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Schuyler Center for Analysis and Advocacy

October 31, 2010

Secretary Kathleen Sebelius
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9974-P
P.O. Box 8010
Baltimore, MD 21244-8010

RE: Comment on proposed rule on Patient Protection and Affordable Care Act; Exchange
Functions in the Individual Market; Eligibility Determinations; Exchange Standards for
Employers – File Code CMS-9974-P

Dear Secretary Sebelius:

Health Care for All New York (HCFANY) writes to comment on the on the Notice of Proposed Rulemaking (NPRM) on the Patient Protection and Affordable Care Act (ACA) provisions regarding the Exchange Functions in the Individual Market, Eligibility Determinations, and Exchange Standards for Employers. HCFANY is a statewide coalition of more than 100 organizations, which seek to achieve affordable, quality health care for all New Yorkers.

We commend the Department for rules that prioritize streamlining and simplifying the application processes. We have seen in the past that increasing the application and documentation burden prevents consumers from enrolling in health coverage programs for which they qualify.

Health Care For All New York
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1. § 155.330 Definitions

Qualifying Coverage in an Eligible Employer-Sponsored Plan

The NPRM defines “qualifying coverage” under an employer-based plan by reference to the definition in 26 CFR §1.36B-2(c)(3)(v) in the IRS proposed regulation regarding premium tax credits. This definition states that for dependents, affordable coverage is that for which the premium cost for self-only coverage is less than 9.5 percent of a household’s income. Self-only coverage, however, would provide coverage to only one member of the household (the employee), not to the dependents. Thus, the affordability test for dependents would not actually consider the cost of coverage for dependents. Because premiums for family coverage are much higher than those for self-only coverage, many dependents will be determined to have access to affordable minimum essential coverage even though the cost of premiums to cover the entire family would far exceed 9.5 percent of the household’s income. This interpretation violates the overall intent of the Affordable Care Act, would leave millions of dependents without affordable coverage, and has the potential to destabilize employer-sponsored insurance.

HCFANY Comment: As we explain in greater detail in our Comment on the IRS premium tax credit NPRM, HCFANY opposes this proposal. The NPRM should be amended. Coverage should only be deemed affordable when the premium cost for family coverage, not individual coverage, would be less than 9.5 percent of family income.

2. §155.305 Eligibility Standards

a. §155.305(a)(1) Citizenship, status as a national, or lawful presence

The NPRM requests Comment on how to implement the statutory language stating that an individual is not a qualified individual if he or she is “not reasonably expected to be for the entire period for which enrollment is sought, a citizen or national of the United States or an alien lawfully present in the United States.”

The NPRM proposes adopting the same definition of “lawfully present” as used in 45 CFR 152.2, which determines lawful presence for purposes of Pre-Existing Condition Insurance Plan Program (PCIP).

HCFANY Comment: HCFANY urges the Department to provide additional guidance to make it clear that a consumer may attest that they expect to retain the required immigration status for the enrollment period, without being required to provide other documents to prove that the expectation is reasonable. To ensure that all eligible applicants have an opportunity to establish lawful presence, the NPRM should require an Exchange to accept a broad range of documents or identifiers that may establish evidence of status prior to verification. Any such list must not be exclusive, given the range of documents that a lawfully present applicant may have, as well as the fact that immigration statuses and documents continue to evolve. Further guidance should



also make it clear that a consumer may apply for enrollment for a period that does not encompass the entire benefit year.

HCFANY supports adopting the same definition of “lawfully present” as used in 45 CFR 152.2, which determines lawful presence for purposes of Pre-Existing Condition Insurance Plan Program (PCIP). This definition has allowed New York’s PCIP, the NY Bridge Plan, to align program eligibility closely with eligibility for other public health programs in New York State.

b. §155.305(a)(3) Residency

Intent to reside

The NPRM adopts the Medicaid “intent to reside” standard to meet the residency requirement for qualified health plans. It also provides a special rule allowing a family member living outside the service area of the Exchange to choose between obtaining coverage through the primary taxpayer’s Exchange or the Exchange servicing the area in which the family member lives.

