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February 1, 2016

Andy Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services (CMS)
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue S.W.
Washington, DC 20201

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Document Identifier: CMS-10430, CMS-10593, CMS-10592, CMS-10440

Dear Mr. Slavitt:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, labor unions, non-profit organizations, and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members. NILC submits the following comments in response to CMS's notice (Doc. No. 2015-30534) of its plans to extend its existing information collection practices in the context of ACA applications and enrollments.

Immigrant families, and in particular mixed-status immigrant families where one or more of the family members may be undocumented, face unique challenges when accessing health affordability programs like the Marketplaces, Medicaid, and CHIP. They often face technical barriers that delay or prevent them from enrolling in coverage for which they are eligible, including but not limited to the ones highlighted below. Immigrant families often also have fears related to potential harm that may result from sharing personal information, such as immigration status, with government agencies. We strongly believe that the recommendations below would increase health care access for eligible immigrant consumers and their families and urge CMS to consider incorporating them into their current and future practices.

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I. Questions Related to Immigration Status

Immigrants as a group face unique challenges when accessing health care programs and may require special attention to prevent discrimination. These challenges were recognized by the 2011 Tri-Agency guidance, and incorporated into Medicaid, CHIP and Exchange regulations¹ prohibiting processes and requirements that have the effect of deterring or preventing eligible individuals in mixed-immigration status families from securing access to programs and services, including through applications for health insurance affordability programs. Unnecessary questions related to a person's immigration status may produce a chilling effect and deter eligible immigrants from applying for health coverage. Similarly, requests for Social Security numbers (SSN) that do not fully comply with Privacy Act requirements and Medicaid/CHIP and Exchange regulations (including providing notification of why the SSN is requested, what it will be used for, and whether it is optional or mandatory) and/or do not provide an option for people who do not have an SSN at the time of application to complete the application, may also produce a chilling effect and deter eligible immigrants from applying.

Recommendation: As the Federally-facilitated Marketplace (FFM) continues to improve its online and paper applications, we strongly recommend that it:

- ask only those questions about applicants' immigration status that are necessary to verify the eligibility of those consumers applying for coverage,
- not ask any questions related to immigration status of household members applying on behalf of another person in his or her family, and
- ensure that requests for SSNs comply with Medicaid, CHIP and Exchange regulations and that help text or instructions are developed with sensitivity toward immigrant families that may include people who do not have SSNs, including both undocumented and lawfully present immigrants.

II. Privacy Protections and Immigration Enforcement

Given the sensitive nature of information provided by consumers during the application process for health care coverage, including the names, and income information of household members who are not applying for health coverage for themselves, it is important that immigrant families understand that any personal information provided will not be used against them or other family members for immigration enforcement purposes. In 2013, U.S. Customs and Immigration Enforcement (ICE) issued a memorandum clarifying that any information provided by consumers in the context of health care coverage through the Marketplaces, Medicaid, CHIP, and Basic Health Plan, would not be used for immigration enforcement purposes.

We urge the FFM to incorporate this policy clearly during the application process so that immigrant families better understand their privacy protections and reassure them that it is safe to apply for health insurance and applying will not put any family member at an

¹ Triagency Letter, Dept. of Health & Human Serv., Dept. of Agriculture, available at <http://www.hhs.gov/civil-rights/for-individuals/special-topics/needier-families/triagency-letter/index.html>; see also 42 C.F.R § 435.907(e)(Medicaid); Pub. L. 111-148, § 1411(g), 124 Stat. 119, 230 (2010); 45 C.F.R. § 155.315(i) (Affordable Care Act).

increased risk of deportation. This type of clarification would also be consistent with the principles embodied in the Tri-Agency guidance as these unaddressed fears about how their personal information will be shared, including whether it will be shared with ICE and could result in the deportation of a family member, produces a chilling effect that deters eligible families from enrolling in coverage.

III. Language Access

We incorporate the language access recommendations submitted by the Asian & Pacific Islander American Health Forum (APIAHF). Currently, the online Marketplace application allows a consumer to optionally select their preferred written and spoken language and the manner in which they would like notices to be delivered to them. The “other” option is not fillable, however, and thus consumers who speak other languages not listed cannot complete the form. This raises a number of issues, including the fact that accurate language preference is not being transmitted to insurers and is not being collected by the federal Marketplace. Without this information, we are concerned that the federal Marketplace is not able to meet its obligation under Section 1557.

Recommendation: Edit the Marketplace application to allow individuals to fill in the “other” option under preferred spoken or written language in the dropdown menu.

Recommendation: We continue to support the optional collection of race, ethnicity and other demographic information collected in the Marketplace application. These optional questions should be maintained in the Marketplace application and in any State applications that require approval from the Secretary to be changed.

Recommendation: Add information that explains why the demographic data is requested, including how such information will be used, and that a response is voluntary. This can help to ensure that data collection is maximized across all groups, given that in the first Open Enrollment period, one-third of federal Marketplace data on race and ethnicity was missing.

