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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 435, 457, and 600

Office of the Secretary

45 CFR Parts 152 and 155

[CMS–9894–P]

RIN 0938–AV23

Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: This proposed rule would make several clarifications and update the definitions currently used to determine whether a consumer is eligible to enroll in a Qualified Health Plan (QHP) through an Exchange; a Basic Health Program (BHP), in States that elect to operate a BHP; and for some State Medicaid and Children's Health Insurance Programs (CHIPs).

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by June 23, 2023.

ADDRESSES: In commenting, please refer to file code CMS–9894–P.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *https://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9894–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9894–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Morgan Gruenewald, (301) 492–5141, or Anna Lorsbach, (301) 492–4424, for matters related to Exchanges.

Sarah Lichtman Spector, (410) 786–3031, or Annie Hollis, (410) 786–7095, for matters related to Medicaid, CHIP, and BHP.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *https://www.regulations.gov.* Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

The Patient Protection and Affordable Care Act (ACA) [1] generally [2] requires that in order to enroll in a Qualified Health Plan (QHP) through an Exchange, an individual must be either a citizen or national of the United States or be ''lawfully present'' in the United States.[3] The ACA also generally requires that individuals be ''lawfully present'' in order to be eligible for insurance affordability programs such as premium tax credits (PTC),[4] advance payments of the premium tax credit (APTC),[5] and cost-sharing reductions (CSRs);[6] additionally, enrollees in a Basic Health Program (BHP) are required to meet the same citizenship and immigration requirements as QHP enrollees.[7] Further, the ACA required that individuals be ''lawfully present'' in order to qualify for the Pre-Existing Condition Insurance Plan Program (PCIP), which expired in 2014.[8] The ACA does not define ''lawfully present'' beyond specifying that an individual is only considered lawfully present if they are reasonably expected to be lawfully present for the period of their enrollment.[9] The ACA also requires the Centers for Medicare & Medicaid Services (CMS) to verify that Exchange applicants are lawfully present in the United States.[10]

As such, consistent with its statutory authority under the ACA and in order to facilitate the operation of its programs, CMS issued regulations in 2010 to define ''lawfully present'' for the purposes of determining eligibility for PCIP (75 FR 45013); in 2012 for purposes of determining eligibility to enroll in a QHP through an Exchange by cross-referencing the existing PCIP definition (77 FR 18309); and in 2014 to cross-reference the existing definition for purposes of determining eligibility to enroll in a BHP (79 FR 14111). In this proposed rule, we propose to amend these three regulations in order to update the definition of ''lawfully present'' at 45 CFR 152.2, which is used to determine whether a consumer is eligible to enroll in a QHP through an Exchange and for a BHP. Exchange regulations apply this definition to the eligibility standards for APTC and CSRs by requiring an applicant to be eligible to enroll in a QHP to be eligible for

[1] The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Healthcare and Education Reconciliation Act of 2010 (Pub. L. 111–152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this rulemaking, the two statutes are referred to collectively as the ''Patient Protection and Affordable Care Act'', ''Affordable Care Act'', or ''ACA.''.

[2] States may pursue a waiver under section 1332 of the Affordable Care Act (ACA) that could waive the ''lawfully present'' framework in section 1312(f)(3) of the ACA. See 42 U.S.C. 18052(a)(2)(B). There is currently one State (Washington) with an approved section 1332 waiver that includes a waiver of the ''lawfully present'' framework to the extent necessary to permit all State residents, regardless of immigration status, to enroll in a QHP and Qualified Dental Plan (QDP) through the State's Exchange, as well as to apply for State subsidies to defray the costs of enrolling in such coverage. Consumers who are eligible for Exchange coverage under the waiver remain ineligible for PTC. For more information on this State's section 1332 waiver, see *https://www.cms.gov/cciio/programs-and-initiatives/state-innovation-waivers/section_1332_state_innovation_waivers-.*

[3] 42 U.S.C. 18032(f)(3).

[4] 26 U.S.C. 36B(e)(2).

[5] 42 U.S.C. 18082(d).

[6] 42 U.S.C. 18071(e).

[7] 42 U.S.C. 18051(e).

[8] 42 U.S.C. 18001(d)(1).

[9] 42 U.S.C. 18032(f)(3), 42 U.S.C. 18071(e)(2).

[10] 42 U.S.C. 18081(c)(2)(B).

APTC and CSRs.[11] Accordingly, in this proposed rule, when we refer to the regulatory definition of ''lawfully present'' used to determine whether a consumer is eligible to enroll in a QHP through an Exchange, we also are referring to the regulatory definition used to determine whether a consumer is eligible for APTC and CSRs.

We propose a similar definition of ''lawfully present'' applicable to eligibility for Medicaid and Children's Health Insurance Program (CHIP) in States that elect to cover ''lawfully residing'' pregnant individuals and children under section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (hereinafter ''CHIPRA 214 option''), now codified at section 1903(v)(4) of the Social Security Act (the Act) for Medicaid and section 2107(e)(1)(O) of the Act for CHIP. In July 2010, CMS interpreted ''lawfully residing'' to mean individuals who are ''lawfully present'' in the United States and who are residents of the State in which they are applying under the State's Medicaid or CHIP residency rules.[12] The definitions of ''lawfully present'' and ''lawfully residing'' used for Medicaid and CHIP are currently set forth in a 2010 State Health Official (SHO) letter (SHO #10–006) and further clarified in a 2012 SHO letter (SHO #12–002).[13]

We propose several modifications to the definition of ''lawfully present'' currently articulated at 45 CFR 152.2 and described in the SHO letters for Medicaid and CHIP. First, we propose to remove an exception that excludes Deferred Action for Childhood Arrivals (DACA) recipients from the definitions of ''lawfully present'' used to determine eligibility to enroll in a QHP through an Exchange, a BHP, or Medicaid and CHIP under the CHIPRA 214 option. If this proposal is finalized, DACA recipients would be considered lawfully present for purposes of eligibility for these insurance affordability programs [14] based on a grant of deferred action, just like other similarly situated noncitizens who are granted deferred action. We also propose to incorporate additional technical changes into the proposed ''lawfully present'' definition at 45 CFR 152.2, as well as to the proposed ''lawfully present'' definition at 42 CFR 435.4.

These proposed definitions are solely for the purposes of determining eligibility for specific Department of Health and Human Services (HHS) health programs and are not intended to define lawful presence for purposes of any other law or program. We also note that this proposed rule would not provide any noncitizen relief or protection from removal, or convey any immigration status or other authority for a noncitizen to remain in the United States under existing immigration laws or to become eligible for any immigration benefit available under the U.S. Department of Homeland Security (DHS)'s or Department of Justice's purview.

II. Provisions of the Proposed Regulations

A. Proposed Effective Date

CMS's target effective date for this rule is November 1, 2023, to ensure the provisions are effective during the Open Enrollment Period for individual market Exchanges, the next of which will begin on November 1, 2023. We are considering this target date because Open Enrollment is an important opportunity for consumers to shop for and enroll in insurance coverage, and implementation of these changes would be most effective during a period when there are many outreach and enrollment activities occurring from CMS, State Exchanges, Navigator and assister groups, and other interested parties. We note that, if this rule is finalized as proposed, DACA recipients would qualify for the Special Enrollment Period at 45 CFR 155.420(d)(3) for individuals who become newly eligible for enrollment in a QHP through an Exchange due to newly meeting the requirement at 45 CFR 155.305(a)(1) that an enrollee be lawfully present. However, we still believe that proposing to align this rule's effective date with the individual market Exchange Open Enrollment Period would reduce barriers to enrollment for consumers due to the previously mentioned outreach and enrollment activities occurring during this time and the longer period of time individuals have to enroll in a QHP through an Exchange during the individual market Exchange Open Enrollment Period compared with a Special Enrollment Period. Further, even though the individual market Exchange Open Enrollment Period is, among the programs addressed in this proposed rule, currently only applicable to Exchanges, we believe that it is important to align effective dates across Exchanges, BHP, Medicaid and CHIP in order to promote consistency, and because eligibility for these programs is typically evaluated through a single application.[15]

We seek comment on the feasibility of this target effective date and whether to consider a different target effective date when we finalize this proposed rule. CMS is committed to working with State agencies and providing technical assistance regarding implementation of these proposed changes, if finalized. At the same time, CMS understands that State Medicaid and CHIP agencies are experiencing a significant increase in workload following the end of the Medicaid continuous enrollment condition established under section 6008(b)(3) of the Families First Coronavirus Response Act, as amended by section 5131 of the Consolidated Appropriations Act, 2023, and we seek comment about the impact of this workload or any other operational barriers to implementation for State Exchanges, and State Medicaid, CHIP, and BHP agencies. While CMS believes that there are advantages to implementing these provisions, if finalized, on the proposed November 1, 2023 target effective date, CMS will consider the comments received on this issue as we evaluate the feasibility of a November 1, 2023 effective date or different effective dates, if this proposal is finalized.

