

New York appreciates the opportunity to comment on the proposed regulations for 42 CFR 600 and 45 CFR 14; Basic Health Program: State Administration of Basic Health Programs; Eligibility and Enrollment in Standard Health Plans; Performance Standards for Basic Health Programs; Premium and Cost Sharing for Basic Health Programs; Federal Funding Process; Trust Fund and Financial Integrity; Proposed Rule [RIN 0938—AR93].

New York requests clarification on the eligibility requirements in terms of tax filing status and how non-tax filers will be handled. Will States be required to determine eligibility for BHP based on a person's anticipated tax filing status for the upcoming year, as is currently required for calculation of the Advance Premium Tax Credit determinations? If not, then will the BHP reconciliation process or formula be in any way based on whether a particular BHP enrollee did or did not file taxes for the coverage year?

New York would like to offer the following additional comments on specific provisions in the proposed regulations:

§ 600.110 Basic Health Program Blueprint

Given the tight timeframe to develop and submit a Blueprint plan for BHP operations in 2015, New York strongly recommends limiting the required submission for year one to a description of the BHP application, determination and enrollment process and standards, and the benefits package.

§ 600.115 Development and submission of a BHP Blueprint

New York endorses State flexibility to determine whether any particular interested parties beyond federally recognized tribes require notice.

§ 600.120 Certification of a BHP Blueprint

Due to the aggressive time frames for beginning this program, New York requests that some flexibility be added in this provision in the final regulations to allow for program development through 2016. We also request flexibility for staggered program implementation that allows for transitioning existing populations into the BHP throughout the first year.

§ 600.125 Revisions to a certified Blueprint

The proposed regulations do not provide a timeline for the Secretary to certify the new blueprint. New York requests for there to be an outside limit (60 days) after which point, if the Secretary has not responded, the State may proceed with the revisions as proposed in its discretion.

§ 600.170 Annual report content and timing

The proposed regulations attempted to align the annual reporting content and timing requirements with the Exchange to the extent possible. New York agrees that the requirements should align to the extent possible.

§ 600.170 Federal Program Reviews and Audits

The proposed regulations set forth types of reviews that may be initiated, but they do not set forth the standard for review. We request that the standard of review especially as related to use of funds in the trust fund be defined.

§ 600.305 Eligible Individuals

The proposed rules adopt the eligibility processes of Medicaid or CHIP, or to offer a state the option to apply either. New York requests clarification regarding whether tax-filer status is a condition of eligibility for BHP or is a factor in the financial reconciliation process. New York requests clarification about whether if it selects continuous enrollment as in Medicaid rather than open enrollment in the Marketplace, it can select a date to begin the BHP program in between open enrollment periods and allow any QHP enrollees with APTC to be transitioned to the BHP at the next open enrollment period with no impact on the enrollee's APTC.

New York has elected to offer 12 months continuous enrollment for individuals in Medicaid. Should we offer a BHP, we would like to have the opportunity to align coverage rules to the extent possible. We request clarification on whether 12 months continuous eligibility may be offered in the BHP.

§ 600.335 Appeals

The proposed rules acknowledge that there is no statutory authority for escalation of appeals to HHS, and, therefore, adopt the Medicaid appeals process for BHP, under an agreement with the Medicaid program. New York respectfully disagrees with the rule as written. There should be greater State flexibility in this area. New York anticipates the use of the same appeals process utilized by the Marketplace (acknowledging that the notices produced would have to reflect that there is no federal administrative review available for BHP) which handles all MAGI appeals for Medicaid, CHIP and APTC appeals. Since the Secretary retains the right to review and approve the sufficiency of the appeals process pursuant to the Blueprint certification, there is no reason to impose this requirement.

§ 600.410(d) Competitive Contracting Process

The proposed rules impose negotiation points in addition to negotiation of premiums, cost sharing, and benefits. The negotiation points include case management, incentives to promote preventive services, and encourage enrollee involvement in health care decision making. New York respectfully opposes the inclusion of these requirements in the negotiation process. New York believes that the States are in the best position to determine how to operate the competitive contracting processes within the bounds of federal law. Discretion should be afforded to the States to come up with an appropriate contracting process.

