

The Hilltop Institute



analysis to advance the health of vulnerable populations

Overview of the July 1, 2013 Final Rule on Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions

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Miscellaneous Minimum Essential Coverage Provisions**

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Overview of the July 1, 2013 Final Rule on Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions

Introduction

On July 1, 2013, the U.S. Department of Health and Human Services (HHS) issued a final rule on *Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions* (<http://www.gpo.gov/fdsys/pkg/FR-2013-07-01/pdf/2013-15530.pdf>). This document provides a high-level summary of these rules and highlights key changes to the regulation since the issue of the proposed rule.

Part 155: Exchange Establishment Standards

General Provisions: Definitions (§155.20)

In this section, HHS makes technical corrections to the following definitions:

- Applicant: HHS clarifies that the definition of this term in this section excludes those individuals seeking eligibility for an exemption from the individual shared responsibility payment.
- Application filer: HHS clarifies that this means an applicant; an adult who is in the applicant's household or family; an authorized representative of an applicant; or if the applicant is a minor or incapacitated, someone acting responsibly for an applicant, excluding those individuals seeking eligibility for an exemption from the individual shared responsibility payment. HHS further clarifies that inclusion of an authorized representative in the definition refers to the authorized representative of an applicant.

General Functions of an Exchange (§ 155.200)

HHS adopted this rule as proposed, which provides that the Exchange would also perform the minimum functions related to eligibility determinations for exemptions.

Exchange Functions in the Individual Market: Eligibility Determinations for Exemptions (§§155.600, 155.605, 155.610, 155.615, 155.620, 155.625, 155.630, 155.635)

Definitions and General Requirements (§155.600)

In this section, HHS makes a minor technical correction to the definition of “shared responsibility payment” to specify that it means the payment imposed with respect to a non-



exempt individual. HHS adopted the other definitions as proposed. The final rule also adopts the following general requirements as proposed:

- Any attestation that an applicant is to provide under this subpart may also be provided by an application filer on behalf of the applicant.
- Accessibility and notice requirements in 155.205(c) and 155.230 apply to exemptions as well.

Eligibility Standards for Exemptions (§155.605)

The final rule provides three categories of exemption certification issuance: certificates issued exclusively by the Exchange; certificates issued by the Exchange and also available through the tax return filing process; and certificates issued exclusively through the tax return filing process. These sections of the regulations are adopted as proposed.

Exemption certifications available only through the Exchange include:

- Religious conscience
- Hardship

Exemption certifications available both through the Exchange and through the tax filing process include:

- Membership in a health care sharing ministry[retrospectively]
- Membership in an Indian tribe [prospectively or retrospectively]
- Incarceration [retrospectively]

Exemptions certifications available only through the Internal Revenue Service (IRS) tax return filing process:

- Lack of “affordable coverage”
- Income below filing threshold
- Unlawful presence in the United States
- Short-term gaps in coverage

The rule explains that applicants can apply for multiple exemptions simultaneously. Generally, applicants are required to submit a new application for each year for which an applicant wants to be considered for an exemption through the Exchange. Exemptions for membership in an Indian tribe and for religious conscience, however, are expected to remain the same from year to year. Additionally, the Exchange will grant an exemption for membership in an Indian tribe either



prospectively or retrospectively. Finally, Exchanges must determine an applicant to be eligible for an exemption for a calendar year if he or she has been determined ineligible for Medicaid for one or more months during the benefit year solely as a result of a state not implementing §2001(a) of the Affordable Care Act (ACA).

The final rule modifies the proposed rule by clarifying that hardship exemptions for financial or domestic circumstances must be granted for the month before, the month or months during, and the month after which an individual experiences the circumstances that qualify as a hardship, preventing him or her from purchasing a qualified health plan (QHP). The rule explains that the Exchanges have the flexibility to provide an exemption for additional months, consistent with the hardship. The final rule further clarifies that hardship exemptions can also be provided for previous tax years after December 31 of a given calendar year, noting that the Exchange will only accept an application for a hardship exemption during one of the three calendar years after the month or months during which the applicant attests that the hardship occurred.

Exchanges will not be required to send an additional notice to individuals in possession of certificates of exemption at the end of the calendar year to remind them of the need to submit an application for the next calendar year. HHS states that, because the length of time for certification for exemptions will vary, “the corresponding administrative burden on the Exchange is outweighed by the benefits of such a notice.”

