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March 18, 2013

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
200 Independence Avenue SW, Room 445-G
Washington, DC 20201

RE: CMS 9958-P

**Patient Protection and Affordable Care Act; Exchange
Functions: Eligibility for Exemptions; Miscellaneous
Minimum Essential Coverage Provisions**

Dear Sir/Madam:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people.

We appreciate the opportunity to submit these comments addressing our concerns on exemptions from the shared responsibility payment for not maintaining minimum essential coverage as described in § 5000A of the Internal Revenue Code. We look forward to conversations with you and your staff to continue to ensure comprehensive and continuous health insurance coverage for all individuals, including pregnant women.

§ 155.605

The Medicaid statute and regulations require that states provide “pregnancy-related services” as well as coverage for “conditions that might complicate pregnancy,” which may include services for pregnant women that are not covered for non-pregnant adults.¹ Medicaid eligibility rules require

¹ 42 U.S.C. § 1396a(a)(10); 42 C.F.R. § 440.210(a)(2).

states to obtain HHS approval before providing pregnant women more restricted services than offered non-pregnant adults.² HHS has appropriately articulated the expectation that states will provide comprehensive coverage for pregnant women. HHS is accordingly requiring any state that wishes to deny pregnant women services it provides non-pregnant adults to obtain HHS approval by convincing HHS of the evidence-based justification for excluding a service as not pregnancy-related. We commend HHS for recognizing that maternal health and well-being, and improved birth outcomes, require affordable access to comprehensive health care services.

Proposed Department of the Treasury rules exclude coverage of pregnancy-related services under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX) from the definition of “minimum essential coverage.”³ We commend the Department of the Treasury for recognizing not only the time-limited nature of pregnancy-related Medicaid coverage, but also the possibility, no matter how small, that some state Medicaid programs could provide pregnant women with a lesser scope of services than non-pregnant adults. The proposed rule would permit a pregnant woman receiving limited Medicaid benefits to take advantage of advance premium tax credits (APTCs) to purchase comprehensive health care coverage through a health insurance Exchange, if she so desired.

Consistent with these approaches, which promote and protect pregnant women’s health, we urge HHS to ensure that pregnant women are not penalized for not enrolling in other health care coverage if they are receiving pregnancy-related Medicaid benefits. HHS could, for example, include a hardship exemption under § 155.605(g) for a calendar year. An exemption is important because pregnant women might either (1) receive comprehensive coverage through the pregnancy-related Medicaid category, and therefore not need other health insurance coverage, or (2) receive limited-scope coverage through the pregnancy-related Medicaid category, but be unable to afford other health insurance coverage. Even with APTCs, coverage through the Exchange might be unaffordable. This is similar to situations in which a state’s decision regarding the Medicaid Expansion results in an individual being ineligible for Medicaid, but unable to afford other health insurance coverage—individuals for whom HHS has proposed to add an exemption for hardship for a calendar year. HHS should also ensure an exemption based on enrollment in pregnancy-related Medicaid coverage is not subject to certification by Exchanges. This is important not only to protect a woman’s privacy, but also to impose the least possible burden on pregnant women.

RECOMMENDATION(S): We recommend that HHS ensure that pregnant women enrolled in Medicaid under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX) are not penalized, through assessment of a shared responsibility payment under § 5000A of the Internal Revenue Code or otherwise, for not obtaining other health care coverage.

² See Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 77 Fed. Reg. 17144, 17148-49 (March 23, 2012) (to be codified at 42 C.F.R. pts. 431, 435, & 437).

³ See Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 7314, 7325 (Feb. 1, 2013) (to be codified at 25 C.F.R. pt. 1).

We further urge HHS to make sure that any safe harbors or exemptions extended on the basis of enrollment in Medicaid under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX) occur confidentially, and with the least burden on the pregnant woman.

If you have questions about these comments, please contact Dipti Singh, singh@healthlaw.org, (310) 736-1649. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Emily Spitzer". The signature is fluid and cursive, with the first name "Emily" and last name "Spitzer" clearly distinguishable.

Emily Spitzer
Executive Director