New York requests clarification on what constitutes a competitive contracting process. If the State were to issue an invitation to issuers to participate in the BHP with clearly defined standards for participation, could the State select any plan that met the standards?

§ 600.415 Contracting qualifications and requirements

The proposed rules allow States flexibility to contract with non-licensed Medicaid and CHIP-participating offerors, including managed care organizations, to build a Standard Health Plan-compliant network. New York supports this approach.

The proposed rules also state that further guidance will be provided on minimum contract requirements for HHS approval of the BHP. The rules propose a “safe harbor” approach that would provide that a State that incorporates the contract requirements of the Marketplace or Medicaid Management Care will meet the contract requirements for HHS certification, until the next contract cycle after HHS proposes additional guidance. New York supports the safe harbor approach as promoting program efficiencies and administrative simplicity. We would encourage significant advance notice of any proposed modification of the safe harbor approach and/or additional requirements.

§ 600.520(c) General cost-sharing protections

The proposed rule requires BHP plans to meet the same actuarial value standards applicable to Exchange Plans in order to ensure that BHP enrollees do not experience higher cost sharing than they would have in the Exchange. New York respectfully opposes this rule, and suggests that states should be afforded discretion to apply either of the options mentioned, or another reasonable option that accomplishes the same goal. Since any of the options would be subject to Secretarial scrutiny in the Blueprint certification process, there is no reason to limit the State flexibility in this area.

§ 600.605 BHP payment methodology

The proposed rule interprets section 1331(d)(3) of the Affordable Care Act to require that HHS issue payments in the amount of 95% for both the applicable premium tax credit and cost-sharing reduction that a BHP enrollee would have received had she enrolled in a QHP in the Marketplace. While the ACA is clear that HHS must base payment on 95% of the applicable APTC, New York respectfully disagrees with HHS’s interpretation on the amount of the payment states should receive on behalf of enrollees who would have been eligible for cost-sharing reductions. The plain meaning of section 1331(d)(3) indicates that Congress intended to finance a state’s BHP trust with 95% of the applicable premium tax credit and 100% of the applicable cost-sharing reduction. If Congress wanted the Secretary to finance a state’s BHP with only 95% of the applicable cost-sharing reduction, it would have omitted the commas after the numerals “1986” and “1402.” Indeed, the commas setting off the phrase “and the cost-sharing reductions under section 1402” isolate it from the modifier “95 percent of.” Or expressed another way:

$$\text{Payment Amount} = 95\% * \text{APTC} + (\text{CSR})$$

HHS should revise the proposed rule to reflect congressional intent and ensure that states’ BHP trusts are adequately funded.

Additionally, the preamble states that it is anticipated that the seven factors in this section will be included in the funding formula which will be published in the proposed payment notice. We request that these factors, the weight they will be given and applicability be defined in the proposed payment notice or in this section of the regulation. For example, how will the Marketplace experience in other states with respect to Exchange participation and the effect of premium tax credits and cost-sharing reductions provided to residents, especially those with income below 200% FPL be determined and how will it effect the payments for a BHP?

The proposed rule limits retroactive adjustment of payment methodologies to errors, and distinguishes improvements of the methodologies from errors. The preamble explains that retrospective adjustment is warranted if based on incorrect enrollment data, but would not be warranted if the determination accurately reflected the certified methodology, even if, based on new data or analysis, the same methodology would not be certified for subsequent years.

New York requests further clarification on this point. The regulations appear to suggest that retroactive adjustments will be made depending on whether the data are considered inaccurate or incorrect. What is the difference between “incorrect enrollment data” and “new data”? New data or analysis revealing that the data utilized were inaccurate seems equivalent to a discovery that the data utilized were incorrect. Written as such, the explanations suggest that the difference is a matter of degrees, rather than a qualitative difference.

§ 600.705(d) Limitations on allowable trust fund expenditures

The proposed rule explicitly excludes program administration from the uses for which BHP trust fund money may be used. New York respectfully requests that States be allowed to utilize a reasonable sum to cover administrative costs if they are able to demonstrate that the BHP has reduced costs and/or provided increased benefits to consumers.