HCFANY Comment: HCFANY supports using the same residency standard for all income-related eligibility determinations to reduce complexity and confusion. This definition seems to offer maximum flexibility for consumers to obtain coverage in the most appropriate Exchange. We also support the special rule for family members living outside the service area of the Exchange of the primary taxpayer.

Network adequacy

The ACA directs the Office of Personnel Management to contract with health insurance issuers to offer at least two private multi-State plans in each Exchange. The NPRM solicits comment as to whether there are any standards regarding in-network adequacy for out-of-State dependents they should consider.

HCFANY Comment: HCFANY urges the Department to adopt New York’s network adequacy standards for Medicaid managed care plans. When no in-network provider is available, consumers in such plans should receive a notice explaining the process to obtain a covered benefit from out-of-network providers.

c. §155.305(e) Eligibility for Basic Health Program

The NPRM codifies that if a Basic Health Program is operating in the service area of the Exchange, the Exchange will determine and individual’s eligibility for the Basic Health Program.

HCFANY Comment: HCFANY strongly supports this provision. The Basic Health Program will be a critical means of providing affordable quality access to low-income consumers, and Exchanges should be prepared to perform eligibility determinations for the program.



3. §155.310 Eligibility Determination Process

a. §155.310 (a)(2) Information collected from non-applicants

The NPRM prohibits an Exchange from requiring an individual seeking coverage for someone other than himself or herself to provide information regarding the non-applicant's immigration or citizenship status. It also prohibits requiring such a non-applicant to provide a social security number, except where otherwise required to obtain advance payments of the premium tax credit.

HCFANY Comment: HCFANY strongly supports this provision. While undocumented immigrants are not eligible for many Exchange-based programs, we know that there are many families with mixed immigration status. For example, children born in the United States to parents without status qualify for programs like Medicaid and CHIP. In other families, the primary taxpayer might be undocumented but married to a citizen who qualifies for coverage through the Exchange. It is essential that the Exchange allow non-applicants to apply for coverage for family members regardless of immigration status or entitlement to a Social Security number.

b. §155.310 (b) Choice to request determination of eligibility for insurance affordability programs

The NPRM requires Exchange to allow consumers to decline an eligibility determination for all insurance affordability programs; however, a consumer cannot decline to be screened for a subset of programs.

HCFANY Comment: HCFANY supports allowing consumers to choose not to apply for any affordability provisions. We also support requiring the Exchange to screen applicants for all programs, to reduce the possibility that a state Exchange will steer consumers away from state-funded public programs and into less affordable commercial coverage.

c. §155.310(d)(2) Special rules relating to advance payments of the premium tax credit

The NPRM requires an Exchange to allow an enrollee to accept less than the full amount of advance payments of the premium tax credit than the amount for which he or she is determined eligible.

HCFANY Comment: HCFANY supports allowing consumers to accept less than the full amount. A consumer may rationally decide that they prefer not to take the risk of repayment if their income changes. However, the NPRM should accompany this measure with a requirement that an Exchange devote significant resources to educating consumers about the credit and risk of reconciliation payments and providing consumer assistance to ensure that consumers understand the benefit and make the best decision for their families.



d. §155.310 (f) Notification of eligibility determination

The NPRM requires the Exchange to provide timely notice to an applicant of any eligibility determination made. The preamble to the rules states that this notice must be written, even for consumers who have applied online, and that the notice must comply with §155.230's requirements that all notices be written in plain language and in a manner meeting the needs of consumers with disabilities or limited English proficiency.