The final rule clarifies that if an applicant attests to membership in a religious sect or division that is not recognized by the Social Security Administration (SSA) as an approved religious sect or division under §1402(g)(1) of the Internal Revenue Code (IRC), then the Exchange must provide the applicant with information on how the claimed religious sect or division can pursue such recognition. The Exchange must determine the applicant to be ineligible for this exemption until the Exchange obtains information indicating that the religious sect or division has been approved. HHS intends to provide further guidance on this process in collaboration with the SSA.

The final rule makes technical corrections to clarify that the Exchange will determine an individual to be eligible for a hardship exemption if he or she experienced circumstances that prevented him or her from obtaining coverage under a QHP in accordance with the statute. The final rule also adds a paragraph to clarify that, under the hardship exemption, where an individual is offered employer-sponsored coverage that does not meet the minimum value standard, the Exchange will consider the affordability based on the lowest-cost employer-sponsored coverage (self-only if for just an employee, or family coverage if the employee has a family) that meets the minimum value standard or, if such employer-sponsored coverage is not available, on the lowest-cost bronze plan in the “relevant rating area of the Exchange, reduced by any available advanced payments of the premium tax credit (APTC).” Where employer-sponsored coverage is used to determine affordability, the Exchange may not consider wellness incentives or tobacco cessation programs that would lower the cost of premiums. This exemption



will be available throughout the calendar year prospectively until the last date on which the individual could enroll into a QHP during that calendar year (i.e., as late as November).

The final rule also modifies eligibility standards for the religious conscience exemption such that if an exemption is provided to an individual under the age of 21, an exemption will be provided on a continuing basis until the month after the individual's 21st birthday, which triggers a corresponding notice from the Exchange and an opportunity for the individual turning 21 to file another application to maintain this exemption (related *technical correction*: the Exchange must make an exemption in this category available prospectively or retrospectively).

The final rule adds a category of hardship exemption for an individual who is not a member of a federally recognized tribe and is either an Indian eligible for services through an Indian health care provider or an individual eligible for services through the Indian Health Service (IHS). This change will ensure that individuals who have access to health care through the IHS, tribes and tribal organizations, and urban Indian organizations are treated in the same manner as members of federally recognized tribes for purposes of the individual shared responsibility payment. This exemption can be granted prospectively or retrospectively, for a month on a continuing basis until the individuals report a change in their eligibility status.

Eligibility Process for Exemptions (§155.610)

Under this section, the rule explains that the Exchange must collect information necessary to determine eligibility for an exemption certification either through the application developed by HHS or an alternative application approval by HHS. Where the Exchange has already received the information needed to determine eligibility for an exemption, it must use such information to “the maximum extent possible.” Further, where an individual has already submitted an application for a QHP or insurance affordability programs, the Exchange must use information provided on the application and may not duplicate the verification process.

This final rule retains the provisions from the proposed rule related to the channels by which the Exchange will accept an application. Until October 15, 2014, the Exchange must, at a minimum, permit an individual to apply for an exemption by mail using a paper application. HHS intends to issue future regulation on additional channels that may be available after October 15, 2014.

Regarding the hardship exemption, HHS corrects an oversight in the proposed rule by adding language that provides that an applicable exemption that is “available retrospectively can also be provided for previous tax years based on an application that is submitted after December 31 of a given calendar year.” This may only be provided during one of the three calendar years after the month or months during which the applicant attests that the hardship occurred.

Finally, in the preamble of this final rule, HHS notes that it does not have the authority to determine if an individual is liable for the shared responsibility payment (individual mandate)



and reiterates that this authority solely belongs to the IRS. HHS notes that comments addressing the appeals process will be discussed in future regulation.

HHS believes that it is appropriate to provide exemptions based on religious conscience and membership in a federally recognized Indian tribe retrospectively, without a time limit for filing. Further, the rule explains that HHS made a drafting oversight in the proposed rule and therefore added a reference to the hardship exemption in the regulation text to specify that this should also be treated differently than under the general rule.

HHS clarifies that, in a situation in which an individual applies for multiple exemptions, it expects the Exchange to provide the appropriate notice regarding each exemption for which the individual applied. HHS believes that not providing feedback for all requested exemptions could create additional confusion for consumers. Additionally, HHS expects that if an applicant is approved for an exemption and is later denied for a different exemption for the same time period, then the notice describing the denial will “clearly state that the applicant’s prior exemption remains in effect.” Finally, with regard to notifications, HHS, in response to commenters’ suggestion, clarifies that the Exchange will notify individuals to retain the certificate of exemption, as well as records that demonstrate the underlying qualification for the exemption.