Recommendation: As supported by national language access advocates, we strongly encourage CMS to request that race, ethnicity and primary language information is optionally requested for all applicants and not just the primary completing the application. This data is crucial to supporting the federal government’s language access efforts and ensuring that LEP persons can meaningfully access the Marketplace and coverage once they enroll.

IV. Remote Identify Proofing (RIDP)

Healthcare.gov requires consumers to successfully complete a remote identity proofing (RIDP) process before being able to submit an online application for coverage. The current RIDP process verifies identity using a consumer’s credit history, checked against records maintained by the credit bureau, Experian. While this type of RIDP may work for a majority of consumers, it is not an effective way of verifying identity for individuals with little or no credit history. Immigrant consumers, especially recent arrivals, are less

likely to have the type of credit history for successful ID verification and as result many are delayed from enrolling or are unable to complete their application. Furthermore, in the case of mixed-status families, the filer of the online application is not necessarily the same as the person(s) applying for coverage and RIDP prevents the filer, who may be an undocumented person with little credit history, from completing an application on behalf of eligible family members.

Recommendations: We urge CMS to add greater flexibility to the ID proofing process to allow consumers with little credit history to obtain coverage for which they are eligible. Possible remedies to this issue may include but are not limited to:

- CMS should consider training assisters to conduct in-person verification as some state-based marketplaces allow;
- The FFM should allow for immediate submission of documentation proving identity when necessary, instead of the current process requiring that the individual first call and fail over-the-phone verification through Experian;
- When a consumer's identity is not immediately verified, they should be allowed to complete their healthcare.gov application and enroll in coverage while the verification process continues. RIDP is not an eligibility requirement for Marketplace coverage and should not be used to deny access to eligible individuals;
- The FFM should expand we the list of acceptable documents that consumers can provide via the online application, by phone, or by mail to complete RIDP;
- Some consumers have both a problem with RIDP and data matching issue (DMI) related to immigration status or citizenship. Whenever possible, the FFM should utilize documents submitted to resolve a DMI to resolve RIDP issues.

IV. Improving the Application Process to Better Direct Immigrant Consumers to the Appropriate Form of Coverage

Under the ACA, noncitizens who are lawfully present but who are not eligible for Medicaid due to their immigration status are eligible for Marketplace coverage, with subsidies, even if their income is below 100 percent of the federal poverty level.² Unfortunately, the FFM has had difficulty effectively implementing this rule for certain consumers whose immigration status or citizenship is not immediately verified, often resulting in lengthy delays and complications with the application process. In some cases, consumers who are eligible for Marketplace coverage are treated as if they fall in the coverage gap, meaning they can enroll in a qualified health plan but without the subsidies that make plans affordable. In other cases, consumers are routed to their state Medicaid

² 45 CFR 155.305(f)(ii)(B)(2)

where they must receive a Medicaid denial before they are able to return to the FFM and receive premium tax credits.

Recommendation: We support the Center on Budget and Policy Priorities’ recommendations that consumers whose immigration status cannot be immediately verified and, therefore, whose eligibility for Medicaid or the Marketplace cannot be immediately ascertained using the existing process, be permitted to answer additional, optional questions about their immigration status. This could be done by including a new optional question that would ask for more specific information about an applicant’s immigrant status, such as: “Select [insert applicant’s name]’s immigration status from the list below.” The drop-down list would include a full list of immigration statuses considered lawfully present under the ACA. The list would not be truncated — for example, it would list all non-immigrant visas. It would also have to include the options: “I don’t know” and “other eligible immigration status.” Additional question may also need to be added to better identify applicants who may appear to be subject to Medicaid’s five-year waiting period, but are exempt, such as lawful permanent residents who are veterans. Because immigration statuses are complicated and are at times referred to by different labels, we recommend you seek stakeholder input in creating the new questions, including conducting consumer testing with diverse immigrant communities.

Adopting this recommendation would address a persistent, systemic barrier many lawfully present immigrants under 100 percent of the federal poverty level have faced enrolling in affordable health insurance through the Marketplace. It would help prevent lawfully-present persons who are income-eligible for tax credits, but ineligible for Medicaid due to their immigration status from being incorrectly sent to state Medicaid programs and allow for these persons to be more quickly processed and enrolled in a Marketplace plan.

We appreciate the continued efforts made by CMS to improve the application process for all consumers, including immigrants and their families. We hope that CMS will recognize the unique circumstances and experience of immigrant families as they navigate the application process and work toward improving the application process with this in mind.

Thank you for the opportunity to provide feedback on HHS’s information collection practices in the context of ACA applications and enrollments. Please direct any questions about our comments to Angel Padilla at padilla@nilc.org.

Sincerely,

/s/

Angel Padilla
Health Policy Analyst
National Immigration Law Center