HCFANY Comment: HCFANY strongly supports the requirement that the Exchange provide timely written notice to applicants, including applicants who apply online. We agree that written notices are necessary at determination of eligibility as well as when additional information is needed. While some applicants will have regular access to the internet and the ability to check online for updates, many applicants will not. We recommend that the Department amend the rule to include the word "written." We also strongly support the requirement that all notices be written in plain language and in a manner that meets the needs of consumers with disabilities or limited English proficiency. Finally, we recommend that the Department require Exchanges to allow consumers to indicate in the application that they would like to have a copy of the written eligibility determination notice sent to a consumer advocate or enrollment assister who helped them complete the application. Consumers who need assistance in completing the application are more likely to need additional help resolving problems with the application process.

e. §155.310(g) Notice of an employee's eligibility for advance payments of the premium tax credit and cost-sharing reductions to an employer

The NPRM requires an Exchange to notify and employer that an employee has been determined eligible for insurance affordability programs. The notice must identify the employee.

HCFANY Comment: The NPRM should clarify that the employer should only be notified if the employee's receipt of insurance affordability payment has a direct effect on the size of an employer's responsibility payment. The NPRM should also require that the notice to the employer specify that the employer may not retaliate against employees receiving subsidies.

f. §155.310(h) Duration of eligibility determination

The NPRM requires the Exchange to accept an application and determine the eligibility of an applicant at any time of the year, including time periods outside his or her enrollment period. If a consumer receives such a determination, and later seeks a new enrollment period earlier than the date on which he or she would be subject to an annual redetermination, the Exchange should only require the consumer to attest as to whether information affecting eligibility has changed and process any changes reported.

HCFANY Comment: HCFANY supports this rule, which will minimize the administrative burden on consumers and the Exchange, while ensuring accuracy.



4. § 155.315 Verification Process related to eligibility for enrollment in a QHP

The NPRM sets out a process for verifying that the information provided by an applicant is accurate. The NPRM proposes allowing an Exchange to request documentation from an applicant when the information provided by the applicant is not “reasonably compatible” with the information provided by the applicant or information in the Exchange records. This standard is also used throughout the Medicaid proposed rule.

HCFANY Comment: HCFANY strongly supports the NPRM’s efforts to reduce the administrative burden on applicants and to rely on applicant attestation wherever possible. We strongly support use of the “reasonable compatibility” standard. However, we urge the Department to define “reasonably compatible” to prevent development of state-specific definitions that undermine the goal of administrative simplification.

a. § 155.315(b) Verification of citizenship, status as a national, or lawful presence

The NPRM requires that an Exchange verify citizenship for applicants who attest to citizenship and provide a social security number (SSN) by submitting the applicants’ SSN and other identifying information to HHS, which will submit it to the Social Security Administration (SSA). The Exchange must submit information to HHS, which will submit it to the Department of Homeland Security (DHS) if an applicant has documentation that can be verified through DHS and attests to lawful presence, or if the applicant's citizenship status cannot be verified through the SSA. HHS will work with DHS to determine the best technological option to maximize accuracy and reduce delay. One option is the Systematic Alien Verification for Entitlements (SAVE) system.

HCFANY Comment: The NPRM should adopt the procedures and protections afforded to Medicaid applicants. In implementing the ACA, HHS should ensure that information provided by and on behalf of the individual is used only for the purpose of determining eligibility for enrollment, premium tax credits, or cost-sharing reductions under the Exchange. We support use of the SAVE system where an applicant’s status cannot be verified through the SSA.

The United States Citizenship and Immigration Services (USCIS) and HHS should provide training and outreach on the permissible uses of information provided to SAVE and the conclusions that can and cannot be drawn from a SAVE response. The training should include reminders on permissible inquiries about immigration status and Social Security Numbers, compliance with the Privacy Act and other confidentiality laws, Title VI and other anti-discrimination laws, including ACA section 1557. And Exchange notices to consumers about citizenship status determinations should explain how an applicant can appeal denials based on a SAVE response.



b. §155.315(c) Verification of Residency

The Exchange must accept the applicant's attestation to residency without verification, unless the state Medicaid or CHIP agency elects to verify applicant residency using electronic sources, or the information provided by the applicant regarding residency is not reasonably compatible with other information the applicant provided or with information in the records of the Exchange. A document that provides evidence of immigration status may not be used alone to determine State residency.