Verification Process Related to Eligibility for Exemptions (§155.615)

This section of the rule addresses the verification process for eligibility for exemptions. HHS proposes that, unless it grants a request for modification of the information collection and verification process to mitigate administrative costs and burden, the Exchange is required to verify and obtain information according to this section to determine whether the applicant is eligible for an exemption. HHS proposes the following categories for exemption:

- **Religious Conscience**: The Exchange must verify that applicants requesting this exemption meet the standards in §155.605(c)—specifically that the individual is a member of a recognized religious sect or division (as recognized by the SSA) and an adherent of established tenets or teachings of such sect/division. HHS proposed that, except for instances in which such religious sect or division is not compatible with information provided by the individual or records of the Exchange, the Exchange will accept a Form 4029 that reflects that an applicant has been approved for an exemption from Social Security and Medicare taxes under §1402(g)(1) of the IRC. If an applicant attests to membership in a religious sect or division that is not recognized by SSA, the Exchange must provide the applicant with information regarding how his or her religious sect or division can pursue such recognition and determine the applicant ineligible for this exemption until the Exchange obtains information that indicates the religious sect or division has been approved.
- **Healthcare Sharing Ministry**: The Exchange must verify that applicants requesting this exemption meet the standards defined in §155.605(d). The Exchange can only make such



exemption retrospectively. HHS proposes that the Exchange—except for instances in which the information provided by the applicant is not compatible with Exchange records or such healthcare sharing ministry is not known to the Exchange—will first accept an attestation from an applicant that he or she is a member of a health care sharing ministry. The Exchange will verify that the health care sharing ministry for which the applicant attests membership is known to the Exchange as a health care sharing ministry based on a list that will be developed by HHS. If an applicant attests to membership in a health care sharing ministry that is unknown to the Exchange, the Exchange will notify HHS and not make an eligibility determination until HHS informs the Exchange of the attested health care sharing ministry status.

- **Incarceration**: The Exchange must verify that applicants requesting this exemption meet the standard set forth in §155.605(e). The Exchange can only make such exemption retrospectively.
- **Membership in Indian Tribe**: The Exchange must verify membership in an Indian tribe through the process outlined in §155.350(c).
- **Eligible for Services through an Indian Health Provider**: For any applicant who requests an exemption based on his or her eligibility to receive services through an Indian Health Provider, the Exchange must verify such eligibility based on similar procedures to verify Indian tribal membership.
- **Hardship Exemption**: For any individual applying for a hardship exemption prospectively based on the inability to afford coverage, the Exchange must verify the unavailability of affordable coverage through the procedures used to (1) determine eligibility for the APTCs and (2) verify eligibility for qualifying coverage in an eligible employer-sponsored plan for the purposes of eligibility for APTCs and cost-sharing reductions (CSRs). In the event that the Exchange is unable to verify information necessary to make a determination for a hardship exemption (including situations in which an applicant's attestation is not reasonably compatible), the Exchange must follow procedures similar to those in §155.315(f), with modifications to *preclude eligibility pending the outcome of the verification process, made in accordance with the Secretary's authority under ACA §1411*.

Reasonable Compatibility

If the information provided by the applicant for these exemptions is not reasonably compatible with other information provided by the individual and records of the Exchange, then the Exchange is required to:

- Make a reasonable effort to identify and address the causes of such inconsistency, including typographical or other clerical errors, by contacting the applicant to confirm the accuracy of the submitted information.



- If unable to resolve inconsistencies, (1) notify the applicant of these inconsistencies; (2) allow the applicant 90 days from the date of the notice to present satisfactory evidence via the same channels available for the submission of an application (except by telephone); (3) extend the 90-day period if the applicant demonstrates that a good faith effort has been made to obtain the documentation; and (4) if it remains unable to verify the attestation, determine the applicant’s eligibility for an exemption based on any information available from the data sources used unless the applicant qualifies for the exemption for “special circumstance.” As such, the Exchange is required to notify the applicant of such determination and include in such notice that the Exchange is unable to verify the attestation.
- During the 90 day period, or extension of such period when the applicant demonstrates a good faith effort, the Exchange may not grant a certificate of exemption.

HHS also proposes that the Exchange provide a case-by-case exception for applicants for whom documentation does not exist or is not reasonably available to account for situations in which documentation cannot be obtained.

