

# Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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Submitted via –

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January 13, 2014

Ms. Kitty Marx  
Director, Tribal Affairs Division  
Ms. Nancy Goetschius  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
200 Independent Avenue, Southwest  
Washington, DC 20201

**Re: Response to CMS Request to Review Draft CMS Application Instructions for Indian-specific Exemptions from the Tax Penalty for Not Maintaining Minimum Essential Coverage**

Dear Ms. Marx and Ms. Goetschius:

I write on behalf of the Technical Tribal Advisory Group (TTAG) to the Centers for Medicare and Medicaid Services (CMS) regarding the January 10, 2014 email requesting comments on the draft application instructions for the American Indian and Alaska Native-specific exemptions from tax penalties contained in the Patient Protection and Affordable Care Act (ACA) for failure to obtain minimum essential coverage (Instructions). We were requested to provide comments back by Monday, January 13 at 8:00 am (AKST).

The TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care program funded (in whole or part) by CMS. In particular, the TTAG focuses on providing policy advice to CMS regarding improving the availability of health care services to American Indians and Alaska Natives (AI/ANs) under these Federal health care programs, including through providers operating under the health programs of the Indian Health Service, Indian Tribes, tribal organizations and urban Indian organizations (referred to as I/T/Us, Indian Health Care Providers, or IHCPs).

We have reviewed the Instructions draft and propose some edits that we believe will improve the completeness and accuracy of the information provided by applicants for the Indian exemptions. A red-lined version of the document is attached. We discuss the

substantive edits below.<sup>1</sup> As requested, we are submitting the TTAG comments to you and Ms. Goetschius with a copy to the leadership of the Center for Consumer Information and Insurance Oversight (CCIIO) at CMS.

## Background

There are two exemptions from the IRS shared responsibility payment (often referred to as the “IRS penalty”) for AI/ANs (and some others) who do not have qualifying health coverage:

- Statutory exemption<sup>2</sup> that we referred to as “Indian exemption” in our earlier comments; and
- Regulatory hardship exemption,<sup>3</sup> that we believe is now described generally in the Application and Instructions as “Other Individuals who are Eligible to Receive Services from an Indian Health Care Provider,” and to which we referred to in earlier comments as the “Exemption for IHCP-eligible persons.”

AI/ANs eligible for the Statutory Exemption are also entitled to certain special benefits, such as protection from certain cost-sharing and special monthly enrollment, and certain benefits accrue to the I/T/Us that serve them. Accordingly, it is important that applicants for an exemption who qualify for the special benefits are correctly identified through the application process. Otherwise, while they will not suffer a tax hardship, they may not be correctly identified as entitled to the special benefits that accrue only to “members of an Indian tribe.”

CMS began referring to the group of AI/ANs who are eligible for the Statutory Exemption as “members of Federally recognized tribes,” but has recently clarified that the phrase “member of an Indian tribe” also includes Alaska Natives who are members of a village or regional or village corporation under the Alaska Native Claims Settlement Act (ANCSA). The definitions of Indian that relate to the Statutory Exemption and special benefits all use the same language regarding ANCSA. *See, eg.*, ISDEAA § 4 (25 U.S.C. § 450b(d) and (e):

(d) “Indian” means a person who is a member of an Indian tribe;

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<sup>1</sup> Please note that a number of different people entered the amendments into the “Instruction” document. However, all of these amendments have been vetted and are offered on behalf of the TTAG.

<sup>2</sup> We will use this term for convenience to discuss the Indian exemption to which special benefits also attach.

<sup>3</sup> We will use this term for convenience to refer to exemption applicable to those applicants who are eligible to receive services from an Indian Health Care Provider, but who are not “members of an Indian tribe.”

(e) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, **including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . .**

Emphasis added.

Many of our proposed edits are intended to ensure that Alaska Native village and ANCSA corporation members will recognize that they should identify themselves as members of an Indian tribe. Others are intended to clarify certain of the items in the Application that are proving to be somewhat confusing, and to complete the list of California Indians who are entitled to health services provided by the Indian Health Service under the Indian Health Care Improvement Act. We hope that the Application can be reconsidered at some point since we believe that some reorganization and rewording would improve its usability.

### **Instructions – Specific Parts.**

**Page 1, first bullet and Step 2, Item 7.** In both of these locations we have added language regarding Alaska Natives. The language comes directly from the definitions relied upon in the ACA. It is not intuitive to AI/ANs (and others) that “member of an Indian tribe” includes ANCSA corporation and village members so we want to be sure the instructions for this item make that clear. Otherwise it is likely that Alaska Native ANCSA corporation and village members will respond to the questions in a way that results in their not receiving the Statutory Exemption and special benefits, but instead being treated as being eligible only for the Regulatory Hardship Exemption granted to the classes of individuals eligible for services through an Indian health care provider under Step 2 Item 9.