HCFANY Comment: We recommend that the NPRM require states to accept self-attestation of residency. If the NPRM allows an Exchange to verify residency through electronic data, it should not be permitted to use a document that provides evidence of immigration status to determine residency.

c. §155.315(e) Inconsistencies

The NPRM codifies the processes for an Exchange to follow if it cannot verify information required to determine eligibility for enrollment in a QHP or subsidy program.

HCFANY Comment: We support the NPRM provision allowing applicants to extend the 90-day period for resolving inconsistencies when applicants have made a good faith effort but need additional time.

d. §155.315(g) Applicant information

An Exchange may not require an applicant to provide information beyond the minimum necessary.

HCFANY Comment: We support the provision prohibiting Exchanges from requiring applicants to provide any information beyond the minimum necessary. We recommend that HHS establish programs to monitor compliance with this policy.

5. §155.320 Verification related to eligibility for insurance affordability programs

a. §155.320(c) Verification of household income and family/household size

The NPRM proposes that the Exchange request tax information for an applicant and all relevant household members from the Department of the Treasury (through HHS). This process would replace the statutory verification process, which would require the application filer to state MAGI. The NPRM proposes using the data recommended in the Medicaid NPRM to determine eligibility for Medicaid or CHIP.

For purposes of the Medicaid and CHIP determination, the NPRM attempts to minimize burden on application filers by only requiring an applicant to provide an attestation regarding



income if he or she attests that the available data sources are not representative of the current or projected financial situation.

If the applicant does not qualify for Medicaid or CHIP, the NPRM proposes that the Exchange accept self-attestation of future income and household size for purposes of determining eligibility for subsidies. The Exchange must ask applicants to attest that the income information received from the Department of Treasury represents an accurate projection for the coming year. If the applicant attests that the income will be higher, the Exchange must generally accept that attestation. If the applicant attests that household income will decrease by 20 percent or more, the Exchange can use other data sources and documentation to verify this attestation.

HCFANY Comment: This section of the NPRM needs clarification. The rules for Medicaid and the subsidies define income and household size in different ways. It is unclear how an applicant would be asked to attest to these different standards in the same application. The “reasonably compatible” standard should be clarified in for this provision as well, as small differences in income could make a difference in the amount of subsidies a family qualifies for. We are also concerned that the Exchange would only consider decreases in income of 20 percent or more in determining the amount of advance credit and cost-sharing reductions. For a very low income household, a five or ten percent decrease in income is substantial. Absorbing an income loss of that degree is challenging to a household budget. If the Exchange does not adjust subsidies accordingly, consumers are much more likely to drop their coverage and incur penalties.

We recommend that consumers be permitted to report income changes without a percentage or dollar limit. The NPRM should require an Exchange to use this new information in determining eligibility when there has been a change that either exceeds a specified threshold or that would make a family eligible or ineligible for the credit. The threshold should be much lower than 20 percent, but not low enough to be burdensome to administer. The NPRM requires an Exchange to provide education and assistance to an application filer and solicits Comment on how to provide this education and assistance. We support this requirement and recommend that the NPRM require Exchanges provide adequate resources to Navigator and Consumer Assistance Programs to provide the education and assistance necessary to consumers with these complicated issues.

b. §155.320(e)

The NPRM directs Exchanges to allow consumers to self-attest to whether they are eligible for qualifying coverage in an eligible employer-sponsored plan for the purposes of eligibility for affordability programs.

HCFANY Comment: HCFANY supports this provision and recommends that the Department develop standard templates for the information needed to make this determination. Employees



should not be expected to provide information on whether available coverage meets minimum value requirements, for example, without assistance.

6. §155.330 Eligibility redetermination during a benefit year

a. 155.330(b) Requirements for individuals to report changes

The NPRM proposes relying primarily on enrollees to report changes in eligibility during the enrollment year. Enrollees are required to report any changes within 30 days, and the Exchange will verify this information using the processes already outlined.