Flexibility

HHS proposes that it has the flexibility to approve an Exchange Blueprint or a significant change to an Exchange Blueprint that modifies the methods for collecting and verifying information for the purposes of determining an exemption.

Social Security Number (SSN) Validation

HHS proposes that for any individual who provides an SSN to the Exchange, the Exchange is required to transmit the SSN and other identifying information to HHS, which will then submit this information to SSA. If the Exchange is unable to validate an individual’s SSN through SSA, or the individual is discovered to be deceased by SSA, then the Exchange must follow procedures specific to resolving inconsistencies (as outlined under each exemption’s section). The date on which the notice of request for additional information from the Exchange means five days after the notice date unless the individual demonstrates that he or she did not receive the notice within that timeframe.

HHS finalized the provisions of §155.615 as proposed, with the following modifications:

- Clarification that if an applicant attests to membership in a religious sect or division that is not recognized by SSA, the Exchange must provide the applicant with information on how the sect or division can pursue such recognition.
- New language to specify a process for establishing a list of health care sharing ministries that meet the statutory standards.



- Clarification that the Exchange may not consider an applicant's previous or current enrollment in health coverage as not reasonably compatible with his or her attestation of membership in a health care sharing ministry.
- Clarification that if an applicant attests to membership in a health care sharing ministry that is not known to the Exchange, the Exchange will provide the applicant with information on how the organization can pursue such recognition.
- Clarification that the Exchange will not verify whether an applicant experienced a hardship under §155.605(g)(3) or (5); these exemptions will be claimed directly with the IRS at tax filing.
- New language to require the Exchange (when determining eligibility for lack of affordable coverage) to accept an application filer's attestation for an applicant regarding eligibility for minimum essential coverage (MEC) other than through an eligible employer-sponsored plan.
- Further specification that the Exchange will use the same verification procedures for the exemption for an individual who is eligible for services through an Indian health care provider as it will use for members of a federally recognized tribe.
- Specification that the Exchange would trigger an inconsistency when electronic data are required but not reasonably expected to be available within two days.
- Modification to the time period for an applicant to present satisfactory documentary evidence to resolve an inconsistency from 30 days to 90 days.
- Further specification on how an Exchange must validate an SSN for an individual seeking an exemption.
- Other minor technical corrections.

In response to comments, HHS notes that it will clarify that the Exchange will not consider an individual's current or previous health coverage as reasonably incompatible with membership in a health care sharing ministry because nothing in statute limits the availability of such an exemption to an individual who was or is uninsured. HHS also notes that, because of the short timeline for implementation (October 1, 2013), the federally facilitated Exchange will be unable to collect data from individual tribes and, as such, will rely on a paper documentation process. HHS notes that state-based Exchanges may have additional opportunities for October 1, 2013. Exchanges will have the flexibility to work with local tribes to gain information that could be used on an electronic basis. HHS intends to work with all of the relevant stakeholders in the future to identify opportunities to increase the efficiency and integrity of the verification process.

Eligibility Redeterminations for Exemptions during a Calendar Year (§155.620)

This section of the rule addresses redetermination of an individual's eligibility for an exemption if the Exchange receives and verifies new information as reported by an individual. HHS



proposes that the Exchange must require an individual with a certificate of exemption to report any changes relating to his or her eligibility for such exemption. HHS further proposes that the Exchange allow an individual to report changes through the channels acceptable for the submission of an exemption application. Prior to using the self-reported information in an eligibility determination for an exemption, the Exchange would use the verification processes utilized at the point of initial application in verifying any changes in eligibility.

HHS proposes that the Exchange notify an individual after re-determining his or her eligibility based on a reported change. The Exchange would be required to provide periodic electronic notifications regarding the requirements for reporting changes unless the individual declined to receive such notifications. HHS notes that it does *not* propose an annual Exchange redetermination process for exemptions or periodic data matching.

HHS adopted the rule as proposed with the following modifications:

- HHS clarifies that redeterminations under this section can only occur when an individual reports a change that impacts his or her eligibility determination for an exemption, except for the hardship exemption.
- The Exchange will not conduct mid-year redeterminations for the hardship exemption, will not require individuals receiving the hardship exemption to report changes, and will not send periodic reminders to report changes to individuals who have this exemption.
- HHS adds new language to clarify that the Exchange will implement a change resulting from a redetermination under this section for the month or months after the month in which redetermination occurs such that a certificate that was provided for the month in which redetermination occurs remains effective.

