

## Immigration and Obamacare Proposed Medicaid Rules for Verifying Status

By James R. Edwards, Jr.

In January 2013, the Centers for Medicare and Medicaid Services and the Department of Health and Human Services issued a proposed rule implementing health reform's Medicaid, Children's Health Insurance Program (CHIP), and Exchanges provisions.<sup>1</sup> The proposal includes details of the statutory requirements for verifying the immigration or citizenship status of those applying for Medicaid and CHIP. This *Backgrounder* describes the proposed verification process and standards.

Key aspects relating to immigration status include:

- The definition of “lawfully present” does not include recipients of the DACA administrative amnesty.
- Lacking verified immigration status may not hinder enrollment of those whose preliminary information indicates they are eligible for Medicaid or CHIP, under “presumptive eligibility” rules.
- State residency is separate from citizenship or lawful presence verification.
- Electronic documentation begins to overtake presentation of authentic identification documents. Similarly, a record of identity or status verification is regarded as more important than having authenticated copies of valid, legitimate documents on record.
- Two, down from three, documents are to be required to establish one's status.
- Attestation made about someone's citizenship status in a single affidavit counts as one of the accepted forms of identity. However, self-attestation is not allowed.
- The SAVE system will verify eligibility by citizenship or immigration status through a single “federal data services hub”, which will connect state agencies and exchanges with applicable government databases.
- Individuals whose immigration or citizenship status verification “fails” or is delayed, including for those who cannot give a Social Security number or otherwise provide sufficient or adequate ID documents, have a 90-day “reasonable opportunity period” to settle the matter. The due process period may be extended.
- Those whose immigration status check fails are enrolled in Medicaid or the health program for which they otherwise seem to qualify during the “reasonable opportunity period”.
- For Medicaid and CHIP, certain “lawfully present” aliens no longer face key welfare reform provisions, such as sufficient immigrant sponsor income or a five-year wait.

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The chief goal of the proposed rule is quickly enrolling as many people as can be regarded as eligible into health coverage. This is consistent with the stated goal of the Affordable Care Act (ACA).<sup>2</sup> However, it seeks widespread enrollment by individuals at the price of less assurance that ineligible aliens do not collect taxpayer-funded benefits for which they do not qualify.

The rule's central provisions relating to immigration and citizenship involve the definition of lawful presence, presumptive eligibility, documentation standards, electronic verification, and "reasonable opportunity". Several other aspects factor into the approach embodied in these regulations.

## Lawful Presence

Building on the CHIP reauthorization law's extension of Medicaid and CHIP to certain "lawfully residing" aliens, this rule makes the definition of "lawfully present" applying to exchanges align with the CHIP/Medicaid definition.<sup>3</sup> The law, or CHIPRA, used the term "lawfully residing", while the ACA used the term "lawfully present". The rule proposes to employ the term "lawfully present" here, largely incorporating the definition established in 2010 guidance implementing CHIPRA.<sup>4</sup>

The rule excepts from the "lawfully present" definition recipients of amnesty through the Deferred Action for Childhood Arrivals procedure. Thus, DACA aliens would not be eligible for Medicaid, CHIP, or taxpayer-subsidized coverage through an exchange.

Noncitizens who meet the same lawful presence definition would be able to obtain health insurance through an exchange or enroll in the Medicaid or CHIP program, depending on household income level. This definition includes immigrants and nonimmigrants whose immigration status remains valid, extending to visa holders, certain parolees, asylum applicants, Temporary Protected Status beneficiaries, and others. The rule is loosened by qualifying for taxpayer-funded health care all nonimmigrants with valid status, rather than excluding those who have violated the terms of their visa.<sup>5</sup> Further loosening the definition, the regulation regards as "lawfully present" virtually all holders of an employment authorization document, as well as aliens granted an administrative stay of removal by Homeland Security. The rule makes eligible those regarded as victims of human trafficking, whom states must cover in Medicaid. However, the separate criterion of state residency also arises in all eligibility determinations.

Through an exchange, a type of government-run "market", the rule eases "lawfully present" noncitizens' ability to receive premium tax credit payments in advance, reduce cost-sharing, and enroll in a qualified health plan.