B. Pre-Existing Condition Insurance Plan Program (45 CFR 152.2)

We propose to remove the definition of ''lawfully present'' currently at 45 CFR 152.2 and insert the proposed definition of ''lawfully present'' at 45 CFR 155.20. The regulations at 45 CFR 152.2 apply to the PCIP program, which ended in 2014. Further, we are proposing to update BHP regulations at 42 CFR 600.5 that currently cross-reference 45 CFR 152.2 to instead cross-reference the definition proposed in this rule at 45 CFR 155.20. While we do not expect the definition at 45 CFR 152.2 to be used for any current CMS programs, we are proposing to modify the regulation at 45 CFR 152.2 to cross-reference Exchange regulations at 45 CFR 155.20 to help ensure alignment of definitions for other programs. We seek comment on whether, alternatively, we

[11] 45 CFR 155.305(f)(1)(ii)(A) and (g)(1)(i)(A).

[12] Centers for Medicare & Medicaid Services. (2010). *SHO #10–006: Medicaid and CHIP Coverage of ''Lawfully Residing'' Children and Pregnant Women. https://downloads.cms.gov/cmsgov/archived-downloads/smdl/downloads/sho10006.pdf.*

[13] Centers for Medicare & Medicaid Services. State Health Official letter (*SHO) #12–002: Individuals with Deferred Action for Childhood Arrivals* (issued August 28, 2012). Available at *https://www.medicaid.gov/federal-policy-guidance/downloads/sho-12-002.pdf.*

[14] *See* 45 CFR 155.300(a) and 42 CFR 435.4.

[15] Pursuant to 42 CFR 600.320(d), a State operating a BHP must either offer open enrollment periods pursuant Exchange regulations at 45 CFR 155.410 or follow Medicaid's continuous enrollment process. The two States that currently operate a BHP, New York and Minnesota, follow Medicaid's continuous enrollment process.

should strike the definition of ''lawfully present'' currently at 45 CFR 152.2 instead of replacing it with a cross-reference to 45 CFR 155.20.

C. Exchange Establishment Standards and Other Related Standards Under the ACA (45 CFR 155.20)

1. DACA Recipients

The ACA generally requires that in order to enroll in a QHP through an Exchange, an individual must be a ''citizen or national of the United States or an alien lawfully present in the United States.'' [16] While individuals who are not eligible to enroll in a QHP are also not eligible for APTC, PTC, or CSRs to lower the cost of a QHP, the ACA specifies that individuals who are not lawfully present are also not eligible for such insurance affordability programs.[17] The ACA does not offer a definition of ''lawfully present.'' [18]

In a recent rulemaking, DHS referred to its definition of ''lawful presence'' in 8 CFR 1.3, reiterating that it is a ''specialized term of art'' that does not confer lawful status or authorization to remain in the United States, but instead describes noncitizens who are eligible for certain benefits as set forth in 8 U.S.C. 1611(b)(2) (*Deferred Action for Childhood Arrivals,* final rule, 87 FR 53152 (August 30, 2022) (''DHS DACA Final Rule'')). DHS also stated that HHS and ''other agencies whose statutes independently link eligibility for benefits to lawful presence may have the authority to construe such language for purposes of those statutory provisions'' (87 FR 53152). We discuss this authority in further detail later in this section.

CMS first established a regulatory definition of ''lawfully present'' for purposes of the PCIP program in 2010 (75 FR 45013). In that 2010 rulemaking, CMS adopted the definition of ''lawfully present'' already established for Medicaid and CHIP eligibility for children and pregnant individuals under the CHIPRA 214 option articulated in SHO #10–006 (hereinafter ''2010 SHO'') to have the maximum alignment possible across CMS programs establishing eligibility for lawfully present individuals. The definition of ''lawfully present'' articulated in the 2010 SHO was also informed by DHS regulations codified at 8 CFR 1.3(a) defining ''lawfully present'' for the purpose of eligibility for certain Social Security benefits, with some revisions necessary for updating or clarifying purposes, or as otherwise deemed appropriate for the Medicaid and CHIP programs consistent with the Act.

In March 2012, CMS issued regulations regarding eligibility to enroll in a QHP through an Exchange that cross-referenced the definition of ''lawfully present'' set forth in the 2010 PCIP regulations (77 FR 18309). As the DACA policy had not yet been established, the definitions of ''lawfully present'' set forth in the 2010 SHO, the 2010 PCIP regulations, and the 2012 QHP regulations did not explicitly reference DACA recipients. However, these definitions specify that individuals granted deferred action are considered lawfully present for purposes of eligibility to enroll in a QHP through an Exchange, a BHP, or Medicaid and CHIP under the CHIPRA 214 option. In June 2012, DHS issued the memorandum ''Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,'' establishing the DACA policy.[19] DHS explained in this memorandum that DACA is a form of deferred action, and the removal forbearance afforded to a DACA recipient is identical for immigration purposes to the forbearance afforded to any individual who is granted deferred action in other exercises of enforcement discretion. DHS provided that the DACA policy was ''necessary to ensure that [its] enforcement resources are not expended on these low priority cases.'' [20] DHS did not address DACA recipients' ability to access insurance affordability programs through an Exchange, a BHP, and Medicaid or CHIP under the CHIPRA 214 option.

In August 2012, CMS amended its regulatory definition of ''lawfully present'' at 45 CFR 152.2, used for both PCIP and Exchange purposes, to add an exception stating that an individual granted deferred action under DHS' DACA policy was not considered lawfully present (77 FR 52614), thereby treating DACA recipients differently from other deferred action recipients for purposes of these benefits programs. CMS also issued the 2012 SHO excluding DACA recipients from the definition of ''lawfully residing'' for purposes of Medicaid or CHIP eligibility under the CHIPRA 214 option. In 2014, CMS issued regulations establishing the framework governing a BHP, which also adopted the definition of ''lawfully present'' at 45 CFR 152.2, thereby aligning the definition of ''lawfully present'' for a BHP with Exchanges, Medicaid and CHIP. As a result, DACA recipients, unlike all other deferred action recipients, are not currently eligible to enroll in a QHP through an Exchange, or for APTC or CSRs in connection with enrollment in a QHP through an Exchange, nor are they eligible to enroll in a BHP or for Medicaid or CHIP under the CHIPRA 214 option because they are not considered lawfully present for purposes of these programs. In both the August 2012 rulemaking and the 2012 SHO that excluded DACA recipients from CMS definitions of ''lawfully present,'' CMS reasoned that, because the rationale that DHS offered for adopting the DACA policy did not pertain to eligibility for insurance affordability programs, these benefits should not be extended as a result of DHS deferring action under DACA.

HHS has now reconsidered its position, and is proposing to change its interpretation of the statutory phrase ''lawfully present'' to treat DACA recipients the same as other deferred action recipients as described in current regulations in paragraph (4)(iv) of the definition at 45 CFR 152.2. Under the proposed rule, DACA recipients would be considered lawfully present to the same extent as other deferred action recipients for purposes of the ACA at 42 U.S.C. 18032(f)(3) for the Exchange, and 42 U.S.C. 18051(e) for a BHP. To align the eligibility standards across insurance affordability programs for noncitizens considered ''lawfully present,'' we are also proposing to establish rules in the Medicaid and CHIP programs to recognize that DACA recipients are ''lawfully residing'' in the United States, just like other deferred action recipients, for purposes of the CHIPRA 214 option, as discussed in section II.D.1. of this proposed rule.

Since HHS first interpreted ''lawfully present'' to exclude DACA recipients in 2012, new information regarding DACA recipients' access to health insurance coverage has emerged. While a 2021 survey of DACA recipients found that DACA may facilitate access to health insurance through employer-based plans, 34 percent of DACA recipient respondents reported that they were not

[16] 42 U.S.C. 18032(f)(3).

[17] 26 U.S.C. 36B(e)(2), 42 U.S.C. 18082(d), 42 U.S.C. 18071(e).

[18] 42 U.S.C. 18001(d)(1).