HCFANY Comment: HCFANY supports the NPRM reliance on self-reporting of changes in eligibility factors. However, the rule is overly broad. It requires all enrollees to report any change in any eligibility factor, even if the enrollee is not eligible or enrolled in a public plan or subsidies. For example, an enrollee in a QHP who is not receiving a subsidy and would not qualify should not be required to report changes in income. This rule would burden both enrollees and Exchanges by requiring unnecessary reporting. An enrollee in a QHP who is not receiving or applying for subsidies should only be required to report changes in immigration and citizenship status, incarceration and residency within 30 days. An enrollee who is receiving subsidies should be required to report these changes as well as changes in household size and eligibility for minimum essential coverage. The statute does not require an enrollee receiving premium tax credits to report changes in income. An Exchange should educate enrollees about the consequences of failing to adjust the tax credit amount to match changes in eligibility because of income, but not require enrollees to report these changes.

b. §155.330(d) Redetermination and notification of eligibility

The NPRM provides that, if the Exchange verifies the updated information provided by and enrollee, it must redetermine the enrollee's eligibility and notify the enrollee. It does not specify what the Exchange must do if it cannot verify this information.

HCFANY Comment: If the Exchange cannot verify the information, the NPRM should require that it send a notice to the enrollee informing them that no action will be taken, and explaining how to appeal this decision.

c. §155.330(e) Effective dates

Changes are generally effective on the first day of the month following the date of a notice informing an enrollee of a determination that their eligibility has changed. With authorization from HHS, an Exchange may determine a reasonable point in a month after which a change will not be effective until the first day of the next month. If an enrollee is redetermined to be ineligible to continue his or her QHP enrollment, the Exchange must maintain their eligibility, without insurance affordability provisions, for a full month following the month in which they receive notice.



HCFANY Comment: The NPRM should be revised to provide some enrollees more time to enroll in a new plan based on new eligibility. Because individuals who make a QHP selection between the 23rd and the last day of the month may not be able to start their new coverage until the first day of the second month following the QHP selection, these rules might leaves gaps in coverage for consumers. The NPRM should also be revised to make it clear that an enrollee may terminate coverage, with appropriate notice, rather than maintaining coverage for an full month after they have lost eligibility for subsidies.

7. § 155.335 Annual eligibility redetermination

The NPRM proposes an annual redetermination process, in which the Exchange redetermines an enrollee’s eligibility for a QHP and reviews the enrollee’s eligibility for affordability programs if they have a request on file. It does not specify when this annual redetermination must occur. The preamble also requests Comment on whether a redetermination performed during the year should satisfy the annual redetermination requirement, reducing the burden on applicants and spreading the Exchange’s eligibility workload across the year.

HCFANY Comment: The NPRM should specify that the annual redetermination period should be conducted in concert with the annual open enrollment period. HCFANY opposes allowing an Exchange to satisfy the annual redetermination requirement with a redetermination performed during the year. Such a system would create unnecessary complexity because plan years would not be synchronized with the eligibility year for subsidies, which by statute has to be based on the calendar year. It would also create confusion for consumers. The added complexity would outweigh any benefits.

a. § 155.335(b) Updated income and family size information

The NPRM requires an Exchange to obtain updated tax return information and data regarding MAGI-based income for an enrollee requesting an eligibility determination for insurance affordability programs.

HCFANY Comment: The NPRM should clarify that an enrollee receiving subsidies does not need to submit a new application; the process of updating income and family size should be automatic.

b. § 155.335(c) Notice to enrollee

The NPRM proposes that the Exchange conduct electronic data matching to obtain updated tax return and income information and provide the updated information to the enrollee in a notice. The notice will include the data obtained, data used in the most recent eligibility determination, the enrollee’s projected eligibility determination, and the amount of any insurance affordability payments they might qualify for.