## Presumptive Eligibility

The rule expands "presumptive eligibility" for Medicaid to children under 19, pregnant women, and patients with breast and cervical cancer. Presumptive eligibility refers to the practice of considering certain people as qualifying for Medicaid, a federal welfare program, based on certain preliminary information. The regulation widens the scope of those presumed eligible, according with the ACA's Medicaid expansion, as well as giving six new options for presuming eligibility provided under the health law. Further, federal funding underwrites the associated administrative costs.

Presumptive Medicaid eligibility for these populations is based on preliminary income information. States may require an applicant or someone attesting that the individual seeking presumptive eligibility is a U.S. citizen or national or otherwise has lawful immigration status. Attestation of state residency may also be required. A state may not delegate authority to determine presumptive eligibility. States must put into place integrity mechanisms overseeing presumptive eligibility determinations. However, a state may not require verification of the information given (e.g., income, immigration status) before presuming someone's eligibility for Medicaid or add other conditions on applicants.<sup>6</sup> For children, presumptive eligibility rules also apply to CHIP enrollment. Presuming eligibility is eased for individuals who are "medically needy".

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In addition, the regulation enables certain hospitals to determine someone's presumptive eligibility for Medicaid. State agencies may set standards for such hospitals, based on the proportion of presumed eligible individuals submitting a regular application or who are ultimately determined eligible. Also, newborns of mothers covered by Medicaid on the date of birth or awarded program eligibility retroactively are "automatically deemed eligible for Medicaid for one year from birth".<sup>7</sup>

### Documentation Standards

The rule says states may ask individuals for more information, including documents, for verifying their eligibility, if electronic information is unavailable or differs with what the person attested. But the rule carves out exceptions to document requests for "individuals for whom providing documentation even in such limited circumstances would create an insurmountable procedural barrier to accessing coverage, while serving little evidentiary value."<sup>8</sup> Going by the electronic documentation, as opposed to actual documentation the person can produce, is the standard stressed under this rule.

Claiming administrative burden and undue denial or delay in citizens' Medicaid enrollment, the regulation revises the citizen document structure. Acceptable documentation will either "provide evidence of citizenship" or "provide evidence of citizenship, but require an additional identity document".<sup>9</sup> The former category includes U.S. Passport Cards and certain Indian tribal documents.<sup>10</sup> Certain other individuals are allowed to declare the applicant's citizenship or immigration status, including an adult family member or an "authorized representative".<sup>11</sup>

It is proposed that identifying documents bear a photograph or "other identifying information including, but not limited to, name, age, sex, race, height, weight, eye color, or address".<sup>12</sup> Canadian driver's licenses are specified as unacceptable for establishing U.S. identity.

The rule drops the requirement that documents produced must be original copies, now allowing photocopies and other inauthentic forms.<sup>13</sup> Nor must school, medical, or religious records have to have been created within strict time periods, and such documentation no longer must show the person's birth date or age when the record was created, or parents' names or birthplaces. The rule expands use of school records for CHIP enrollment from the current under the age of 16 to age 19. Copies of proof of citizenship are no longer to be maintained in an applicant's file. And states must help Medicaid applicants to obtain any required documentation. This includes "limited English proficient" applicants.

The regulation also sets forth how affidavits claiming citizenship may be used. Someone claiming to be a U.S. citizen and lacking a document from the list may provide an affidavit. The affidavit should give the individual's name, birth date, and U.S. birthplace. It comes from "someone who can reasonably attest to the individual's citizenship".<sup>14</sup> The proposal further diminishes the reliability of attestation by allowing just one affidavit, while eliminating the requirement of two signed affidavits from persons having "personal knowledge of the individual's birth" who must prove their citizenship. Also, the rule broadens affidavit usage to "anyone unable to produce other identity documentation, provided that the affiant can reasonably attest to the applicant's identity, consistent with our proposal for affidavits demonstrating citizenship."<sup>15</sup> However, self-attestation of U.S. citizenship is no longer acceptable for CHIP enrollment.

### Electronic Verification

The rule designates a central means of electronically verifying individuals' information. A "federal data services hub" is to be established where state agencies and insurance affordability programs can gain access for verifying Medicaid, CHIP, and exchange applicants' income, citizenship, or immigration status, and other requirements associated with receiving welfare or taxpayer subsidy.<sup>16</sup> To verify U.S. citizenship, Social Security records are checked. Immigration records of Homeland Security provide verification of immigration status. If the data hub is unavailable during a

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status check, an agency will directly match data with Social Security (for citizens) or DHS (for aliens). The rule anticipates immediate or nearly immediate verification through the electronic process, and it harmonizes the process across health programs.