[19] United States Department of Homeland Security. (2012) *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.*

[20] United States Department of Homeland Security. (2012) *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.*

covered by health insurance.[21] Individuals without health insurance are less likely to receive preventative or routine health screenings, and may delay necessary medical care, incurring high costs and debts.[22] The 2021 survey of DACA recipients also found that 47 percent of respondents attested to having experienced a delay in medical care due to their immigration status and 67 percent of respondents said that they or a family member were unable to pay medical bills or expenses.[23] The COVID–19 public health emergency has also highlighted the need for this population to have access to high quality, affordable health coverage. According to a demographic estimate by the Center for Migration Studies, over 200,000 DACA recipients served as essential workers during the COVID–19 public health emergency.[24] This figure encompasses 43,500 DACA recipients who worked in health care and social assistance occupations, including 10,300 in hospitals and 2,000 in nursing care facilities.[25] During the height of the pandemic, essential workers were disproportionately likely to contract COVID–19.[26] [27] These factors emphasize how increasing access to health insurance would improve the health and well-being of many DACA recipients currently without coverage. In addition to improving health outcomes, these individuals could be even more productive and better economic contributors to their communities and society at large with improved access to health care. A 2016 study found that a worker with health insurance is estimated to miss 77 percent fewer workdays than an uninsured worker.[28]

By including DACA recipients in the definition of ''lawfully present,'' this proposed rule is aligned with the goals of the ACA—specifically, to lower the number of people who are uninsured in the United States and make affordable health insurance available to more people. Further, DACA recipients represent a pool of relatively young, healthy adults; at an average age of 29 per U.S. Citizenship and Immigration Services (USCIS) data, they are younger than the general Exchange population.[29] As such, there may be a slight effect on the Exchange or BHP risk pools as a result of this proposed change, discussed further in the Regulatory Impact Analysis in section VI.C. of this proposed rule.

In previously excluding DACA recipients from the definition of ''lawfully present,'' CMS had posited that the broadly accepted conventions of lawful presence should be set aside if the program or status in question was not established with the explicit objective of expanding access to health insurance affordability programs. However, given the broad aims of the ACA to increase access to health coverage, we now assess that this rationale for excluding certain noncitizen groups from such coverage was not only not statutorily mandated, it failed to best effectuate congressional intent in the ACA. Additionally, HHS previously reasoned that considering DACA recipients eligible for insurance affordability programs was inconsistent with the limited relief that the DACA policy was intended to afford. However, on further review and consideration, it is clear that the DACA policy was intended to provide recipients with the stability and assurance that would allow them to obtain education and lawful employment, and integrate as productive members of society. Extending health benefits to these individuals is consistent with those fundamental goals of DACA. It is also evident that there was no statutory mandate to distinguish between recipients of deferred action under the DACA policy and other deferred action recipients.

The proposed change to no longer exclude DACA recipients from CMS definitions of ''lawfully present'' aligns with both the longstanding DHS definition of lawful presence under 8 CFR 1.3 and DHS's explanation of this definition in the DHS DACA Final Rule. In a January 20, 2021 memorandum, ''Preserving and Fortifying Deferred Action for Childhood Arrivals,'' the President directed the Secretary of Homeland Security and the Attorney General to take appropriate steps consistent with applicable law to act to preserve and fortify DACA.[30]

Following the issuance of this memorandum, DHS issued a proposed rule, ''Deferred Action for Childhood Arrivals,'' on September 28, 2021 (86 FR 53736), and the DHS DACA Final Rule on August 30, 2022, with an effective date of October 31, 2022.[31] Among other things, the DHS DACA Final Rule reiterated USCIS' longstanding policy that a noncitizen who has been granted deferred action is deemed ''lawfully present''—a specialized term of art that Congress has used in multiple statutes—for example, for purposes of 8 U.S.C. 1611(b)(2). The DHS DACA Final Rule also reiterated that DACA recipients do not accrue ''unlawful presence'' for purposes of 8 U.S.C. 1182(a)(9).

We are aware that DHS received public comments about ''HHS' exclusion of DACA recipients from participation in Medicaid, the Children's Health Insurance Program (CHIP), and the ACA health insurance marketplace.'' (87 FR 53152). In response, DHS noted that it did not have the authority to make changes to the definitions of ''lawfully present'' used to determine eligibility for insurance affordability programs and affirmed that such authority rests with HHS (87 FR 53152). While review of the DHS DACA Final Rule in part prompted HHS to revisit its own interpretation of ''lawfully present,'' the changes proposed in this rule reflect a desire to align with longstanding DHS policy

[21] National Immigration Law Center. *Tracking DACA Recipients' Access to Health Care. https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.*

[22] Kaiser Family Foundation. *Key Facts About the Uninsured Population. https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/.*

[23] National Immigration Law Center. *Tracking DACA Recipients' Access to Health Care. https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.*

[24] Center for Migration Studies. *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID–19 Pandemic, as Supreme Court Decision Looms, https://cmsny.org/daca-essential-workers-covid/.*

[25] Center for Migration Studies. *DACA Recipients are Essential Workers and Part of the Front-line Response to the COVID–19 Pandemic, as Supreme Court Decision Looms, https://cmsny.org/daca-essential-workers-covid/.*

[26] Nguyen, L.H., Drew, D.A., Graham, M.S., Joshi, A.D., Guo, C.-G., Ma, W., Mehta, R.S., Warner, E.T., Sikavi, D.R., Lo, C.-H., Kwon, S., Song, M., Mucci, L.A., Stampfer, M.J., Willett, W.C., Eliassen, A.H., Hart, J.E., Chavarro, J.E., Rich-Edwards, J.W., . . . Zhang, F. (2020). Risk of COVID–19 among front-line health-care workers and the general community: A prospective cohort study. *The Lancet Public Health, 5*(9). *https://doi.org/10.1016/S2468-2667(20)30164-X.*

[27] Barrett, E.S., Horton, D.B., Roy, J., Gennaro, M.L., Brooks, A., Tischfield, J., Greenberg, P., Andrews, T., Jagpal, S., Reilly, N., Carson, J.L., Blaser, M.J., & Panettieri, R.A. (2020). Prevalence of SARS–COV–2 infection in previously undiagnosed health care workers in New Jersey, at the onset of the U.S. covid–19 pandemic. *BMC Infectious Diseases, 20*(1). *https://doi.org/10.1186/s12879-020-05587-2.*

[28] Dizioli, Allan and Pinheiro, Roberto. (2016). *Health Insurance as a Productive Factor.* Labour Economics. *https://doi.org/10.1016/j.labeco.2016.03.002.*

[29] Key Facts on Individuals Eligible for the Deferred Action for Childhood Arrivals (DACA) Program. Kaiser Family Foundation. February 1, 2018. *https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-individuals-eligible-for-the-deferred-action-for-childhood-arrivals-daca-program/.*

[30] The White House. (2021). *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA). https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01769.pdf.*

[31] Current court orders prohibit DHS from administering the DACA policy. But a partial stay permits DHS to continue processing DACA renewals and related applications for employment authorization documents. *See* USCIS, DACA Litigation Information and Frequently Asked Questions (Nov. 3, 2022).

predating the DHS DACA Final Rule, under which deferred action recipients have been considered ''lawfully present'' for purposes of certain Social Security benefits under 8 CFR 1.3.

In light of DHS's clarifications, HHS sees no persuasive reasons to treat DACA recipients differently from other noncitizens who have been granted deferred action. Accordingly, HHS proposes to amend our regulations at 42 CFR 600.5 and 45 CFR 152.2 and 155.20, and establish regulations at 42 CFR 435.4 and 457.320, so that DACA recipients would be considered lawfully present for purposes of eligibility for health insurance coverage through an Exchange, a BHP, and for eligibility under the CHIPRA 214 option in Medicaid and CHIP, just like other individuals granted deferred action. Specifically, we are proposing to amend QHP regulations at 45 CFR 155.20 to remove the current cross-reference to 45 CFR 152.2 and to instead add a definition of ''lawfully present'' for purposes of determining eligibility to enroll in a QHP through an Exchange. In section II.B. of this rule, we propose to remove the definition of ''lawfully present'' currently in the PCIP regulations at 45 CFR 152.2 and add a cross reference to 45 CFR 155.20 to ensure alignment across programs. In the definition proposed at 45 CFR 155.20, we propose to remove the existing exception in 45 CFR 152.2 that excludes DACA recipients from the definition of ''lawfully present,'' and clarify that references to noncitizens who are granted deferred action who are lawfully present for purposes of this provision include DACA recipients. Under this proposed change, we estimate that approximately 129,000 DACA recipients would enroll in a QHP through an Exchange, a BHP, or Medicaid or CHIP under the CHIPRA 214 option. Proposed changes to Medicaid and CHIP under the CHIPRA 214 option and BHP are included under sections II.D. and II.E. of this proposed rule.