HCFANY Comment: We support the NRPM requirement that Exchange provide enrollees with these redetermination notices. We recommend that the notices be automatically sent to enrollees with subsidies and that their eligibility be automatically redetermined without an application requirement. In §155.410(d) of the proposed regulations on Exchange standards and functions, Exchanges are required to provide a notice about the annual open enrollment period. In §155.335 of the proposed Exchange eligibility regulations, Exchanges are required to provide a notice of annual redetermination. Individuals would then have 30 days to indicate whether the information in the notice is correct, or to provide corrected information. It is unclear whether this is the same notice about annual enrollment that is referenced in these two sections. We recommend that these notices be merged into one notice. As such, we recommend that the following information related be included in the notice:

- The date that open enrollment begins and ends;
- An explanation that open enrollment is the only opportunity to enroll in new coverage or change coverage, unless there is an event that triggers a special enrollment period;
- The penalty for being uninsured;
- The availability of premium credits and cost-sharing reductions;
- An explanation that open enrollment is the time for redetermining eligibility for premium credits and cost-sharing reductions;
- For individuals receiving premium credits and cost-sharing subsidies, updated income and family size information as verified by the Exchange through the data hub, the level of premium credits and cost-sharing subsidies that the individual is receiving, and the projected level of premium credits and cost-sharing subsidies based on the updated information;
- Where to obtain information about QHPs and premium credits and cost-sharing reductions, including the website, toll free call center, and through Navigator and other consumer assistance programs.

Such notices should be written to assure communication with Limited English Proficiency individuals and to persons with disabilities, in accordance with the standards in §155.230. We recommend that the notice be sent no later than 45 days before the beginning of the annual open enrollment period to allow enrollees to provide updated information and have eligibility redetermined in time to select a plan.

c. § 155.335(d) Changes reported by enrollee

This provision requires the Exchange to allow an enrollee 30 days to respond with any changes.

HCFANY Comment: We recommend that the NPRM clarify that enrollees can report changes using a variety of modes (e.g. telephone, email, in person, fax, on website.)



d. § 155.335(f) Response to redetermination notice

According to this section, an Exchange must require an enrollee to sign and return the notice. However, if an enrollee does not sign and return the form, as directed, the Exchange will redetermine the eligibility based on the information in the notice.

HCFANY Comment: We support the requirement that an enrollee correct any erroneous information and return the form within 30 days. We do not support the requirement that an enrollee sign and return a form with no erroneous information. This is an unnecessary burden on consumers and Exchanges, since the Exchange is instructed to redetermine eligibility using that information if the form is not returned.

e. § 155.335(g) redetermination and notification of eligibility

The NPRM outlines the procedure for redetermining and notifying enrollees of eligibility.

HCFANY Comment: The notice should be written to assure communication with Limited English Proficiency individuals and to persons with disabilities, in accordance with the standards in §155.230, and should include information about the right to appeal and how to get help with the appeal.

f. § 155.335 Effective dates

The NPRM references the effective dates in §155.330(e).

HCFANY Comment: As stated above, we believe that the effective dates in 155.330(e) are not appropriate. Instead, we recommend adopting the effective dates outlined for the annual enrollment periods in 155.410(f), except for enrollees who become eligible for Medicaid. In those cases, we recommend that Medicaid eligibility and coverage be effective on the first day of the month the eligibility determination is made. However, following the rules outlined in §1.36-B2(c)(B) of the proposed IRS regulations, individuals who move from premium credit to Medicaid eligibility would not be treated as eligible for minimum essential coverage under Medicaid earlier than the first day of the first calendar month after the eligibility determination has been made.

g. §155.335(i) Renewal of Coverage

The NPRM proposes that the Exchange keep an enrollee enrolled in the QHP he or she selected the previous year unless the enrollee terminations coverage from that plan.

HCFANY Comment: We support this provision.

8. §155.340 Administration of advance payments of the premium tax credit and cost-sharing requirements



This section codifies the ACA requirement that HHS report information about advance payments of the premium tax credit to Treasury and employers. The NPRM also proposes notifying the issuer of a QHP that an enrollee of the plan qualifies for advance tax payments or cost sharing reductions.

