October 31, 2011

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9974-P
P.O. Box 8010
Baltimore, MD 21244-9010

Re: HHS Rulemaking: Patient Protection and Affordable Care Act; Eligibility (CMS-9974-P)

Dear Sir/Madam:

Thank you for allowing the State of Vermont the opportunity to comment on the Department of Health and Human Services' proposed regulations on PPACA Eligibility Determinations. We have separately commented—also today--on the original proposed exchange regulations; our comments are supplemental and appear in the order of appearance of the provisions to which they refer.

1. § 155.305(f)(1)(i): Vermont strongly supports exchange eligibility beginning at 100% FPL to ensure that people can remain in a qualified health plan, even if their incomes fall below 133% FPL. This provision will be very helpful in minimizing churn for individuals with income fluctuations.

2. § 155.305(h): Please clarify whether lawfully-present immigrants with incomes less than 100% FPL are entitled to cost-sharing reductions. There appears to be no cost-sharing-reduction category that allows for this. Also, because eligibility is allowed to 100% of FPL, Vermont recommends including another eligibility category for household income between 0-100% FPL.

3. § 155.310: The rule should be clarified to allow for electronic notices, at least when eligibility is determined electronically.

4. § 155.315(b)(2): This provision states:

   "For an applicant who has documentation that can be verified through the Department of Homeland Security and who attests to lawful presence, or who attests to citizenship and for whom the Exchange cannot substantiate a claim of citizenship through the Social Security Administration, the Exchange must transmit information from the applicant's documentation and other identifying information to HHS, which will submit necessary information to the Department of Homeland Security."

   a. It remains unclear to us how the Exchange will know at the time of application whether an individual has documentation that can be timely verified through the Department of Homeland Security.

b. If the Exchange does verify citizenship through a data match with the Social Security Administration, the exchange will not have any basis for knowing whether the individual has documentation that warrants a second attempt to data match with DHS.

5. § 155.315(b)(3):

a. This provision establishes the procedures to be employed in the verification of citizenship. By and large, it incorporates the procedures outlined in § 155.315(e)–the paragraph that deals with verification in the case of general inconsistencies. However, in § 155.315(e), the applicant's response period begins on the day that notice is sent. Here, in contrast, the period begins on the day that the individual receives the notice.

i. This difference will likely be confusing to staff. It appears that the date of receipt is used here to mirror the standard used in the analogous Medicaid context. CMS State Health Officer Letter No. 09-016 (CHIPRA, No. 11, Dec 28, 2009), p. 6. Here, however, the standard includes a definition of "receipt date," which is not a part of the Medicaid standard. All of these provisions should be reconciled. Perhaps the 90-day period across both rules could use the receipt date, subject to the definition that is included in this section.

ii. It is not clear whether this paragraph is intended to preempt the provision in § 155.315(e) that allows the Exchange to grant a good faith extension of the response time. If so, that should be clarified.

(1) If the rule permits the Exchange to grant a good-faith extension in the citizenship context, it will be inconsistent with the Medicaid standard: In its State Health Official Letter on this topic, CMS stated that, if "[a]fter 90 days, if the inconsistency has not been resolved or documentary evidence of citizenship or nationality has not been provided, the State must dis-enroll the individual with timely and adequate notice within 30 days." CMS State Health Officer Letter No. 09-016 (CHIPRA, No. 11, Dec 28, 2009), p. 6.

6. § 155.315(e): The Exchange rule for resolving inconsistencies should be identical to the Medicaid rule on this topic. However, as they now stand, there are several significant differences:

a. 42 CFR § 435.949(b) requires states to use HHS's electronic service in the first instance, if data is available through the service. The Exchange rule does not include a similar requirement.

b. This rule requires the Exchange to make a reasonable effort to resolve the inconsistency, before asking the applicant for additional information. The Medicaid rule does not contain a parallel requirement.

c. The Exchange rule requires the Exchange to grant benefits to otherwise-eligible individuals pending completion of the verification process and provides a procedure for action if the Exchange is unable to verify eligibility at the close of the response period. The Medicaid rule does not contain parallel provisions. In fact, 42 CFR § 435.911(c) seems to provide for enrollment pending completion of eligibility only during the time that the agency is providing a reasonable opportunity to provide documentation of citizenship or immigration status.

d. § 155.315(e)(2)(ii): See, Comment 4(a)(i).

e. § 155.315(e)(3): It does not appear that the proposed Medicaid rule provides for a good-faith extension of the verification response period. The Exchange and Medicaid verification rules should be identical: Both should allow for a good-faith extension or neither should.

7. § 155.320: It would be very helpful to the states if the "hub" included federal data sources like Veteran's Administration, Tri-Care, and Office of Personnel Management.