2. Other Proposed Changes to the ''Lawfully Present'' Definition

In addition to including DACA recipients in the definition of ''lawfully present'' for the purposes of eligibility for health insurance coverage through an Exchange, a BHP, and for eligibility under the CHIPRA 214 option in Medicaid and CHIP, CMS is proposing several other clarifications and technical adjustments to the definition proposed at 45 CFR 155.20, as compared to the definition currently at 45 CFR 152.2.

First, in paragraph (1) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, we propose some revisions as compared to paragraph (1) of the definition currently at 45 CFR 152.2. In the current regulations at 45 CFR 152.2, paragraph (1) provides that qualified aliens, as defined in the Personal Responsibility and Work Opportunity Act (PRWORA) at 8 U.S.C. 1641, are lawfully present. Throughout the proposed definition at 45 CFR 155.20, we propose a nomenclature change to use the term ''noncitizen'' instead of ''alien'' when appropriate to align with more modern terminology. Additionally, in paragraph (1) of the proposed definition at 45 CFR 155.20, we propose to cite the definition of ''qualified noncitizen'' at 42 CFR 435.4, rather than the definition of ''qualified alien'' in PRWORA. The definition of ''qualified noncitizen'' currently at 42 CFR 435.4 includes the term ''qualified alien'' as defined at 8 U.S.C. 1641(b) and (c). We note that for purposes of Exchange coverage and APTC eligibility, citizens of the Freely Associated States (FAS) living in the United States under the Compacts of Free Association (COFA), commonly referred to as COFA migrants, are not considered qualified noncitizens because the statutory provision at 8 U.S.C.1641(b)(8) making such individuals qualified noncitizens only applies to Medicaid. Similarly, for purposes of BHP eligibility, COFA migrants are not considered qualified noncitizens by cross-referencing the BHP definition of ''lawfully present'' at 42 CFR 600.5 to 45 CFR 155.20. Please see section II.D.3. of this proposed rule, where we discuss this further and we seek comment on whether to provide a more detailed definition of ''qualified noncitizen'' at 42 CFR 435.4. Pending such comments, and to ensure alignment across CMS programs, we propose that the Exchange regulations at 45 CFR 155.20 define ''qualified noncitizen'' by including a citation to the Medicaid regulations at 42 CFR 435.4, rather than to PRWORA.

Further, in the current definition of ''lawfully present'' at 45 CFR 152.2, CMS included in paragraph (2), a noncitizen in a nonimmigrant status who has not violated the terms of the status under which they were admitted or the status to which they have changed since their admission. In this rule, we propose in paragraph (2) of 45 CFR 155.20, modifying this language such that a noncitizen in a valid nonimmigrant status would be deemed lawfully present. Determining whether an individual has violated the terms of their status is a responsibility of DHS, not CMS. Accordingly, this proposed change would ensure coverage of noncitizens in a nonimmigrant status that has not expired, so long as DHS has not determined those noncitizens have violated their status.

Exchanges would continue to submit requests to verify an applicant's nonimmigrant status through a data match with DHS via the Federal data services hub using DHS' Systematic Alien Verification for Entitlements (SAVE) system. If SAVE indicates that the applicant has no eligible immigration status, the applicant would not be eligible for coverage. As such, this modification will simplify the eligibility verification process, so that a nonimmigrant's immigration status can be verified solely using the existing SAVE process, and reduce the number of individuals for whom an Exchange or State agency may need to request additional information. We also believe this change will promote simplicity, consistency in program administration, and program integrity given the reliance on a Federal trusted data source, while eliminating the agency's responsibility to understand and evaluate the minute complexities of the various immigration statuses and regulations.

We also propose a minor technical change in paragraph (4) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, as compared to the definition of ''lawfully present'' currently in paragraph (4)(i) at 45 CFR 152.2, to refer to individuals who are ''granted,'' rather than ''currently in'' temporary resident status, as this language more accurately refers to how this status is conferred. We similarly propose a minor technical change in paragraph (5) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, as compared to the definition of ''lawfully present'' currently in paragraph (4)(ii) at 45 CFR 152.2, to refer to individuals who are ''granted,'' rather than ''currently under'' Temporary Protected Status (TPS), as this language more accurately refers to how DHS confers this temporary status upon individuals.

Paragraph (4)(iii) of the current definition at 45 CFR 152.2 provides that noncitizens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24) are considered lawfully present. In paragraph (6) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, we propose to cross reference 8 CFR 274a.12(c) in its entirety in order to simplify the regulatory definition and verification process. We are proposing this modification to the regulatory text to include all noncitizens who have been granted an Employment Authorization

Document (EAD) under 8 CFR 274a.12(c), as USCIS has authorized these noncitizens to accept employment in the United States. USCIS may grant noncitizens employment authorization under this regulatory provision based on the noncitizen's underlying immigration status or relief granted, an application for such status or other immigration relief, or other basis. Almost all noncitizens granted an EAD under 8 CFR 274a.12(c) are already considered lawfully present under existing regulations, either at in paragraph (4)(iii) of the defintion at 45 CFR 152.2 or within 45 CFR 152.2 more broadly. This modification would add only two minor categories to the proposed definition: noncitizens granted employment authorization under 8 CFR 274a.12(c)(35) and (36). Individuals covered under 8 CFR 274a.12(c)(35) and (36) are noncitizens with certain approved employment-based immigrant visa petitions who are transitioning from an employment-based nonimmigrant status to lawful permanent resident (LPR) status, and their spouses and children, for whom immigrant visa numbers are not yet available. These EAD categories act as a ''bridge'' to allow these noncitizens to maintain work authorization after their nonimmigrant status expires while they await an immigrant visa to become available. Because these individuals were previously eligible for insurance programs by virtue of their nonimmigrant status, the proposed rule would simply allow their eligibility to continue until they are eligible to apply to adjust to LPR status.

This change to consider ''lawfully present'' all individuals with an EAD granted under 8 CFR 274a.12(c) is beneficial because Exchanges can usually verify that an individual has been granted an EAD under 8 CFR 274a.12(c) in real time through SAVE, at the initial step of the verification process. Thus, the proposed revision to the definition would help to streamline and expedite verification of status for individuals who have been granted an EAD under this regulatory provision.

Further, to reduce duplication and confusion, we propose to remove the clause currently in paragraph (4)(ii) of the defintion in 45 CFR 152.2, referring to ''pending applicants for TPS who have been granted employment authorization,'' as these individuals would be covered under proposed paragraph (6) of the definition of ''lawfully present'' at 45 CFR 155.20.

We propose a minor technical modification to the citation in paragraph (7) of the definition of ''lawfully present'' to more accurately describe Family Unity beneficiaries. Family Unity beneficiaries are individuals who entered the United States and have been continuously residing in the United States since May 1988, and who have a family relationship (spouse or child) to a noncitizen with ''legalized status.'' [32] The current definition of ''lawfully present'' at 45 CFR 152.2 includes Family Unity beneficiaries eligible under section 301 of the Immigration Act of 1990 (Pub. L. 101–649, enacted November 29, 1990), as amended. However, DHS also considers as Family Unity beneficiaries individuals who are granted benefits under section 1504 of the Legal Immigration and Family Equity (LIFE) Act Amendments of 2000 (enacted by reference in Pub. L. 106–554, enacted December 21, 2000), referred to hereinafter as the LIFE Act Amendments. In this rule, we propose to amend the definition to include individuals who are granted benefits under section 1504 of the LIFE Act Amendments for consistency with DHS's policy to consider such individuals Family Unity beneficiaries.

As discussed previously, in paragraph (9) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, we propose an additional clause clarifying that all recipients of deferred action, including DACA recipients, are lawfully present for purposes of 45 CFR part 155, which concerns eligibility to enroll in a QHP through an Exchange, and by cross-reference at 42 CFR 600.5, eligibility for a BHP.

In paragraph (10) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, we propose to clarify that individuals with a pending application for adjustment of status are not required to have an approved immigrant visa petition in order to be considered lawfully present. We propose this change because in some circumstances, DHS does not require a noncitizen to have an approved immigrant visa petition to apply for adjustment of status. For example, USCIS allows noncitizens in some employment-based categories, as well as immediate relatives of U.S. citizens, to concurrently file a visa petition with an application for adjustment of status. Further, there are some scenarios where individuals need not have an approved visa petition at all, such as individuals applying for adjustment of status under the Cuban Adjustment Act. In addition, the DHS SAVE verification system generally does not currently return information to requestors on the status of underlying immigrant visa petitions associated with the adjustment of status response. This proposed modification would simplify verification for these noncitizens, reduce the burden on States and individual applicants, and align with current DHS procedures.