HCFANY Comment: We recommend that the requirement that Exchanges provide information to employers be limited to a minimum amount of information required by the statute (employee name and taxpayer identification number.) The NPRM should only require transmittal of tax identification numbers, not Social Security numbers. The NPRM should state that the notice to enrollees should be written to assure communication with Limited English Proficiency individuals and to persons with disabilities, in accordance with the standards in §155.230.

9. §155.345 Coordination with Medicaid, CHIP, BHP, and PCIP

a. §155.345(b) Responsibilities related to individuals potentially eligible for Medicaid based on other information or through other coverage groups

The NPRM requires an Exchange to conduct basic screening of an applicant and transmit a determination of potential eligibility to the state agency administering Medicaid, CHIP, or the BHP. If the applicant is otherwise eligible for insurance affordability programs, the Exchange must provide them until the relevant state agency notifies the Exchange that the applicant is eligible for the program.

HCFANY Comment: The NPRM should provide more information about what the basic screening for other eligibility entails, and specify how enrollees should be informed that they can ask for more a more thorough determination review. The Exchange should be required to inform applicants that this basic screening is not an eligibility determination, but only a preliminary collection of information. The NPRM should also clarify that every applicant to the Exchange should receive the same basic screening.

b. §155.345(c) Individuals requesting additional screening

The Exchange must also allow an applicant to request a full determination of eligibility for Medicaid for applicants based on criteria other than those described in this rule.

HCFANY Comment: We support this requirement, but the NPRM should be clarified to address how an applicant will be notified that they can request a full determination, as well as specify that people will not be required to resubmit or re-verify any information that already has been provided to the Exchange. In addition, individuals requesting additional screening should be able to secure tax credits on a temporary basis in the same manner of those found potentially eligible under the “basic screening.”



c. §155.345(d) Determination of eligibility for individuals submitting applications directly to an agency administering Medicaid, CHIP, or the Basic Health Program

The NPRM directs that the Exchange must consult with the agencies administering Medicaid, CHIP, and the Basic Health Program to establish procedures for those agencies to determine eligibility for QHPs and subsidies when a consumer submits an application to one of those agencies.

HCFANY Comment: This section of the NPRM must be strengthened and clarified. It should also make clear that Exchanges are not allowed, not simply “not required,” to duplicate eligibility and verification findings made by the Medicaid/CHIP agency.

d. §155.345(f) Transition from the Pre-Existing Condition Insurance Program (PCIP)

The NPRM requires the Exchange to facilitate transition of PCIP enrollees to the Exchange.

HCFANY Comment: We support the requirement that Exchanges facilitate transition of PCIP enrollees to Exchange-based coverage. The NPRM should outline specific procedures and/or requirements with which states must comply to ensure a smooth transition between PCIP and new sources of coverage that become available after January 1, 2014. It should also require that the Exchange fund consumer assistance and Navigator entities to assist these enrollees.

10. §155.355 Right to appeal

The NPRM requires an Exchange to include a notice of the right to appeal and instructions on how to file an appeal in any determination notice. It refers to three separate sections regarding eligibility determinations—the eligibility determination process at §155.310, eligibility redetermination during the benefit year at §155.330, and the annual redetermination process at §155.335.

HCFANY Comment: The outcome of a determination under all three of these rules could be a determination of eligibility for Medicaid (or CHIP for children under 19). Moreover, because a determination of eligibility for advance payments of premium credits presumes a finding of ineligibility for Medicaid, every decision by the exchange is effectively a denial of Medicaid benefits. This means that the Exchange appeal process will have to be coordinated with the Medicaid process and provide all due process protections that are required under Medicaid. The notice should include contact information for the state consumer assistance program, and the NPRM should require the Exchange to fund consumer assistance with appeals of Exchange decisions. The notice should be written to assure communication with Limited English



Proficiency individuals and to persons with disabilities, in accordance with the standards in §155.230.

11. §157.200 Eligibility of Qualified Employers to Participate in a SHOP

a. §157.200(a) General Requirements

The NPRM states that only a qualified employer may participate in the SHOP.

