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National Indian Health Board

Legislative Tool Kit for Tribes and their advocates: How to Fix Definition of "Indian" in the Affordable Care Act May 21, 2013

The definitions of the word "Indian" in the Patient Protection and Affordable Care Act ("ACA" or "Act") are not consistent with the definition used for delivery of other federally-supported health services to American Indians/Alaska Natives (AI/ANs) under Medicaid and Children's Health Insurance Program ("CHIP") program and through the Indian Health Service ("IHS"). The inconsistency will result in many AI/ANs being subjected to tax penalties from which they should be exempt, and not receiving the benefits and special protections (protection from cost sharing and special enrollment) intended for them consistent with the special trust responsibility the United States owes to AI/ANs. It will also create significant confusion since the application for Medicaid and participation in insurance exchanges are being integrated. It is imperative that Congress correct these problems.

What's in the Tool Kit:

- NIHB Briefing Document for Capitol Hill staff
- Proposed definition for "Indian" in the ACA
- Reference guide of Related laws and regulations
- Press Coverage of Definition of Indian

Examples of AI/ANs who might be affected include:

- Children born into Tribes that do not permit enrollment until age 18 may be ineligible to be treated as Indian under the ACA, although they are correctly treated as such by IHS and by the Centers for Medicare and Medicaid Services ("CMS") for Medicaid.
- California Indians who are entitled to IHS and Medicaid services as Indians will not be treated as Indian under the ACA.
- Many Alaska Natives who are too young to have enrolled in an Alaska Native Claims Settlement Act Corporation, which largely ended in the 1970s, may be denied the protections due Indians because they have not yet become shareholders which is mostly dependent on inheritance from a parent or grandparent who may still be living.

Actions Needed:

Tribal leaders and advocates need to contact their Members of Congress about this issue and recommend passage of new definitions of Indian described below. The ACA health exchanges begin enrollment October 1, 2013, so Congress must act to ensure that AI/ANs are not forced to pay unjust tax penalties, nor prevented from accessing benefits of the exchanges intended for them. Currently, the strategy is to get this included into any bill that is going to be passed through Congress. Examples include, the debt ceiling limit or a comprehensive tax package that the House is expected to consider in early summer.

Please contact Caitrin McCarron, NIHB's Manager of Congressional Relations, by phone (202-507-4085) or email (cmccarron@nihb.org) about all Congressional meetings you have on this issue, so that NIHB may

follow-up with the appropriate offices.

Legislative Recommendation:

The National Indian Health Board, the National Congress of American Indians, the Tribal Technical Advisory Group to CMS, the Tribal Self-Governance Advisory Committee, Area Indian Health Boards, and many individual Tribes have officially endorsed amending the definition of Indian in the ACA provisions affecting cost sharing (ACA 1402), special enrollment (ACA 1311) and tax penalties (ACA 1501/IRC 5000A) to correspond to the definition of Indian adopted by CMS in regulation at 42 C.F.R. § 447.50. Initially, tribal advocates believed it could accomplish this by cross-reference to the CMS regulation, however we understand there may be some concerns about referencing regulations in statute. In order to avoid any procedural or technical delays, we endorse putting the language of the CMS regulation into the statute (as updated to reflect statutory reference updates since it was adopted and with language that eliminates an internal regulatory citation). A copy of the proposed language is attached.

Questions You May Be Asked:

What about the Administration's views? Members of Congress or their staff may inquire about the Administration position on the definition. The HHS Secretary and IRS have said in public forums with AI/ANs that they believe the definitions should be the same as the definition adopted in regulation by CMS.

Do Tribal advocates and the Administration agree on the Congressional remedy? Recently, HHS offered technical assistance to the Congress in which it proposed to amend Section 1402 (and by reference back to Sec. 1402, the two other critical provisions) of the ACA by adding a new definition of Indian. Although there were some concerns about the initial draft, the IHS Director responded to Tribal questions by committing that the intent was that the new definition be identical to the CMS regulation. Tribal advocates have agreed on the attached language, which achieves the same result as the CMS regulation. A copy of the CMS regulation and the provisions of law and relevant IHS regulations are attached. A comparison to our proposed statutory language shows that it has the same effect as the CMS regulation.

Will this improve access to health care by AI/ANs? By using the same definition of Indian for all Federally funded health programs that rely on the same streamlined application (i.e. Medicaid, CHIP, and exchanges) and for avoiding tax penalties, all AI/ANs will be treated equally and fairly consistent with the special trust responsibility owed to them and improve their access to all the available programs.

Are there other benefits? Using a single definition of Indian for Medicaid and the exchanges will reduce the costs of managing the new streamlined application and minimize the likelihood of errors that will negatively affect individual AI/ANs and their families.

Does this solve all definition issues? Although there are other definitions of "Indian" in the ACA, we are advocating correcting only the exchange-related definitions because these most directly affect access to health care and, if they are not fixed, there will be a real and immediate negative effect on AI/ANs.

If you have any questions on this matter, *AND to update NIHB regarding any Congressional contact you have on this issue*, please contact Caitrin McCarron, Manager of Congressional Relations at the National Indian Health Board, at (202) 507-4085 or cmccarron@nihb.org.

Draft Bill for the Definition of Indian in the Affordable Care Act
May 21, 2013

A BILL

To correct inconsistencies in the definitions affecting health care services for Native Americans.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TECHNICAL CORRECTIONS ALIGNING THE DEFINITIONS OF INDIAN FOR HEALTH CARE PURPOSES.