Paragraph (5) of the current definition of ''lawfully present'' pertains to applicants for asylum, withholding of removal, or relief under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (hereinafter ''Convention Against Torture''). In this rule, we are proposing to move this text to paragraph (12) of the definition of ''lawfully present'' at 45 CFR 155.20, and remove the portion of the text pertaining to noncitizens age 14 and older who have been granted employment authorization, as these individuals are noncitizens granted employment authorization under 8 CFR 274a.12(c)(8), and as such, are included in paragraph (6) of our proposed definition of ''lawfully present'' at 45 CFR 155.20. This proposed change is intended to reduce duplication and will not have a substantive impact on the definition of ''lawfully present.''

We further propose to remove the requirement in the current definition that individuals under age 14 who have filed an application for asylum, withholding of removal, or relief under the Convention Against Torture have had their application pending for 180 days to be deemed lawfully present. We originally included this 180-day waiting period for children under 14 in our definition of ''lawfully present'' to align with the statutory waiting period before applicants for asylum and other related forms of protection can be granted an EAD. We now propose to change this so that children under 14 are considered lawfully present without linking their eligibility to the 180-day waiting period for an EAD. We note that children under age 14 are generally are not permitted to work in the United States under the Fair Labor Standards Act,[33] and as such, the EAD waiting period has no direct nexus to their eligibility for coverage. Under the proposed rule, Exchanges and States would continue to verify that a child has the relevant pending application or is listed as a dependent on a parent's [34] pending application for asylum or related protection using DHS's SAVE system. This proposed modification captures the same population of children that were previously covered as lawfully present, without respect to

[32] See USCIS Form I–817 (Application for Family Unity Benefits) and Instructions available at *https://www.uscis.gov/sites/default/files/document/forms/i-817.pdf. https://www.uscis.gov/sites/default/files/document/forms/i-817instr.pdf.*

[33] See 29 CFR 570.2.

[34] See 8 U.S.C. 1101(b)(2) (definition of ''parent'').

how long their applications have been pending.

In paragraph (13) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, we propose to include individuals with an approved petition for Special Immigrant Juvenile (SIJ) classification. The definition currently at paragraph (7) of 45 CFR 152.2 refers imprecisely to noncitizens with a ''pending application for [SIJ] status'' and therefore unintentionally excludes from the definition of ''lawfully present,'' children whose petitions for SIJ classification have been approved but who cannot yet apply for adjustment of status due to lack of an available visa number.[35] Due to high demand for visas in this category, for many applicants it can take several years for a visa number to become available. SIJs are an extremely vulnerable population and as such, we propose to close this unintentional gap so that all children with an approved petition for SIJ classification are deemed lawfully present.

In May 2022, USCIS began considering granting deferred action to noncitizens with approved petitions for SIJ classification but who are unable to apply for adjustment of status solely due to unavailable immigrant visa numbers. Accordingly, based on the proposed changes at 45 CFR 155.20, SIJs could be considered ''lawfully present'' under three possible categories, as applicable: paragraph (9) deferred action; paragraph (10) a pending adjustment of status application; or paragraph (13) a pending or approved SIJ petition. While paragraph (9) would cover individuals with approved SIJ petitions who cannot apply for adjustment of status, there may be a small number of SIJs with approved petitions whose request for deferred action has not yet been decided, for whom DHS has declined to defer action, or who were not considered for deferred action. The proposed modification to paragraph (13) of the definition of ''lawfully present'' at 45 CFR 155.20 would capture individuals who have established eligibility for SIJ classification but do not qualify under paragraph (9) or (10) of the proposed definition of ''lawfully present'' at 45 CFR 155.20, and eliminate an unintentional gap in the definition.

We also propose a nomenclature change to the definitions currently at 45 CFR 152.2 to use the term ''noncitizen,'' rather than ''alien'' in the definition proposed at 45 CFR 155.20 to align with more modern terminology.

3. Severability

We propose to add a new section at 45 CFR 155.30 addressing the severability of the provisions proposed in this rule. In the event that any portion of a final rule is declared invalid, CMS intends that the various provisions of the definition of ''lawfully present'' be severable, and that the changes we are proposing with respect to the definitions of ''lawfully present'' in 45 CFR 155.20 would continue even if some of the proposed changes to any individual category are found invalid. The severability of these provisions is discussed in detail in section III. of this proposed rule.

D. Eligibility in States, the District of Columbia, the Northern Mariana Islands, and American Samoa and Children's Health Insurance Programs (CHIPs) (42 CFR 435.4 and 457.320(c))

1. Lawfully Residing and Lawfully Present Definitions

Section 214 of CHIPRA is currently codified at sections 1903(v)(4)(A) and 2107(e)(1)(O) of the Act to allow States and territories an option to provide Medicaid and CHIP benefits to children under age 21 (under age 19 for CHIP) and pregnant individuals who are ''lawfully residing'' in the United States, without a 5-year waiting period, provided that they meet all other eligibility requirements in the State (for example, income). When States elect to cover pregnant individuals and children under the CHIPRA 214 option, this coverage includes the 60-day postpartum period or, at State option, the 12-month postpartum period (including for adolescents who become pregnant),[36] when they are lawfully residing and meet all other eligibility requirements in the State. While the Medicaid and CHIP statutes do not define ''lawfully residing'', we have previously recognized that this term is broader than the definition of ''qualified noncitizen'', discussed in section II.D.3. of this proposed rule.

As discussed previously in this rule, on July 1, 2010, CMS issued the 2010 SHO letter providing guidance for State Medicaid and CHIP agencies to implement section 214 of CHIPRA. In the 2010 SHO letter, CMS interpreted ''lawfully residing'' to mean individuals who are ''lawfully present'' in the United States and who are residents of the State in which they are applying under the State's Medicaid or CHIP residency rules.[37] The term ''lawfully present'' is defined in the 2010 SHO and was based on the definition of ''lawfully present'' that is now codified at 8 CFR 1.3 with some revisions necessary for updating or clarifying purposes, or as otherwise determined appropriate for the Medicaid and CHIP programs consistent with the Act.

On August 28, 2012, CMS issued the 2012 SHO, excluding DACA recipients from being considered lawfully residing for Medicaid and CHIP under the CHIPRA 214 option.[38] The 2012 SHO established CMS' current interpretation of ''lawfully present'' indicating that DACA recipients, unlike other recipients of deferred action, are not considered lawfully present for purposes of eligibility for Medicaid and CHIP under section 214 of CHIPRA. In the 2012 SHO, CMS reasoned that because the rationale that DHS offered for adopting the DACA policy did not pertain to eligibility for Medicaid and CHIP, eligibility for these benefits should not be extended as a result of DHS deferring action under DACA. In so reasoning, CMS relied on the description of the DACA policy offered by DHS in its ''Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'' memorandum, which explained that the DACA policy was ''necessary to ensure that [its]

[35] Moreover, SIJ classification is not itself a status and should not be described as such in the regulation. The current regulatory reference to a ''pending application for SIJ status'' has been construed to encompass noncitizens with a pending SIJ petition. It is not limited to noncitizens with a pending application for adjustment of status based on an approved SIJ petition. Therefore, the proposed regulatory change does not modify the current practice of determining lawful presence for noncitizens in the SIJ process based on a pending petition, rather than (as with other categories of noncitizens seeking (LPR) status) based on a pending application. Rather, the modification we propose in this rule clarifies the language so that both pending and approved SIJ petitions convey lawful presence for the purposes of eligibility for health insurance coverage through an Exchange, a BHP, and for eligibility under the CHIPRA 214 option in Medicaid and CHIP, whether or not an individual with an approved SIJ petition has an adjustment application pending.

[36] 42 U.S.C. 1396a(e)(16); 42 U.S.C. 1397gg(e)(1)(J). *See* SHO #21–0007, ''Improving Maternal Health and Extending Postpartum Coverage in Medicaid and the Children's Health Insurance Program (CHIP)'' (issued Dec 7, 2021), available at *https://www.medicaid.gov/federal-policy-guidance/downloads/sho21007.pdf. See also* Sec. 2, Division FF, Title V, Subtitle D, Sec. 5113 of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328) *(removing the 5-year limitation on the State option to extend postpartum coverage to 12-months).*

[37] Centers for Medicare & Medicaid Services. (2010). *SHO #10–006: Medicaid and CHIP Coverage of ''Lawfully Residing'' Children and Pregnant Women. https://downloads.cms.gov/cmsgov/archived-downloads/smdl/downloads/sho10006.pdf.*

[38] Centers for Medicare & Medicaid Services. (2012). *SHO #12–002: Individuals with Deferred Action for Childhood Arrivals. https://www.medicaid.gov/federal-policy-guidance/downloads/sho-12-002.pdf.*

enforcement resources are not expended on these low priority cases.'' [39] The DHS memorandum did not address the availability of health insurance coverage through the Exchange, a BHP, Medicaid or CHIP. As such, DACA recipients are not currently eligible for Medicaid or CHIP programs under the CHIPRA 214 option.

