



March 4, 2021

Elizabeth J. Lipari
Administrative Practice Officer
Division of Taxation
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Tax.RuleMakingComments@treas.nj.gov

Re: Proposed New Rules: N.J.A.C. 18:35-12.1 et seq
DOT Proposal Number: PRN 2021-001.

Dear Ms. Lipari:

New Jersey Appleseed Public Interest Law Center respectfully submits, on behalf of the NJ for Health Care Coalition, the following comments in response to the Division of Taxation's (the "Division") proposed new rules, which implement P.L. 2018, c. 31, the New Jersey Health Insurance Market Preservation Act, including the imposition of a State shared responsibility payment. ("SSRP"). In accordance with N.J.S.A. 54A:11-3, the SSRP is equal to a taxpayer's Federal penalty in effect on December 15, 2017, under Section 5000A of the Internal Revenue Code of 1986, and is authorized to include a hardship exemption that would, if properly designed, prevent individual taxpayers from experiencing significant deprivation as a result of the State's requirement to obtain coverage under a qualified health plan.

The NJ for Health Care Coalition is a broad-based alliance of health care, consumer, senior, student, disability, women's, labor, faith-based, civil rights and social justice organizations working to bring guaranteed, high quality, affordable health care to all New Jersey residents. We have been working over the past several years to build strong alliances with patients, providers, small and large businesses and health care and social service agencies across the State in order to ensure that the Affordable Care Act (ACA), and associated State health insurance programs are effectively implemented in New Jersey in accordance with our core principles: affordability, transparency, and accountability to all consumers. We were instrumental in assisting our Legislature to develop a blueprint for our state-insurance exchange;

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supported the imposition of the SSRP when the federal government relinquished its role in assessing that tax penalty; worked assiduously to enact a Health Impact Assessment statute that would establish a dedicated trust fund to provide subsidies to low-income households to enable them to purchase affordable insurance; and most recently, we are working with the Legislature to establish the New Jersey Easy Enrollment Health Insurance Program. (S.3238/A.5213). Our involvement in each of these efforts frames our perspective: **we see these regulations as one part of an administrative system that must be designed to promote universal coverage in the State that is affordable to all residents, regardless of income.**

Substantial Deprivation Exemption Standard

As a general matter, we commend the Department for responding to comments submitted by Legal Services of New Jersey, dated January 15, 2020, by including N.J.A.C. 18:35-12.5(11) as a distinct basis for exemption. This provision creates an exemption for individuals who are presumed to “face significant deprivation if they are required to pay minimum essential coverage.” Though the “substantial deprivation language” was included in the federal “hardship” exemption (45 C.F.F. 155.605(d)(1)(ii)), we support the proposed rule that establishes it as a separate exemption distinct from either N.J.A.C. 18:35-12.5(4) (Individuals who cannot afford coverage) and N.J.A.C. 18:35-12.5(10)(Hardships). Notwithstanding our support for this provision, we have concerns that the presumption embedded in this rule (*i.e.*, “Individuals whose annual household income is at or below 138 percent of the Federal Poverty Level [FPL] shall be presumptively assumed to face significant deprivation”) may be set too low and does not adequately protect households with annual incomes below 250 percent of the FPL from incurring unfair penalties. Research conducted by Legal Services of New Jersey’s Poverty Research Institute indicates that a family would need to have income that is at least 250% of the FPL (\$64,375 for a family of four) to have any income available to pay for health care after paying for other necessities such as food, shelter and transportation.

NJ for Health Care Coalition understands that the State wants to design an SSRP regime that provides taxpayers with an incentive to purchase health insurance; not one that would exempt those persons who could actually afford to purchase minimum essential coverage. But regulators must make sure that the system that they create promotes rationale decision-making by taxpayers (*i.e.*, purchase of a plan that they can use despite cost-sharing obligations) at the same time that it contains costs to the system as a whole by moving low-income taxpayers and their families away from receiving care through the charity care system. In this way, the substantial deprivation presumption must be set so that the SSRP does not unfairly harm low-income taxpayers while at the same time that it creates an incentive for those who are able to secure health insurance to do so. We trust that the Department will adjust the presumptive eligibility standard in light of New Jersey’s experience with the SSRP the past two years; information, however, that is not yet publicly available and prevents us from asserting as fact that the 138 percent of the FPL is too low and/or what is the magic number that adequately protects low-income households.