**Step 2, Item 8.** We have added more explanation about the circumstances that might cause someone to answer “No” to Item 8. Without this, we are concerned that many non-pregnant AI/AN women eligible for a Regulatory Hardship Exemption will not understand that they should complete more of the form. We did this by emphasizing the “only” that appears in Item 8, but was deleted from the instructions.<sup>4</sup>

**Step 2, Items 10 and 11.** In the course of our review, these questions on the Application received a lot of comment mostly asking what they meant and how they were to be completed. Unfortunately, the Instructions do not help much since they don’t draw the distinction between AI/AN descendants/California Indians and other AI/ANs etc. who will

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<sup>4</sup> We note that this might not be needed if item 9 preceded 8 as it logically should, since anyone who answers “yes” to question 9 is entitled to a Regulatory Hardship Exemption without any time limits, but since we can’t change the Application itself at this time, we believe this change in the Instructions is needed. We hope changing the order of the questions can be one of the changes made the next time the Application is reviewed for amendments.

always qualify for the Regulatory Hardship Exemption and the non-AI/AN spouses and children whose coverage is conditioned on certain other criteria. We have changed some wording and added examples to try to make the Instructions easier to follow for someone trying to fill out the form without the assistance of a trained person. For example, a descendent of an AI/AN will not have an end date to eligibility, but is required by the direction in Item 9 to fill out Item 11. To address this we also added language that makes filling in Item 11 conditioned on it being applicable.

A better solution might be the add an introduction to Items 10 and 11 that says something like: “If you are an AI/AN and eligible for services from an Indian Health Care Provider even if you are not pregnant and without regard to your marital status, age, or place of residence, you do not need to respond to Items 10 or 11.” Or, that could be added between the first and second sentences of Item 9.

**Step 2, Items 7, 8, 9, and 10 and Second Paragraph of Introduction to the Tables.**

We have changed the somewhat more colloquial use of “you’re” to “you are.” While we appreciate the effort to make the Instructions seem more approachable, “you’re” is often confused with “your” when read aloud. We anticipate that in many Indian Health Programs (and in many family homes as well) assistance may include reading the instructions to an Applicant.

**Introduction to Tables, Second Paragraph.** We also added in “only” to the second sentence to emphasize that applicants who can supply documentation listed in Table 1 need not also supply documents listed in Table 2.

In the introduction to Table 1, I propose we restore the language offered by CMS in their most recent draft. For the reasons I outlined above, I think it is important that we do not emphasize the “Federally recognized tribe” language in general explanations since the title would encourage uniformed navigators and CMS personnel to think that ANCSA shareholders fit in “exemption for persons eligible for services from an Indian health care provider” class, instead of the “member of an Indian tribe” Statutory Exemption.

**Table 1, Rows 1 and 2.** In both we added reference to the Certificate of Degree of Indian Blood (CDIB), which can be issued by the Bureau of Indian Affairs (BIA) or a Tribe. In many cases, these cards not only provide the blood quantum, which is sufficient for establishing eligibility for services from an Indian Health Care Provider, but they also specifically identify the Tribe in which the individual is a member or that an individual is an ANCSA shareholder (proof of membership in a village or regional ANCSA corporation). Individuals who are providing assistance to applicants for exemptions specifically noted that for many AI/ANs this is the only form of proof of tribal membership to which they have ready access. Documents issued by the BIA or by the Tribe should always be accepted if

they address the specific matter that needs to be considered – such as tribal membership or ANCSA shareholder status.

**Table 1, Row 3.** This row was amended to fully describe the categories of Indians who are entitled to health services provided by the Indian Health Service under the Indian Health Care Improvement Act. *See*, 25 U.S.C. §§ 1603(3) and 1679. As drafted, Table 1, Row 3 only lists two of the three factors in 25 U.S.C. 1679. The omitted factor is critically important to California tribes. It serves as the underpinning of the IHS Manual provision and is grounded in early California Indian treaties and rolls, and must be included as well.

### **Conclusion**

We hope these comments and proposed amendments to the Instructions will assist CMS in helping us achieve our common goal of making the protections for AI/ANs as easily understood and accessible as possible. If there are any concerns about any of these suggestions, we would appreciate a phone call or email about them. As our quick turn around on these comments – over a week-end – demonstrates, we consider this process to be extremely important, and we believe that the TTAG members and Indian health program leadership and staff have a unique understanding of the challenges faced by AI/ANs as they attempt to comply with the ACA.

Thank you again for the opportunity to provide these comments.

