Emily Spitzer
Executive Director

NATIONAL HEALTH LAW PROGRAM

May 2, 2013

VIA ELECTRONIC SUBMISSION

Internal Revenue Service
Department of the Treasury
1111 Constitution Ave. NW
Washington, DC 20224

RE: REG 148500-12

Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage

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. The oldest non-profit of its kind, NHeLP advocates, educates, and litigates at the federal and state levels.

We appreciate the opportunity to submit these comments addressing the Department of the Treasury's ("the Department") proposed rules on shared responsibility payments for not maintaining minimum essential coverage as described in § 5000A of the Internal Revenue Code ("IRC").

§ 1.5000A-2(b)(2)(i)

The Department's proposed rule excludes coverage of family planning services under 42 U.S.C. § 1396a(a)(10)(A)(ii)(XXI), which allows states to amend their state Medicaid plans through a State Plan Amendment ("SPA") to expand eligibility for family planning services and supplies to certain individuals. We commend the Department for recognizing that coverage for only family planning services and supplies does not suffice as comprehensive health insurance coverage, and therefore,

does not rise to the level of minimum essential coverage. We are concerned, however, that the Department's rule leaves some uncertainty about whether family planning expansions under the waiver authority provided in § 1115 of the Social Security Act ("SSA") are also excluded from the definition of minimum essential coverage. As with the SPA option, § 1115 family planning programs do not provide comprehensive health benefits. Instead, these waiver programs provide coverage for only family planning services and supplies. The Department should clarify that coverage of family planning services under a § 1115 demonstration waiver is not minimum essential coverage.

RECOMMENDATIONS:

- Maintain the exclusion of family planning services under 42 U.S.C. § 1396a(a)(10)(A)(ii)(XXI) from the definition of minimum essential coverage.[1]
- Clarify that family planning services under a § 1115 demonstration waiver are not minimum essential coverage.

§ 1.5000A-2(b)(2)(ii)

Pregnancy-Related Services is Not Minimum Essential Coverage

We strongly support the exclusion of 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." Pregnancy is time-limited, and the Department's decision to exclude pregnancy-related services from the definition of minimum essential coverage appropriately recognizes this fact. The decision means that women will not have to switch or obtain other health insurance coverage just during the period of pregnancy. The exclusion further recognizes 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.[2] Indeed, currently variation exists between the scope of services under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX). Some states, like Massachusetts and Illinois, define "pregnancy-related" as full Medicaid coverage. However, other states offer low-income pregnant women a more limited scope of benefits than non-pregnant adults with the same income. For example, Idaho currently excludes any "treatment that is not directly a result of, or which does not directly affect the pregnancy."[3] The Department's proposed rule would appropriately permit a

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[1] *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).

[2] In March 2012, the Department of Health and Human Services ("HHS") issued rules, which will now require a state to obtain approval from HHS if it wants to deny pregnant women services it provides to non-pregnant adults. *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). We hope that HHS will enforce this rule, so that all pregnant women on Medicaid receive the full scope of medically-necessary services and treatments.

[3] Idaho Dep't of Health & Welfare, MMIS Provider Handbook, Gen. Provider & Participant Info., § 2.4.4.5, https://www.idmedicaid.com/General%20Information/General%20Provider%20and%20Participant%20Information.pdf.

pregnant woman receiving limited Medicaid benefits to take advantage of premium tax credits to purchase comprehensive health care coverage through a health insurance Exchange, if she so desired. The Department's proposed rule further recognizes that some state Medicaid programs provide pregnant women services not generally covered by private health insurance, but which are time-limited to the pregnancy and particularly critical for the maternal and fetal health (e.g., oral health care).[4] By allowing pregnant women to access the complete package of benefits available through both Medicaid and a Qualified Health Plan ("QHP"), the Department recognizes the importance of guaranteeing access to health care services during pregnancy when the health and well-being of the mother and the fetus are at stake.