We do know from IRS data that the federal tax penalty upon which New Jersey’s mandate was modeled indicates that approximately 77% of New Jersey residents who paid the

federal tax penalty lived in households with annual incomes below \$50,000, with 37% living in households with incomes below \$25,000. On the other hand, we do not know who in New Jersey incurred the SSRP penalty in 2019 nor in 2020 --- a year where additional state premium subsidies were available to low-income households who purchased insurance on our State health insurance exchange. We also know that federal cost-sharing subsidies have been available to people earning 250% of the FPL, though we do not know whether these co-sharing subsidies have been sufficient to make health insurance actually affordable for all households at or below that income cut-of (or some portion thereof). Similarly, members of the public understand that the proposed regulations, like the federal regulations, do not impose the SSRP on an individual who “lacks affordable coverage in a month if the individual's required contribution, as defined at N.J.S.A. 54A:11-4.c(1), for minimum essential coverage for the month exceeds” 8% (now 8.7%) of their annual income. N.J.A.C. 18:35-12.5(4). But we do not know how many New Jersey taxpayers fell into this category in either 2019 or 2020, and what was their income as a percent of the FPL. And finally, we do know that families with incomes of 300% of the FPL or less are eligible for charity care; but we do not know how many insured individuals were eligible for charity care, because they were unable to pay hospital co-pays that were required under their health plan.

There is little doubt that the interplay of all the above factors must be considered when setting the income level that would determine whether a taxpayer was presumptively eligible for exemption under the “substantial deprivation” standard. Accordingly, we are requesting that you ensure flexibility in the application of this standard, and explicitly make clear that the presumption may be rebutted if premium and cost sharing subsidies are not available to the taxpayer so as to render a qualified health plan affordable “in fact.” Through this regulatory scheme, the State is creating an administrative scheme that should incentivize all taxpayers to purchase minimum essential coverage. When doing so, the Division has an obligation not to impose the penalty on those persons who would enroll in health insurance plan if it were in fact rational for them to do so (i.e., affordable premiums and co-pay requirements), with or without additional state subsidies, and are not enrolling only because it makes no sense for them to do so.

Coordination with Easy Enrollment Health Insurance Program

This brings us to the fact that the Division is finalizing these regulations at the same time that the Legislature is considering establishing an Easy Enrollment Health Insurance Program, which would be operated by the Department of Banking and Insurance (DOBI), but would require coordination with the State Treasurer. S.3238/A.5213 set forth obligations that the State Treasurer will have to undertake, in consultation with DOBI and the stakeholder workgroup that will be established by these bills as currently written, and we believe that such obligations should be considered before finalizing these regulations. At minimum, the Division should ensure itself that nothing in the proposed regulations will hinder its obligations to facilitate the enrollment of uninsured taxpayers in a health plan in lieu of imposing the SSRP, which is at the heart of the Easy Enrollment program.

Cost-Benefit Analysis Must Include Impact on Low-Income Households

As a last point, the NJ for Health Care Coalition would like to note that we believe that as a matter of policy, the Division's cost-benefit analysis must specify the income level, race and ethnicity of the taxpayers who are likely to be impacted by the proposed regulations. Under "Economic Impact." The Division states:

The proposed new rules and amendments will constitute a liability for non-exempt taxpayers who do not have the required insurance, as such taxpayers will be liable to pay the State shared responsibility payment.

This statement though technically accurate does not set forth the income level, race or ethnicity of the taxpayers who are likely to be harmed, nor does it attempt to capture the concentrated harm it may do in certain communities in the State. It is not sufficient to merely state that the proposed rules will constitute a liability for taxpayers who will have to pay the SSRP; we need to identify who those taxpayers are likely to be in order to accurately capture the full scope of the adverse impact that the proposed rules will have on certain households and the communities in which they live.

Conclusion

On behalf of New Jersey consumers, we look forward to regulations that are tailored to target individuals who simply do not want to secure health insurance. Meaning those individuals who for ideological reasons do not want to purchase health insurance although they have the means to do so, rather than hitting New Jersey taxpayers who would enroll in health insurance plans if those plans were truly affordable for them to use. The Division, in coordination with DOBI and DHS, must make sure that the health plans available to all those currently eligible for charity care (300% FPL and below) provide coverage not just in name, but also in substance. Rather than imposing or exempting individuals from the SSRP, these regulations must set forth a process by which taxpayers have the opportunity to apply to purchase a health plan on the state health insurance exchange, which they are able to use in order to obtain the services that are necessary to keep themselves and their families healthy. In short, if Treasury is able to coordinate its implementation of the "penalty" payment with DOBI's implementation of the anticipated Easy Enrollment program and enhanced state subsidies to assist with cost sharing (not just premiums), New Jersey will be able to move quickly toward universal enrollment in a fair, efficient and effective way.

Respectfully submitted,

/s/ Renée Steinhagen
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/s/ Maura Collinsgru
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Health Program Director, NJCA