Sincerely Yours,



Valerie Davidson  
Chair, CMS Tribal Technical Advisory Group

Cc: Gary Cohen, Deputy Administrator and Director, CCIIO  
Dr. Yvette Roubideaux, Director, Indian Health Service

Attachment A: Instructions for Completing the Application for Exemption for American Indians and Alaska Natives; and Other Individuals Who Are Eligible to Receive Services from an Indian Health Care Provider

## **Attachment A:**

### **Instructions for Completing the Application for Exemption for American Indians and Alaska Natives; and Other Individuals ~~w~~Who ~~a~~Are Eligible to Receive Services from an Indian Health Care Provider**

Use this application to apply for an exemption if you or anyone in your tax household is:

- A member of an Indian tribe, which includes Alaska Natives who are members of an Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act.
- An American Indian or Alaska Native or other individual who ~~is's~~ is eligible for health services through the Indian Health Service, Tribes and tribal organizations, or urban Indian organizations (referred to as “Indian Health Care Providers” or “I/T/Us”), as described below:

- **Indians**

Individuals of Indian descent belonging to the Indian community served by the local facilities and program of the Indian Health Service are eligible for services. An individual may be regarded as within the scope of the Indian Health Service program if he or she is regarded as an Indian by the community in which he or she lives as seen 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. Eligibility based on one’s status as a California Indian, Eskimo, Aleut, or other Alaska Native is included within this framework.

- **Non-Indians**

Additionally, the following non-Indians are eligible for services from the Indian Health Service:

- (A) A child under the age of 19 who is the natural child, adopted child, stepchild, foster child, legal ward, or orphan of an eligible Indian,
- (B) Spouses of an eligible Indian, if the tribe passed a tribal resolution that makes spouses eligible to receive services from the Indian Health Service, or
- (C) Non-Indian women who are pregnant with the child of an eligible Indian.

- **Urban Indians**

The Indian Health Service also contracts with urban Indian organizations to provide services to urban populations for which special statutory eligibility criteria apply. To be eligible for the exemption as an urban Indian, an individual must reside in an urban center where an IHS funded urban Indian health program clinic or referral center is located and meet one or more of the following four-4 criteria:

(A) Be 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) Be an Eskimo or Aleut or other Alaska Native,

(C) Be considered by the Secretary of the Interior to be an Indian for any purpose; or,

(D) Be determined to be an Indian under regulations promulgated by the Secretary.

### **Step 1: Tell us about yourself as the person completing the form.**

An adult (18 or older) must complete the contact information in Step 1. We need this information so we can follow up with you if we have questions about your application and so we can let you know if you or someone on the application qualifies for an exemption. You don't have to be eligible for this exemption to complete the form for someone else. See page X below for a list of acceptable documents that show you're eligible to apply for this exemption.

### **Step 2: Tell us about your tax household.**

You need to give information about anyone in your tax household who needs an exemption. Don't include those who aren't asking for an exemption. **Start with yourself.**

The application has space for up to 2 people—yourself and one other person (adult or child). **If you have more than 2 people in your household who are applying for an exemption, make copies of Step 2 (page 2) and complete Step 2 only for each additional person.** You do not need to repeat your contact information if you will be the contact for the other people.

#### **Item 7**

Check "Yes" if you ~~re~~ are a member of an Indian tribe, which includes Alaska Natives who are members of an Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, and ~~skip to Step 3 and skip~~ leave the rest of the page blank to item 9. If not, check "No."

#### **Item 8**

If you ~~re~~ are eligible to get services through an Indian health care provider only because you ~~re~~ are pregnant with a child of a man who is eligible for services through an Indian health care provider's a member of an Indian tribe, check "Yes" and provide ~~theyour~~ your due date. If you answered "No" because you are eligible to get services through an Indian health care provider whether or not you are pregnant or for any other reason, ~~skip go~~ skip go to item 9.

#### **Item 9**

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Check “Yes” if you ~~are~~ are eligible to get services through an Indian health care provider and answer items 10 and 11. If you ~~are~~ are not eligible, skip to Step 3 and then leave the rest of the page blank.

**Item 10**

If you ~~are~~ are eligible for services from an Indian health care provider only because of your relationship with an American Indian or Alaska Native (i.e., spouse of a Tribal member or ANCSA shareholder and who would not otherwise be eligible), when did you become eligible for the services through an Indian health care provider? Eg. This might be the date on which the Indian health care provider authorized services to non-Indian/Alaska Native spouses or, if later, the date of your marriage. If not applicable, leave this item blank.

