of the protected classes under the federal law governing the operation of the Marketplaces. Specifically, the full list of categories under 45 CFR 155.120 includes age, sexual orientation, and gender identity in

addition to race, color, national origin, sex, and disability. As such, the nondiscrimination statement on these three forms should read as follows:

"I know that under federal law, discrimination isn't permitted on the basis of race, color, national origin, sex, age, disability, sexual orientation, or gender identity. I can file a complaint of discrimination by visiting www.hhs.gov/ocr/office/file."

Collecting demographic data on sexual orientation and gender identity

Comprehensive demographic data collection is indispensable to the effective operation of the Marketplaces. These data will help Marketplaces with activities such as outreach planning, compliance with nondiscrimination requirements, and customer satisfaction evaluations. They will also help the Marketplaces understand and address health disparities related to personal identity factors that affect health status, access to health care and insurance, and health care outcomes. As such, we recommend that the demographic data collection sections of the individual applications (CMS-10440 Appendices A, C, and D) collect a full range of demographic data, including sexual orientation and gender identity.

Numerous sources, including the Department of Health and Human Services itself and the Institute of Medicine reports *Collecting Sexual Orientation and Gender Identity Data in Electronic Health Records* (2012) and *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011), testify to the importance of sexual orientation and gender identity data. In fact, Secretary Sebelius has drawn on the authority granted under Section 4302 of the Affordable Care Act to commit the Department to developing sexual orientation and gender identity questions for federally supported health surveys. According to the "LGBT Data Progression Plan," which HHS released in 2011, "The [Affordable Care Act] also provides the Department of Health and Human Services the opportunity to collect additional demographic data to further improve our understanding of healthcare disparities. In the past, identifying disparities and effectively monitoring efforts to reduce them has been limited by a lack of specificity, uniformity, and quality in data collection and reporting procedures. Consistent methods for collecting and reporting health data will help us better understand the nature of health problems in the LGBT community."¹

Respondents may be uncomfortable sharing personal information on Marketplace applications due to concerns about privacy. The inclusion of race, ethnicity, and language questions on the draft applications, however, correctly indicates that the importance of these data justifies the inclusion of these questions as optional measures. Sexual orientation and gender identity data are no different. Moreover, the groundbreaking LGBT-inclusive nondiscrimination laws that apply to the Marketplaces provide unprecedented protection for gay and transgender individuals and offer a major opportunity to move forward with data collection that can help identify and address a range of disparities, as envisioned by Section 4302 of the Affordable Care Act.

We therefore recommend the addition of the following **optional** questions to CMS-10440 Appendices A, C, and D:

i. Sexual orientation

The following question was developed by the National Center for Health Statistics, and a version of it is now on the National Health Interview Survey:

Do you consider yourself to be:

- *Straight or heterosexual*
- *Gay or lesbian*
- *Bisexual*

¹ Department of Health and Human Services. 2011. "Plan for Health Data Collection on Lesbian, Gay, Bisexual, and Transgender (LGBT) Populations." Available from <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlid=209>

- *Something else (write in)*_____

ii. Gender identity

The measure below has been used on state Behavioral Risk Factor Surveillance System surveys for several years:

Some people describe themselves as transgender when they experience a different gender identity from their sex at birth. For example, a person born into a male body, but who feels female or lives as a woman. Do you consider yourself to be transgender?

- *Yes, transgender, male to female*
- *Yes, transgender, female to male*
- *Yes, transgender, gender-nonconforming*
- *No*

In research conducted around the use of this question in Massachusetts, the non-response rate (1.4%) was very low; in fact, it was much lower than the non-response rate for income. Analyses of MA-BRFSS data collected between 2007-2009 indicate that 0.5% of 18 to 64-year-old adults answered yes to this question and were classified as transgender,² which is consistent with population-based estimates from two other states (California and Vermont).³

The creation of Marketplaces offers a historic opportunity to collect data about the experiences and needs of LGBT individuals and their families, as well as to connect this population with affordable, comprehensive coverage. We urge CMS to take the opportunity to include LGBT individuals and their families in these applications to help ensure they fully benefit from the health reform effort.

Thank you,



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² 95% confidence interval [CI]=0.3%, 0.6%; Conron KJ, G Scott, GS Stowell, and SJ Landers. "Transgender health in Massachusetts: Results from a household probability sample of adults." *Am J Pub Health* 102 (2012):118-122.

³ Ibid.