The federal Systematic Alien Verification for Entitlements, or SAVE, system is referenced in the rule as the means of verifying “virtually all nonimmigrant applicants or beneficiaries”.<sup>17</sup> This verification system is used for electronic comparison, either through the federal data hub or directly if the hub is inaccessible. Electronic checks must be attempted before requesting paper ID documents. The number of corroborating documents someone must produce is reduced from three to two. And states must accept documents the applicant presents.<sup>18</sup> A state agency may rely on the identify verification of another federal or state agency or an “Express Lane agency”. States may keep a record, tangible or electronic, of applicants’ citizenship having been verified, instead of copies of someone’s ID documentation itself. Applicants must not be required to appear in person, but may apply for a health benefit by mail or online.<sup>19</sup>

The proposed rule unifies the application during the launch of the open enrollment period October 1, 2013, for health coverage starting January 1, 2014. This unified “single streamlined” application is good for insurance and premium-support subsidy through the exchange and for Medicaid and CHIP.<sup>20</sup> However, this application is in addition to current state Medicaid and CHIP applications. Some states may delegate Medicaid eligibility determinations to the exchange.<sup>21</sup>

Aliens with U.S. military service or dependents are exempt from the five-year bar on Medicaid eligibility. The rule anticipates states reverifying lawful immigration status for aliens seeking Medicaid renewal or applying for Medicaid again in the future. Infants are exempt from citizenship verification if deemed CHIP- or Medicaid-eligible, including those benefited because of the mother’s Medicaid coverage for the birth (“deemed newborns”), immediately or in the future. And states may match birth data with state vital statistics records. However, school records for CHIP enrollment no longer must be verified as authentic.

## Reasonable Opportunity

If electronic verification of citizenship or immigration status fails or is delayed, applicants for health benefits must have a “reasonable opportunity period” in which to confirm their status. If otherwise eligible for Medicaid, states must grant Medicaid enrollment to unverified persons during this period. States must take steps to clear up the status issue and may ask applicants for additional documentation. This process applies to both alleged U.S. citizens and alleged lawfully present aliens.<sup>22</sup> Further, it applies to those seeking Medicaid or exchange-based health insurance.

“Reasonable opportunity” even applies, under this rule, to persons “unable to provide a SSN [Social Security number]” — a rather glaring loophole for frauds to exploit. Thus, those who do not supply documentation or “where verification with DHS has failed” (which very well might indicate the alien is unlawfully present) are afforded a “reasonable opportunity period” for obtaining taxpayer-funded health benefits while the inconsistencies in their records get reconciled.

States may have some yet-undetermined number of business days before the period begins. The rule requests public comment. The period begins the date the person receives notice from the agency, which the rule further specifies as five days after the date on the notice.<sup>23</sup> Once the “reasonable opportunity” timeframe begins, it extends 90 days, whether for exchange subsidies, Medicaid, citizenship, or immigration. States may extend this period, and applicants may ask for extensions. The rule provides for an administrative appeal, while states have the option of continuing the person’s benefits during the appeal or terminating the benefits.<sup>24</sup> Federal monies may be tapped to pay for benefits to individuals claiming citizenship or legal immigration status during the reasonable opportunity period.

## Rolling Back Welfare Reform

Several provisions of the regulation undo landmark achievements of the 1996 welfare reform. Moreover, they chip away at the modest steps toward requiring personal responsibility on the part of immigrants.

If a state accepts lawfully present pregnant women or children by exercising optional eligibility through Section 214 of CHIPRA, the state must take all who qualify and are present into Medicaid and may not take only a portion of that class of aliens. Under this provision, the rule removes certain constraints included in the welfare reform law. These “lawfully present” aliens will not face the five-year waiting period to qualify for Medicaid and CHIP welfare. Limitations on unqualified noncitizens’ payment services are suspended. Sponsor income deeming is dropped. And state options to require 40 quarters of work or coverage caps of seven years are similarly blocked.<sup>25</sup>