We are proposing to define the terms ''lawfully present'' and ''lawfully residing'' at 42 CFR 435.4. For the same reasons as the proposed changes at 45 CFR 155.20, described in section II.C.1. of this proposed rule, and to ensure alignment across CMS programs, the proposed definition of ''lawfully present'' would remove the exclusion of DACA recipients and clarify that they are included in the broader category of those granted deferred action as lawfully residing in the United States for purposes of Medicaid and CHIP eligibility under the CHIPRA 214 option. We are also proposing to add a cross-reference to this definition at 42 CFR 457.320(c) for purposes of determining eligibility for CHIP. Thus, under the proposed rule, DACA recipients who are children under 21 years of age (under age 19 for CHIP) or pregnant, including during the postpartum period,[40] would be eligible for Medicaid and CHIP benefits in States that have elected the option in their State plan to cover all lawfully residing children or pregnant individuals under the CHIPRA 214 option. These individuals would still need to meet all other eligibility requirements for coverage in the State.[41] We propose the definition of ''lawfully residing'' to match the definition as defined in the 2010 SHO, discussed previously in this rule—that an individual is ''lawfully residing'' if they are ''lawfully present'' in the United States and are a resident of the State in which they are applying under the State's Medicaid or CHIP residency rules.

Further, as discussed in section II.C.2. of this proposed rule regarding modifications to the lawfully present definition proposed in 45 CFR 155.20, we propose in 42 CFR 435.4 each of the same clarifications and minor technical changes. The proposed definition of ''lawfully present'' in 42 CFR 435.4 would mirror the current definition of ''lawfully present'' as defined in the 2010 SHO letter with the clarification and minor technical changes described previously in this proposed rule. We are proposing these rules to align with the proposed definition of ''lawfully present'' across programs and for the same rationales described in section II.C.2. of this proposed rule.

The ''lawfully present'' definition proposed at 42 CFR 435.4 is identical to the definition proposed at 45 CFR 155.20, except for two additional paragraphs related to the territories. Consistent with the 2010 SHO definition of ''lawfully present,'' paragraph (14) of the proposed definition of ''lawfully present'' at 42 CFR 435.4 provides that individuals who are lawfully present in American Samoa are considered lawfully present. CMS is not proposing a change from its current policy described in the 2010 SHO regarding individuals who are lawfully present in American Samoa. Paragraph (15) of the proposed definition of ''lawfully present'' at 42 CFR 435.4 provides a revised description of lawfully present individuals in the Commonwealth of the Northern Mariana Islands (CNMI) under 48 U.S.C. 1806(e), as compared to paragraph (8) of the definition of ''lawfully present'' in the 2010 SHO. The 2010 SHO definition covered individuals described in 48 U.S.C. 1806(e)(1), which granted continued lawful presence in the CNMI to certain noncitizens who were lawfully present at that time under former CNMI immigration law. This statutory provision expired on November 28, 2011. However, in the Northern Mariana Islands Long-Term Legal Residents Relief Act (Public Law 116–24, enacted June 25, 2019), Congress subsequently added a new paragraph (6) to section 1806(e) of the Act, creating a new immigration status of ''CNMI Resident'' for certain long-term residents of the CNMI. Our proposed definition of ''lawfully present'' at 45 CFR 435.4 includes CNMI Residents at paragraph (15), with an update to reflect the current statute regarding individuals who are CNMI residents. Similar language is not included in the definition at 45 CFR 155.20 because American Samoa and the CNMI do not have Exchanges.

We also propose a nomenclature change to the definitions of ''citizenship,'' ''noncitizen,'' and ''qualified noncitizen'' in 42 CFR 435.4 in order to remove the hyphen in the term ''non-citizen'' and use the term ''noncitizen'' throughout those definitions to align with terminology used by DHS.

2. Severability

We propose to add a new section at 42 CFR 435.12 addressing the severability of the provisions proposed in this rule. In the event that any portion of a final rule might be declared invalid, CMS intends that the various provisions of the definition of ''lawfully present'' be severable, and that the changes we are proposing with respect to the definitions of ''lawfully present'' in § 435.4 would continue even if some of the proposed changes to any individual category are found invalid. The severability of these provisions is discussed in detail in section III. of this proposed rule.

3. Defining Qualified Noncitizen

As previously discussed, the proposed definition of ''lawfully present'' includes an individual who is a ''qualified noncitizen''. Under our current Medicaid regulations, a ''qualified non-citizen'' is defined at 42 CFR 435.4 and includes an individual described in 8 U.S.C. 1641(b) and (c). The definition is currently used for determining Medicaid eligibility under our regulation at 42 CFR 435.406, and the definition would also be important for determining eligibility of individuals who are seeking CHIPRA section 214 benefits. We are considering whether the current definition of qualified noncitizen at 42 CFR 435.4 should be modified to provide greater clarity and increase transparency for the public. Specifically, we are considering whether the definition should be modified to expressly provide all of the categories of noncitizens covered by 8 U.S.C. 1641(b) and (c), as well as additional categories of noncitizens that Medicaid agencies are required to cover as a result of subsequently enacted

[39] United States Department of Homeland Security. (2012) *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.*

[40] The postpartum period for pregnant individuals includes the 60-day period described in sections 1903(v)(4)(A)(i) and 2107(e)(1)(O) of the Act or the extended 12-month period described in sections 1902(e)(16) and 2107(e)(1)(J) of the Act in States that have elected that option.

[41] To date, 35 States, the District of Columbia, and three territories have elected the CHIPRA 214 option for at least one population of children or pregnant individuals in their Medicaid or CHIP programs. A current list of States that elect the CHIPRA 214 option in Medicaid and/or CHIP is available at *https://www.medicaid.gov/medicaid/enrollment-strategies/medicaid-and-chip-coverage-lawfully-residing-children-pregnant-women.*

legislation that was not codified in 8 U.S.C. 1641(b) or (c). For example, Federal law requires certain populations to be treated as ''refugees.'' [42] Additional categories of noncitizens treated as ''refugees'' under Federal law that could be specifically described in the regulation include, for example, victims of trafficking and certain Afghans and Ukrainians.[43] We are considering whether to revise the definition of qualified noncitizen in 42 CFR 435.4 to account for these and other noncitizens for clarity and transparency.

We note that there is at least one difference in how the term ''qualified noncitizen'' applies to Medicaid compared to the other programs discussed in this proposed rule. Generally, although the definition of ''qualified alien'' in 8 U.S.C. 1641 applies to all of the programs, COFA migrants are only considered ''qualified aliens'' for purposes of the Medicaid program. The Consolidated Appropriations Act, 2021 added individuals who lawfully reside in the United States in accordance with COFA to the definition of qualified alien under new paragraph (8) of 8 U.S.C. 1641(b).[44] This paragraph specifies that COFA migrants' eligibility only extends to the designated Federal program defined in 8 U.S.C. 1612(b)(3)(C), which is the Medicaid program.

Since CHIP is not included as a designated Federal program at 8 U.S.C. 1612(b)(3)(C), we acknowledge that COFA migrants would need to be excluded from the definition of qualified noncitizen for separate CHIP through an exception at 42 CFR 457.320(c). However, we also note that under the definition of ''lawfully present,'' COFA migrants with a valid nonimmigrant status, as defined in 8 U.S.C. 1101(a)(15) or otherwise under the immigration laws (as defined in 8 U.S.C. 1101(a)(17)), may be eligible for CHIP in States that have elected the CHIPRA 214 option, if they meet all other eligibility requirements within the State. Similarly, enrollment in a QHP through an Exchange and BHP enrollment are not included as designated Federal programs, and as such, COFA migrants are not considered qualified noncitizens for purposes of eligibility for Exchange coverage, APTC, cost sharing reductions, or BHP eligibility. However, COFA migrants would generally be considered lawfully present under paragraph (2) of the proposed ''lawfully present'' definition at 45 CFR 152.2 regarding nonimmigrants, as they are considered lawfully present under existing regulations in paragraph (2) of the defintion at 45 CFR 152.2 today, and thus would continue to be eligible for Exchange coverage in a QHP, APTC, CSRs, and BHP, if they meet all other eligibility requirements for those programs.

Because noncitizens who are treated as refugees for purposes of Medicaid eligibility are also treated as refugees for purposes of CHIP eligibility, these categories of noncitizens (discussed previously in this proposed rule) are also being considered for the definition of qualified noncitizen for purposes of CHIP. We seek public comment on our consideration of modifying the definition of qualified noncitizen in 42 CFR 435.4 in this manner.