The Department Should Not Penalize Pregnant Women Receiving Pregnancy-Related Medicaid Coverage

Further, we urge the Department to ensure that these pregnant women do not face penalties for not obtaining other health insurance coverage.[5] 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 during the pregnancy. Even with advanced premium tax credits ("APTCs"), coverage through the Exchange might be unaffordable, particularly for low-income pregnant women. Thus, if HHS does not exempt pregnant women from the requirement to maintain minimum essential coverage, the Department should provide pregnant women with a safe harbor from the shared responsibility payment. A safe harbor for pregnant women would be similar to situations in which a state's decision regarding the Medicaid Expansion results in an individual being

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[4] Federal law requires 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. 42 U.S.C. § 1396a(a)(10); 42 C.F.R. § 440.210(a)(2). For example, some states provide adult pregnant women oral health care services, which they do not provide (or severely restrict) for non-pregnant adults. Pregnant women are particularly susceptible to oral diseases due to issues that may include fluctuating hormonal balances during pregnancy, an increased diet of sugary food from food cravings, vomiting during morning sickness, and the limited attention paid to oral health issues during pregnancy. *See, e.g.*, 77 AM. FAMILY PHYSICIAN 1139, 1140 (2008), *available at* http://www.aafp.org/afp/2008/0415/p1139.html; Am. Acad. of Pediatric Dentistry, Guideline on Oral Health Care for the Pregnant Adolescent, 31 CLINICAL GUIDELINES 108, 109 (2007), *available at* http://www.aapd.org/media/Policies_Guidelines/G_Pregnancy.pdf. Medical research has also shown that untreated oral infection can adversely affect fetal and child development. *See, e.g.*, Adam Allston, Improving Women's Health and Perinatal Outcomes: The Impact of Oral Diseases 1, 5-6 (2002), *available at* http://www.jhsph.edu/bin/u/x/oralbrief.pdf.

[5] We also raised these concerns in comments to HHS' proposed rules on the Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions, 78 Fed. Reg. 7348 (Feb. 1, 2013) (to be codified at 45 C.F.R. pts. 155 and 156).

ineligible for Medicaid, but unable to afford other health insurance coverage—individuals for whom HHS has proposed to add a hardship exemption.

The Department Must Ensure That The Process Adopted is Implemented Seamlessly and Confidentially.

The Department must ensure that any process, whether by exemption or a safe harbor, is implemented seamlessly, with the least burden on the pregnant woman, and confidentially. To this end, the Department must coordinate its efforts with HHS and state insurance affordability programs. Further, the Department must ensure that a woman has the information she needs to appropriately complete her Federal tax return. A pregnant woman might not know that she is enrolled in coverage under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX), and that such coverage is not minimum essential coverage. Internal Revenue Code § 6055(a) requires every government agency that administers government-sponsored health insurance programs and any entity that provides minimum essential coverage to file annual returns reporting information for each individual for whom minimum essential coverage is provided. This reporting requirement enables individuals to prove that they do not owe penalties for the failure to maintain minimum essential coverage. The Department should similarly require these government agencies and entities to enable women receiving coverage under 42 U.S.C. § 1396a(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX), which is not minimum essential coverage, to file Federal tax returns that allows the Department to determine: (1) that the shared responsibility payment does not apply to these women (or they meet the safe harbor requirements); and (2) if the woman received APTCs, that she was eligible for them.

The Department must ensure that any process adopted protects personal data and confidentiality. For example, an adult woman or minor receiving coverage for pregnancy or family planning services might not want members of her household (e.g., the taxpayer) to know about that fact.

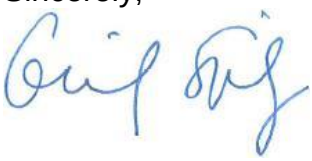
RECOMMENDATIONS:

- Maintain the exclusion of 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.
- 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 or otherwise, for not obtaining other health care coverage.
- Ensure that states effectively enable all Medicaid beneficiaries, including pregnant women, to file a Federal tax return indicating whether they are required to pay a shared responsibility payment and, if they were receiving APTCs, whether they were eligible for them.

- Ensure that any exemption or safe harbor 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.
- Coordinate with HHS and state insurance affordability programs.

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

Sincerely,



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