**Item 11**

If applicable, and you know, fill in give the date when your eligibility for services through an Indian health care provider has ended or will may end. If you were eligible as the spouse of an American Indian or Alaska Native, but have subsequently divorced, this may be the effective date of the divorce. If you are a non-Indian or Alaska Native child, this might be the date on which you will turn 19 years of age.

**Documents Showing Tribal Membership or Eligibility for Services from the Indian Health Service, an Indian Tribe, Tribal Organization, or an Urban Indian Organization (“Indian Health Care Provider”)**

Submit copies of documents (not originals) based on your status or eligibility type as described in Table 1 and Table 2.

You need to submit copies of only one document if you ~~are~~ are eligible for an exemption through Table 1. You need to submit copies of more than one document if you ~~are~~ are only eligible for an exemption through Table 2.

Table 1

Documents to demonstrate eligibility for the Indian exemption and/or exemption for persons eligible for services from an Indian health care provider

Document Type (You need to submit copies of only one of these documents.)	Source of document	Other requirement
Enrollment or membership document	Federally Recognized Tribe <u>or BIA</u>	Tribal letterhead or enrollment/membership card that contains tribal seal or official signature <u>or a Certificate of Degree of Indian Blood (CDIB) issued by the Bureau of Indian Affairs (BIA) or a Tribe, if the CDIB includes tribal enrollment information.</u>



Document issued by Alaska Native Village/Tribe, or an ANCSA regional or village corporation acknowledging descent, or affiliation, or shareholder status, or participation in village or Alaska Native community affairs	Alaska Native Village/Tribe or ANCSA (Alaska Native Claims Settlement Act) corporation <u>or BIA</u>	For Alaska Natives only. <u>Documents may also include a CDIB issued by the BIA or a Tribe, if the CDIB includes ANCSA shareholder status or information regarding membership in an Alaska Native Village.</u>
Document showing a person 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, <u>and any descendant of such an Indian;</u> or document showing trust interests in public domain, national forest, or reservation allotments in California; <u>or document showing a person is a descendant of an Indian who was residing in California on June 1, 1852, if such descendant is a member of the Indian community served by a local program of the Service; and is regarded as an Indian by the community in which such descendant lives.</u>	Bureau of Indian Affairs <u>or Indian community served by a local program of the Service</u>	For California Indians only
Letter from IHS, Tribal or urban Indian health care provider verifying eligibility for services	IHS, Tribal, or urban Indian health care facility	Facility letterhead, and official signature
Other tribal document acknowledging membership, descent, participation in tribal community affairs, residence on tax exempt land, or that it regards the person as Indian	Federally Recognized Tribe	Tribal letterhead, and tribal seal or official signature
BIA Form 4432	Bureau of Indian Affairs	Form, signature of BIA/Tribal Official
Certificate of Degree of Indian Blood (CDIB)	Bureau of Indian Affairs or Tribe	Form, signature of BIA/Tribal Official

Table 2

Types of eligibility for exemption for persons eligible for services from an Indian health care provider that requires more than one document to be submitted with application.

Eligibility Type	Document 1		Document 2
	Documents related to person applying for exemption	Source of document	Second document required

<b>Persons of Indian descent, including urban Indians, without personal documentation from Table 1</b>	Birth certificate	State or local government	Document from Table 1 for applicant's parent or grandparent. If grandparent is used to qualify, a birth certificate linking parent to grandparent is also required.
<b>Non-Indian natural child, adopted child, stepchild, foster child, legal ward, or orphan of an eligible Indian</b>	Birth certificate or adoption papers	State or Tribal government	Document from Table 1 required for eligible Indian parent or guardian.
<b>Non-Indian Spouses</b>	Marriage certificate, if non-Indian spouses are made eligible for IHS services, as a class, by an appropriate resolution of the governing body of the Indian tribe or tribal organization	State or Tribe (issuer of marriage certificate)	Document from Table 1 required for eligible Indian spouse.
<b>Non-Indian woman pregnant with an eligible Indian's child</b>	Verification of pregnancy	Any medical provider	Unless married, paternity must be acknowledged in writing by the eligible Indian or determined by order of a court of competent jurisdiction.  Document from Table 1 required for eligible Indian father of child.
<b>Urban Indian</b>	Enrollment or membership card/ID or document establishing that the individual is:  (A) 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) An Eskimo or Aleut or other Alaska Native,  (C) Considered by the Secretary of the Interior to be an Indian for any purpose; or,	Federally recognized tribe; State-recognized Tribe; terminated Tribe; regional or Alaska Native Village Corporation; Secretary of the Interior	Document showing residency in an urban Indian center, such as a rent statement, mortgage, utility bill, voter registration card, etc.

	(D) Be determined to be an Indian under regulations promulgated by the Secretary.		
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