E. Administration, Eligibility, Essential Health Benefits, Performance Standards, Service Delivery Requirements, Premium and Cost Sharing, Allotments, and Reconciliation (42 CFR Part 600)

Section 1331 of the ACA provides States with an option to establish a BHP.[45] In States that elect to implement a BHP, the program makes affordable health benefits coverage available for lawfully present individuals under age 65 with household incomes between 133 percent and 200 percent of the Federal poverty level (FPL) who are not otherwise eligible for Medicaid, CHIP, or affordable employer-sponsored coverage, or for individuals whose income is below these levels but are lawfully present noncitizens ineligible for Medicaid. For those States that have expanded Medicaid coverage under section 1902(a)(10)(A)(i)(VIII) of the Act, the lower income threshold for BHP eligibility is effectively 138 percent of the FPL due to the application of a required 5 percent income disregard in determining the upper limits of Medicaid income eligibility (section 1902(e)(14)(I) of the Act). Currently, there are two States that operate a BHP—Minnesota and New York.[46]

In this rule, we propose conforming amendments to the BHP regulations to remove the current cross-reference to 45 CFR 152.2 in the definition of ''lawfully present'' at 42 CFR 600.5. We also propose to amend the definition of ''lawfully present'' in the BHP regulations at 42 CFR 600.5 to instead cross-reference the definition of ''lawfully present'' proposed in this rule at 45 CFR 155.20. This proposal, if finalized, would result in DACA recipients being considered lawfully present for purposes of eligibility to enroll in a BHP in a State that elects to implement such a program, if otherwise eligible. Also, if the proposals are finalized, this modification would ensure that the definition of ''lawfully present'' used to determine eligibility for coverage under a BHP is aligned with the definition of ''lawfully present'' used for the other insurance affordability programs. This alignment is important because it would help ensure a State could provide continuity of care for BHP enrollees who may have been previously eligible for a QHP or Medicaid. Additionally, pursuant to 42 CFR 600.310(a), the States use the single streamlined application that is used to determine eligibility for a QHP in an Exchange as well as Medicaid and CHIP. An aligned definition of ''lawfully present'' would reduce administrative burdens for the State as well as the potential for incorrect eligibility determinations.

III. Severability

As described in the background section of this proposed rule, the ACA generally [47] requires that in order to enroll in a QHP through an Exchange, an individual must be either a citizen or national of the United States or be

[42] Refugees are listed as a category of noncitizens who are ''qualified aliens'' at 8 U.S.C. 1641(b)(3).

[43] To date, these other Federal laws include the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)), relating to certain victims of trafficking; section 602(b)(8) of the Afghan Allies Protection Act of 2009, Public Law 111–8 (8 U.S.C. 1101 note), relating to certain Afghan special immigrants; section 1244(g) of the Refugee Crisis in Iraq Act of 2007 (8 U.S.C. 1157 note), relating to certain Iraqi special immigrants; section 584(c) of Public Law 100–202 (8 U.S.C. 1101 note), relating to Amerasian immigrants; section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act of 2021, Public Law 117–43, relating to certain Afghan parolees; and section 401 of the Additional Ukraine Supplemental Appropriations Act of 2022, Public Law 117–128, relating to certain Ukrainian parolees.

[44] Div. CC, Title II, sec. 208, Public Law 116–260.

[45] See 42 U.S.C. 18051. Also see 42 CFR part 600.

[46] Minnesota's program began January 1, 2015, and New York's program began April 1, 2015. For more information, see *https://www.medicaid.gov/basic-health-program/index.html.* Also see, for example, 87 FR 77722, available at *https://www.govinfo.gov/content/pkg/FR-2022-12-20/pdf/2022-27211.pdf.*

[47] States may pursue a waiver under section 1332 of the Affordable Care Act (ACA) that could waive the ''lawfully present'' framework in section 1312(f)(3) of the ACA. See 42 U.S.C. 18052(a)(2)(B). There is currently one State (Washington) with an approved section 1332 waiver that includes a waiver of the ''lawfully present'' framework to the extent necessary to permit all State residents, regardless of immigration status, to enroll in a QHP and Qualified Dental Plan (QDP) through the State's Exchange, as well as to apply for State subsidies to defray the costs of enrolling in such coverage. Consumers who are eligible for Exchange coverage under the waiver remain ineligible for PTC. For more information on this State's section 1332 waiver, see *https://www.cms.gov/cciio/programs-and-initiatives/state-innovation-waivers/section_1332_state_innovation_waivers-.*

''lawfully present'' in the United States.[48] The ACA also generally requires that individuals be ''lawfully present'' in order to be eligible for insurance affordability programs such as PTC,[49] APTC,[50] and CSRs.[51] Additionally, enrollees in a BHP are required to meet the same citizenship and immigration requirements as QHP enrollees.[52] The ACA does not define ''lawfully present'' beyond specifying that an individual is only considered lawfully present if they are reasonably expected to be lawfully present for the period of their enrollment,[53] and that CMS is required to verify that Exchange applicants are lawfully present in the United States.[54] Additionally, the CHIPRA 214 option gives States the option to elect to cover ''lawfully residing'' pregnant individuals and children in their Medicaid and/or CHIP programs. Since 2010, CMS has interpreted ''lawfully residing'' to mean individuals who are ''lawfully present'' in the United States and who are residents of the State in which they are applying under the State's Medicaid or CHIP residency rules.[55] The interpretation of ''lawfully residing'' proposed in this rulemaking is thus consistent with longstanding CMS guidance.

Since 1996, when the Department of Justice's Immigration and Naturalization Service issued an interim final rule defining the term ''lawfully present'' as used in the recently enacted PRWORA, Federal agencies have considered deferred action recipients to be ''lawfully present'' for purposes of certain Social Security benefits (see *Definition of the Term Lawfully Present in the United States for Purposes of Applying for Title II Benefits Under Section 401(b)(2) of Public Law 104–193,* interim final rule, 61 FR 47039). In the intervening years, Congress has been aware of agency actions to clarify definitions of ''lawfully present'' consistent with their statutory authority and has taken no action to codify a detailed definition of ''lawfully present'' for use in administering Federal benefit programs. Given the lack of a statutory definition of ''lawfully present'' or ''lawfully residing'' in the ACA or the CHIPRA, and given the rulemaking authority granted to CMS under 42 U.S.C. 1302, 42 U.S.C. 18051, and 42 U.S.C. 18041, HHS has discretion to determine the best legal interpretations of these terms for purposes of administering its programs. Although the intent of this proposed rule is to make conforming changes to the definition of ''lawfully present'' across all CMS insurance affordability programs, we recognize the underlying statutory authorities and respective regulations contain some differences and apply to different populations. It is CMS' intent that if the rules for one program are found unlawful, the rules for other programs would remain intact. As previously described, CMS' authority to remove the exclusion treating recipients of deferred action under the DACA policy differently from other noncitizens with deferred action under the definition of ''lawfully present'' for purposes of eligibility for insurance affordability programs is well-supported in law and practice and should be upheld in any legal challenge.

Similarly, we have proposed technical changes to the definition of ''lawfully present'' for the purposes of eligibility for insurance affordability programs, and we believe those changes are also well-supported in law and practice and should be upheld in any legal challenge. CMS also believes that its exercise of its authority reflects sound policy.

However, in the event that any portion of a final rule is declared invalid, CMS intends that the other proposed changes to the definition of ''lawfully present'' and within the changes to the regulations defining qualified noncitizens would be severable. For example, if a court were to find unlawful the inclusion of one provision in the definition of ''lawfully present,'' for purposes of eligibility for any health insurance affordability program, CMS intends the remaining features proposed in sections II.C.1., II.C.2., II.D.1., and II.D.3. of this proposed rule to stand. Likewise, CMS intends that if one provision of the changes to the definition of ''lawfully present'' is struck down, that other provisions within that regulation be severable to the extent possible. For example, if one of the provisions discussed in section II.C.2. (Other Proposed Changes to the Definition of Lawfully Present) of this proposed rule is found invalid, CMS intends that the other provisions discussed in that section be severable.

Additionally, a final rule that includes only some provisions of this proposed rule would have significant advantages and be worthwhile in itself. For example, a rule consisting only of the technical and clarifying changes proposed in section II.C.2. of this proposed rule, applied through cross-reference to Exchanges, BHPs, and Medicaid and CHIP in States that elect the CHIPRA 214 option, would allow CMS to more effectively verify lawful presence of noncitizens for purposes of eligibility for health insurance affordability programs. Similarly, a rule consisting only of the changes proposed in section II.D.3. of this rule, would increase transparency for consumers and State Medicaid and CHIP agencies. A rule consisting solely of the changes proposed in section II.C.1. of this proposed rule would have significant benefits because it would increase access to health coverage for DACA recipients. These reasons alone would justify the continued implementation of these policies.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements. Comments, if received, will be responded to within the subsequent final rule.