The rule implements an ACA provision that undoes welfare reform’s requirements. States may not “deem” income of immigrant sponsors for Medicaid or CHIP applicants in presumptive eligibility determinations. In fact, they “must ensure that there is no deeming of income or attribution of financial responsibility that would conflict with” speeding enrollment for these “medically needy” populations.<sup>26</sup>

## Conclusion

The rule implementing immigration status verification under the ACA is a mixed bag. The regulation sacrifices document standards, authentication assurance, and identification integrity in order to speed and maximize enrollment in federal health coverage, including welfare programs such as Medicaid. Rapidly expanding health coverage to some 40 million people, coupled with relaxed ID and verification standards, only increases the likelihood of fraud and improper enrollment of ineligible people, including aliens. Furthermore, the combination of relaxed verification and documentation standards could enable certain identity fraud schemes to be developed.

The involvement of associates from “community-based” organizations to assist in the enrollment process only compounds the likelihood of waste, fraud, and abuse. And the extended due process measures during which ineligible persons can receive taxpayer-funded health care with no requirement to repay what they collect only sweetens the pot for some to game the system. The extra cost exposure here is massive. And weakening welfare reform only encourages and enables dependency and subverts individual responsibility.

At the same time, the rule could have been worse. The rule excludes DACA amnesty recipients from taxpayer-subsidized health care, at least for now, under the “lawfully present” definition. Presumptive program eligibility, especially for aliens unverified as lawfully present, risks scarce public health resources, but seems to apply to welfare instead of exchange-based coverage, limiting the scope. Use of the SAVE system for electronic verification is the single best feature of this regulation. That existing program is the most reliable for immigration status checking the government has.

## End Notes

<sup>1</sup> Department of Health and Human Services, proposed rule, [“Medicaid, Children’s Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing”](#).

<sup>2</sup> For background on health reform, see James R. Edwards, [“Immigration-Related Provisions of Senate and House Health Reform Bills”](#), Center for Immigration Studies, November 2009.

<sup>3</sup> See HHS proposed rule pp. 138-139.

<sup>4</sup> See July 1, 2010, HHS Centers for Medicare and Medicaid Services [guidance letter to State Health Officials](#).

<sup>5</sup> See HHS proposed rule p. 71.

<sup>6</sup> “Because the statute requires qualified entities to determine presumptive eligibility ‘on the basis of preliminary information,’ under the proposed regulations states would be prohibited from requiring verification of the conditions for presumptive eligibility and from imposing additional conditions for presumptive eligibility.” (p. 63 regarding children)

<sup>7</sup> HHS proposed rule p. 73.

<sup>8</sup> HHS proposed rule p. 77. Named exceptions are homeless, domestic violence victims, and those in a natural disaster.

<sup>9</sup> HHS proposed rule p. 88.

<sup>10</sup> HHS proposed rule p. 90.

<sup>11</sup> See HHS proposed rule pp. 142-144. “Authorized representatives” of individual or employee applicants include a relative, legal guardian, designee of employer, or one holding power of attorney. Applicants name such a representative and may revoke representation. These representatives may sign on behalf of the applicant. Assistants from community-based organizations, called “certified application counselors”, may not sign or make attestation on the individual’s behalf. However, “authorized representatives” may be volunteers or staff of organizations.

<sup>12</sup> HHS proposed rule p. 93.

<sup>13</sup> HHS proposed rule p. 89.

<sup>14</sup> HHS proposed rule p. 92.

<sup>15</sup> HHS proposed rule p. 94.

<sup>16</sup> For background on the data hub, see Mary Mosquera, [“Federal hub tool to check data for insurance exchanges, Medicaid”](#), Government Health IT, July 2, 2012.

<sup>17</sup> HHS proposed rule p. 71. Also see p. 79.

<sup>18</sup> HHS proposed rule p. 93.

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<sup>19</sup> HHS proposed rule p. 95.

<sup>20</sup> HHS proposed rule p. 98.

<sup>21</sup> The rule implements ACA changes for determining an individual's eligibility for different kinds of health coverage or subsidy, based on new income criteria. All of that plus citizenship/immigration verification relevant to one's eligibility is supposed to take place in a streamlined fashion.

<sup>22</sup> HHS proposed rule p. 81.

<sup>23</sup> HHS proposed rule p. 84.

<sup>24</sup> HHS proposed rule p. 86.

<sup>25</sup> HHS proposed rule p. 69.

<sup>26</sup> HHS proposed rule p. 67.