Options for Conducting Eligibility Determinations for Exemptions (§155.625)

The proposed rule specifies that the Exchange has the option of executing all eligibility functions either directly, through contracting arrangements, or through the use of a federally managed service. Under the federally managed service option, HHS proposes that the Exchange may implement an eligibility determination for an exemption made by HHS provided that the Exchange accepts the application and issues the eligibility notice and that the Exchange performs verifications and other activities required in connection with eligibility determinations. Under this option, HHS also proposes requiring the Exchange to transmit all application information to HHS and adhere to HHS' determination.

HHS is modifying this proposed rule to allow Exchanges to rely on HHS to process exemption applications, complete the necessary verifications, determine eligibility, and issue notices (including certificates of exemption) for applications submitted *prior to October 15, 2014*. For applications submitted after that date, the Exchange may adopt an exemption eligibility



determination made by HHS provided that the Exchange accepts the application and issues the eligibility notice in the same manner as discussed in the proposed rule.

HHS notes that the appeals process for exemptions will be addressed in a future regulation and expects that it will clarify that Exchanges relying on HHS to make an eligibility determination for an exemption may also rely on HHS to administer the exemption appeals process.

Reporting (§155.630)

In this section, HHS proposes reporting requirements on eligibility determinations for exemptions. The proposed rule requires Exchanges conducting eligibility determinations for exemptions to transmit the following to the IRS: the individual's name, SSN, the exemption certificate number, and any additional information specified in guidance published by the IRS. HHS finalized this provision as proposed without changes. In response to comments, HHS notes that it anticipates that this reporting will be accomplished through a monthly file beginning in February 2014.

Right to Appeal (§155.635)

HHS proposes that Exchanges include notice of the right to appeal and instructions for how to appeal in any notification issued in accordance with §155.610(i) and §155.625(b)(1). HHS also proposes that an individual may appeal any eligibility determination made by the Exchange in relation to an exemption. HHS finalized this provision as proposed with only minor technical changes. In response to comments, HHS notes that the appeals process for exemptions will be further detailed in future rulemaking.

Part 156: Health Insurance Issuer Standards

Definition of MEC (§156.600)

In this section, HHS makes minor clarifying changes to the definition of MEC.

Other Coverage that Qualifies as MEC (§156.602)

The proposed rule specifically designates the following types of coverage as MEC:

- Self-funded student health insurance plans (modified in the final rule)
- Foreign health coverage (deleted in the final rule)
- Refugee medical assistance
- Medicare advantage plans
- AmeriCorps coverage (deleted in the final rule)



- State high-risk pools (modified in the final rule)
- Other coverage that qualifies pursuant to §156.604

The final rule clarifies that self-funded student health insurance plan and state high-risk pool coverage will only be designated as MEC for plan years beginning on or before December 31, 2014. After that date, sponsors of self-funded student health plans and state high-risk pools may apply to be recognized as MEC. HHS notes that the Department of the Treasury intends to publish further guidance about whether individuals who are eligible to enroll in self-funded student health plans and state high-risk pools will be treated as eligible for QHP coverage subsidized by APTCs.

The final rule also clarifies that AmeriCorps and foreign health coverage *will no longer* be automatically designated as MEC, but they may apply to be recognized as MEC.

Requirements for Recognition as MEC not Otherwise Designated (§156.604)

The proposed rule outlines a process by which other types of coverage could seek to be recognized as MEC by HHS. To be recognized as MEC, coverage would need to offer substantially the same consumer protections as those in Title I of the ACA relating to non-grandfathered individual coverage. The proposed rule further specifies the types of information sponsoring organizations must submit to HHS in order to be recognized as MEC. The proposed rule also grants HHS the authority to revoke recognition of MEC if these requirements are no longer met.

HHS accepted this section as proposed with minor changes to clarify that the organization must certify that coverage substantially complies with the requirements of Title I of the ACA that apply to non-grandfathered plans in the individual market, and the organization must submit any plan documentation or other information that demonstrate that coverage substantially complies with these requirements.

HHS Audit Authority (§156.606)

The proposed rule grants HHS the ability to audit plans to ensure the accuracy of the certification either randomly or when triggered by certain information. The proposed rule also specifies that, once recognized as MEC, a plan would have to provide notice to its enrollees, indicating that the plan has been recognized as MEC for the purposes of the individual shared responsibility provision. The sponsor of any plan recognized as MEC would also be required to report annual information to the IRS. There were no major changes to this proposed provision.





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