(a) IN GENERAL.—Title I of the Patient Protection and Affordable Care Act is amended—

(1) in section 1311(c)(6)(D), by striking "(as defined in section 4 of the Indian Health Care Improvement Act)" and inserting "(as defined in section 1402(d)(4))"; and

(2) in section 1402(d)(1), by striking "(as defined in section 4(d) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(d)))"; and

(3) in section 1402(d), by adding a new paragraph (4) to read:

"(4) DEFINITION.—For the purposes of this subsection, 'Indian' means any individual defined at 25 U.S.C. 1603(13), 1603(28), or 1679(a), or who is of Indian descent belonging to the Indian community served by the local facilities and program of the Indian Health Service. This means the individual:

"(A) Is a member of a Federally-recognized Indian tribe;

"(B) Resides in an urban center or rural area and meets one or more of the following four criteria:

"(i) Is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member;

"(ii) Is an Eskimo or Aleut or other Alaska Native;

"(iii) Is considered by the Secretary of the Interior to be an Indian for any purpose; or

"(iv) Is determined to be an Indian under regulations promulgated by the Secretary;

"(C) Is considered by the Secretary of the Interior to be an Indian

for any purpose; or

"(D) Is considered by the Secretary of Health and Human Services to be an Indian for purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut, or other Alaska Native."

(b) EXEMPTION FROM PENALTY FOR NOT MAINTAINING MINIMUM ESSENTIAL COVERAGE.– Section 5000A(e)(3) of the Internal Revenue Code of 1986 is amended by striking subsection (3) and inserting "(3) INDIAN.– Any applicable individual for any month during which the individual is an Indian as defined in section 1402(d)(4) of the Patient Protection and Affordable Care Act.".

Reference Guide: Related Law and Regulations for Definition of Indian in the Affordable Care Act
May 21, 2013

CMS Regulation—42 C.F.R. 447.50 Cost sharing: Basis and purpose. (b) Definitions. For the purposes of this subpart:

(1) Indian means any individual defined at 25 USC 1603(c) [(13)], 1603(f), or 1679(b), or who has been determined eligible as an Indian, pursuant to Sec. 136.12 of this part. This means the individual:
  (i) Is a member of a Federally-recognized Indian tribe;
  (ii) Resides in an urban center and meets one or more of the following four criteria:
    (A) Is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member;
    (B) Is an Eskimo or Aleut or other Alaska Native;
    (C) Is considered by the Secretary of the Interior to be an Indian for any purpose; or
    (D) Is determined to be an Indian under regulations promulgated by the Secretary;
  (iii) Is considered by the Secretary of the Interior to be an Indian for any purpose; or
  (iv) Is considered by the Secretary of Health and Human Services to be an Indian for purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut, or other Alaska Native.

IHCIA Definitions—25 U.S.C. § 1603(13) [§ 1603(c)] Indians or Indian. The term "Indians" or "Indian", unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (14) hereof, except that, for the purpose of section 102 [25 U.S.C. § 1612] and 103 [25 U.S.C. § 1613], such terms shall mean any individual who

(1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or
(2) is an Eskimo or Aleut or other Alaska Native, or
(3) is considered by the Secretary of the Interior to be an Indian for any purpose, or
(4) is determined to be an Indian under regulations promulgated by the Secretary.

25 U.S.C. § 1603(28) [§ 1603(f)] Urban Indian. The term 'urban Indian' means any individual who resides in an urban center, as defined in subsection (g) [(27)] hereof, and who meets one or more of the four criteria in subsection (c)(1) through (4) [(13)(1) through (4)] of this section.

25 U.S.C. § 1679(a) [§ 1679(b)] Eligibility of California Indians. (a) In general. The following California Indians shall be eligible for health services provided by the Service:

(1) Any member of a federally-recognized Indian tribe.
(2) Any descendant of an Indian who was residing in California on June 1, 1852, if such descendant--
  (A) is a member of the Indian community served by a local program of the Service; and
  (B) is regarded as an Indian by the community in which such descendant lives.
(3) Any Indian who holds trust interests in public domain, national forest, or Indian reservation allotments in California.
(4) Any Indian of California who is listed on the plans for distribution of the assets of rancherias and reservations located within the State of California under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

IHS Eligibility Regulation—42 C.F.R. § 136.12 Persons to whom services will be provided. (a) In general.

(1) Services will be made available, as medically indicated, to persons of Indian descent belonging to the Indian community served by the local facilities and program. Services will also be made available, as medically indicated, to a non-Indian woman pregnant with an eligible Indian's child but only during the period of her pregnancy through postpartum (generally about 6 weeks after delivery). In cases where the woman is not married to the eligible Indian under applicable state or tribal law, paternity must be acknowledged in writing by the Indian or determined by order of a court of competent jurisdiction. The Service will also provide medically indicated services to non-Indian members of an eligible Indian's household if the medical officer in charge determines that this is necessary to control acute infectious disease or a public health hazard.
(2) Generally, an individual may be regarded as within the scope of the Indian health and medical service program if he/she is regarded as an Indian by the community in which he/she lives as evidenced by such factors as tribal membership, enrollment, residence on tax-exempt land, ownership of restricted property, active participation in tribal affairs, or other relevant factors in keeping with general Bureau of Indian Affairs practices in the jurisdiction.