8. § 155.320(a)(2): Reference to request for modification at § 155.315(e) should read "§ 155.315(f)."

9. § 155.320(c)(3)(iii)(B): In the case of an inconsistency, the rule provides that the Exchange "may," in the first instance, "utilize data obtained through electronic data sources to verify the attestation," but "must" resort to § 155.315(e) procedures if such data sources is unavailable. It would seem closer to the intent of the rule if, in the first instance, the Exchange "must" utilize data matching, if available.

10. § 155.320(c)(3)(iv)(B): This proposed provision would require the Exchange use the alternate verification process in a case in which the only issue is that the applicant attests to a *decrease* in family size. The process outlined in §155.320(c)(3)(v) seems preferable. That approach would promote administrative simplicity in cases where the result of the inconsistency would be to decrease the amount of the tax credit.

11. § 155.320(c)(3)(iv)(C): This proposed provision permits the Exchange to utilize the alternate verification process established in § 155.320(c)(3)(v) when the application filer attests that annual household income is likely to decrease from "the data described in paragraph (c)(1)(i) of this section [*i.e.,* the income listed on a prior tax return] by 20 percent or more to the benefit year . . . ." Among other things, this process allows the Exchange to utilize the provisions of § 155.315(e) to obtain documentation from the filer, when it cannot verify the attestation through other specified means. (See, § 155.320(c)(3)(v)(C)). This covers situations when the Exchange is determining financial eligibility for premium tax credits and cost-sharing reductions. The Exchange, however, will also be determining eligibility for Medicaid and CHIP. In these cases, it will be relying–not on paragraph (c)(1)(i)'s tax-return data, but–on data regarding MAGI-based income, described in paragraph (c)(1)(ii). In many cases, individuals will attest to incomes that are lower than this data would suggest. In these instances, Exchanges will need access to the alternative verification procedures of § 155.320(c)(3)(v)–including, in appropriate cases, the ability to resort to the provisions of § 155.315(e) to obtain documentation from the filer. However, as this provision is now drafted, it does not appear to permit resort to these procedures in cases where use of annualized MAGI-based income does not support the filer's attestation. There does not appear to be any other provision that would afford Exchanges access to such verification in such cases. Accordingly, allowance should be made in this provision for such verification in such cases.

12. § 155.320(c)(3)(v)(D): This provision is unclear: it prohibits the Exchange from finding an applicant eligible for Medicaid or CHIP–among other insurance affordability programs–if: (1) the applicant fails to timely respond to a § 155.315(e) information request issued pursuant to the § 155.315(c)(3)(v) alternate verification process and (2) the data sources specified in paragraph (c)(1) of this section indicate that an applicant in the primary taxpayer's family is eligible for Medicaid or CHIP. However, the Exchange would not have resorted to the alternate verification

process in such a case: According to § 155.315(c)(3)(iv), this process is only available if "the applicants in the primary taxpayer's family have not established MAGI-based income through the process specified in paragraph (c)(2)(ii) of this section that is within the applicable Medicaid or CHIP MAGI-based income standard."

13. § 155.320(d)(2): The use of the term "may" in this provision seems to imply that verification is at the discretion of the Exchange in cases where attestation of enrollment in an employer-sponsored plan is not reasonably compatible with other information.

14. § 155.320(e): The verification of eligibility for employer-sponsored insurance can be a complicated and time-consuming process. More guidance is needed regarding the procedures that the Exchange is expected to employ in completing this task.

15. § 155.335(f)(2): The reference to "paragraph (h)(1) of this section" seems to be in error. It looks like the reference should be to "paragraph (g)(1)."

16. § 157.200: Eligibility of qualified employers. Vermont supports the ability of qualified employers to participate in the Exchange even if it ceases to be a small employer. In addition, we support the ability for qualified employers to participate in multiple state Exchanges in order to ensure that employers with employees in more than one state can offer insurance through the Exchange.

17. Marital status is a critical factor in determining eligibility for premium tax credits. While many states including Vermont recognize same-sex marriages or civil unions, IRS does not. ("For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife" IRS Publication 501). The rule should clarify how Exchanges in relevant states should address this conflict. If, for example, a QHP offers family coverage to households with same-sex partners, can a family that purchases such coverage ever be eligible for premium tax credits? If so, guidance about how to determine the credit would be helpful. Vermont prefers an approach which would allow states to treat all married couples in the same manner at the state's election.

We hope these comments will be useful to you into refining this proposed rule and again thank you for the opportunity to contribute to the development of these regulations.

Sincerely,

Robin Lunge
Director of Health Care Reform
State of Vermont