HCFANY Comment: HCFANY supports the requirement that only qualified employers may participate in the SHOP. HCFANY agrees that a small employer includes employer groups of up to 100 employees, but does not include sole proprietors or otherwise self-employed individuals who constitute a group of 1 (or any family members that would be included in a family policy). This provision would be inconsistent with current New York State law which includes sole proprietors in our small group market. Obviously, this issue would be eliminated were our individual and small group markets to merge into one market. We believe the categorization of sole proprietors will encourage this to occur. We urge HHS to require states to assist sole proprietors with accessing any available tax credits that they may be eligible for. We recommend that the final rule clarify that sole proprietors or otherwise self-employed individuals are eligible for coverage through the individual Exchange.

b. §157.200(b) Continuing Participation for Growing Small Employers

A qualified employer may continue to participate in the SHOP if it ceases to be a small employer.

HCFANY Comment: HCFANY strongly supports the requirement that SHOPs must continue to deem an employer as qualified, even if its number of employees has grown to exceed the definition of a small employer for the purposes of the SHOP, until the employer either leaves the SHOP or becomes ineligible for other reasons.

12. §157.205 Qualified Employer Participation Process in a SHOP

a. §157.205(c) Information Dissemination to Employees

The NPRM requires qualified employers participating in the SHOP to disseminate enrollment information to their qualified employees.

HCFANY Comment: The final rule should create a specific timeline under which employers must provide this information to employees. The final rule should specify that this information must be provided to employees before initial and annual open enrollment periods and whenever an employee is newly hired. We also recommend that employees receive notice of any changes to the plan offerings from the previous year in advance of annual open enrollment periods.

The preamble suggests that SHOPs may create a toolkit for qualified employers explaining the key pieces of enrollment information to disseminate to employees. We think that this would be very helpful and further recommend that HHS create a template for SHOPs to



disseminate that includes both information for employers and materials for employers to disseminate to employees. This will make it easier for SHOPs to encourage and ensure employer compliance with this requirement

b. §157.205(d) Payment

This section requires employers to submit premium contributions for qualified employees in accordance with standards and processes described in §155.705 of the proposed rule.

HCFANY Comment: We strongly support the requirement that SHOPs must have the capacity to provide employers with an aggregated monthly bill and collect an aggregated premium payment from employers to distribute to the appropriate QHPs.

c. §157.205(f) New Employees and Changes in Employee Eligibility

The NPRM requires qualified employers to provide the SHOP with information about individuals or employees whose SHOP eligibility status has changed. The preamble states that COBRA qualifying events are included among eligibility changes of which employers must notify SHOPs.

HCFANY Comment: We recommend that the final rule state that an employer must notify the SHOP when the eligibility of an individual or employee changes within five business days of the event. We recommend that the final rule clarify that individuals leaving SHOP coverage have the same COBRA (and mini-COBRA, where applicable) rights as individuals leaving non-SHOP small business coverage, and that employers in the SHOP have the same notice requirements pertaining to COBRA (or mini-COBRA) as those outside of the SHOP.

d. §157.205(h) Employer participation renewal

This section states that if a qualified employer takes no action during the annual employer election period, the employer's plan choices and contribution levels will stay the same for the following year.

HCFANY Comment: The NPRM should require that employers receive notice from the SHOP that if they do not take action, their plan offerings to employees will remain the same. This notice should include a description of any premium increases in the plans they offer as well as a notice if any plans they offer have left the SHOP or are intending to leave the SHOP. Finally, such employers should receive a notice that even if premiums for employees increase, their employer premium contribution will not increase unless they take action and that if they do not do so their employees may face higher costs. In addition, the final rule should state that employers who do not take action during the annual employer election period must still comply with the requirements to provide information to employees about open enrollment in accordance with §157.205(c).



Thank you for considering our comments. If you have any questions, please contact Elisabeth Benjamin at ebenjamin@cssny.org or at (212)614-5461 or Carrie Tracy at ctracy@cssny.org or (212)614-5401.

Sincerely,

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