A. Wage Estimates

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' (BLS's) May 2021 National Occupational Employment and Wage Estimates for all salary estimates (*https://www.bls.gov/oes/current/oes_nat.htm*). In this regard, Table 1 presents BLS's mean hourly wage, our estimated cost of fringe benefits and overhead

[48] 42 U.S.C. 18032(f)(3).

[49] 26 U.S.C. 36B(e)(2).

[50] 42 U.S.C. 18082(d).

[51] 42 U.S.C. 18071(e).

[52] 42 U.S.C. 18051(e).

[53] 42 U.S.C. 18032(f)(3), 42 U.S.C. 18071(e)(2).

[54] 42 U.S.C. 18081(c)(2)(B).

[55] Centers for Medicare & Medicaid Services. (2010). *SHO #10–006: Medicaid and CHIP Coverage of ''Lawfully Residing'' Children and Pregnant Women. https://downloads.cms.gov/cmsgov/archived-downloads/smdl/downloads/sho10006.pdf.*

(calculated at 100 percent of salary), and our adjusted hourly wage.

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupational code	Mean hourly wage ($/hr)	Fringe benefits and other indirect costs ($/hr)	Adjusted hourly wage ($/hr)
Computer Programmer	15–1251	46.46	46.46	92.92
Database and Network Administrator & Architect	15–1240	49.25	49.25	98.50
Eligibility Interviewers, Govt Programs	43–4061	23.35	23.35	46.70

For States and the private sector, employee hourly wage estimates have been adjusted by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and other indirect costs vary significantly across employers, and because methods of estimating these costs vary widely across studies. Nonetheless, there is no practical alternative, and we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

We adopt an hourly value of time based on after-tax wages to quantify the opportunity cost of changes in time use for unpaid activities. This approach matches the default assumptions for valuing changes in time use for individuals undertaking administrative and other tasks on their own time, which are outlined in an Assistant Secretary for Planning and Evaluation (ASPE) report on ''Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices.'' [56] We start with a measurement of the usual weekly earnings of wage and salary workers of $998.[57] We divide this weekly rate by 40 hours to calculate an hourly pre-tax wage rate of $24.95. We adjust this hourly rate downwards by an estimate of the effective tax rate for median income households of about 17 percent, resulting in a post-tax hourly wage rate of $20.71. We adopt this as our estimate of the hourly value of time for changes in time use for unpaid activities.

[56] Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. 2017. ''Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices.'' *https://aspe.hhs.gov/reports/valuing-time-us-department-health-human-services-regulatory-impact-analyses-conceptual-framework.*

[57] U.S. Bureau of Labor Statistics. Employed full time: Median usual weekly nominal earnings (second quartile): Wage and salary workers: 16 years and over [LEU0252881500A], retrieved from FRED, Federal Reserve Bank of St. Louis; *https://fred.stlouisfed.org/series/LEU0252881500A.* Annual Estimate, 2021.

B. Adjustment to State Cost Estimates

To estimate the financial burden on States pertaining to Medicaid and CHIP information collection changes, it was important to consider the Federal Government's contribution to the cost of administering the Medicaid program. The Federal Government provides funding based on a Federal medical assistance percentage (FMAP) that is established for each State, based on the per capita income in the State as compared to the national average. FMAPs for care and services range from a minimum of 50 percent in States with higher per capita incomes to a maximum of 83 percent in States with lower per capita incomes. For Medicaid, all States receive a 50 percent matching rate for administrative activities. States also receive higher Federal matching rates for certain administrative activities such as systems improvements, redesign, or operations. For CHIP, States can claim enhanced FMAP for administrative activities up to 10 percent of the State's total computable expenditures within the State's fiscal year allotment. As such, and taking into account the Federal contribution to the costs of administering the Medicaid and CHIP programs for purposes of estimating State burden with respect to collection of information, we elected to use the higher end estimate that the States would contribute 50 percent of the costs, even though the State burden may be much smaller, especially for CHIP administrative activities.

Financial burden pertaining to BHP and State Exchange information collection changes is covered entirely by States, as discussed further in sections IV.C.2. through IV.C.4. of this proposed rule.

C. Proposed Information Collection Requirements (ICRs)

1. ICRs Regarding the CHIPRA 214 Option (42 CFR 435.4 and 457.320(c))

The following proposed changes will be submitted to OMB for review under OMB control number 0938–1147 (CMS–10410) regarding Medicaid and CHIP eligibility.

As discussed previously, the changes proposed to the definition of ''lawfully present'' would impact eligibility for Medicaid and CHIP in States that have elected the CHIPRA 214 option. This proposal would impact the 35 States, the District of Columbia, and three territories that have elected the CHIPRA 214 option for at least one population of children or pregnant individuals in their CHIP or Medicaid programs. For simplicity, in the calculations that follow we will refer to this total as ''States.'' For the purposes of these estimates, we will assume that these proposals do not cause any States to opt in or out of the CHIPRA 214 option. We further note that currently, 10 States cover either children, or children and pregnant individuals regardless of immigration status using State-only funds.[58] However, we are including those States in our estimates, because States may need to adjust their systems to reflect the change in the route of eligibility, or to address the new availability of Federal matching funds for certain individuals.

We estimate that it would take each State 100 hours to develop and code the changes to its Medicaid or CHIP eligibility systems to correctly evaluate and verify eligibility under the revised definition of ''lawfully present'' to include DACA recipients and certain other limited groups of noncitizens in the CHIPRA 214 group, as outlined in section II.C.2. of this proposed rule. Of those 100 hours, we estimate it would take a database and network administrator and architect 25 hours at $98.50 per hour and a computer programmer 75 hours at $92.92 per hour. In aggregate, we estimate a one-time burden of 3,900 hours (39 States ×

[58] As of December 2022, those States are California, the District of Columbia, Illinois, Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington. ''Health Coverage and Care of Immigrants,'' Kaiser Family Foundation, *https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-and-care-of-immigrants/. Accessed* March 2, 2023.

100 hours) at a cost of $367,829 (39 States × [(25 hours × $98.50 per hour) + (75 hours × $92.92 per hour)]) for completing the necessary updates to Medicaid systems. Taking into account the 50 percent Federal contribution to Medicaid and CHIP program administration, the estimated State one-time cost would be $4,716 per State, and $183,914 in total for all States.

These proposed requirements, if finalized, would impose additional costs on States to process the applications for individuals impacted by the proposals in this rule. Those impacts are accounted for under OMB control number 0938–1191 (Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Insurance Marketplaces, Medicaid and Children's Health Insurance Program Agencies (CMS–10440)), discussed in section IV.C.3. of this proposed rule, which pertains to the streamlined application.

2. ICRs Regarding the BHP (42 CFR 600.5)

The following proposed changes will be submitted to OMB for review under OMB control number 0938–1218 (CMS–10510).

The impact of this change is with regards to the two States with BHPs—Minnesota and New York.[59] We estimate that it would take each State 100 hours to develop and code the changes to its BHP eligibility and verification system to correctly evaluate eligibility under the revised definition of ''lawfully present'' to include DACA recipients and certain other limited groups of noncitizens as outlined in section II.C.2. of this proposed rule. To be conservative in our estimates, we are assuming 100 hours per State, but it is important to note that it may take each State less than 100 hours given the overlap in State eligibility and verification systems, as work completed for the Medicaid or State Exchange system may be the same for its BHP.

Of those 100 hours, we estimate it would take a database and network administrator and architect 25 hours at $98.50 per hour and a computer programmer 75 hours at $92.92 per hour. In the aggregate, we estimate a one-time burden of 200 hours (2 States × 100 hours) at a cost of $18,863 (2 States × [(25 hours × $98.50 per hour) + (75 hours × $92.92 per hour)]) for completing the necessary updates to a BHP application.

[59] Minnesota's program began January 1, 2015, and New York's program began April 1, 2015. For more information, see *https://www.medicaid.gov/basic-health-program/index.html.*

These proposed requirements, if finalized, would impose additional costs on States to process the applications for individuals impacted by the proposals in this rule. Those impacts are accounted for under OMB control number 0938–1191 (Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Insurance Marketplaces, Medicaid and Children's Health Insurance Program Agencies (CMS–10440)), discussed in section IV.C.3. of this proposed rule, which pertains to the streamlined application.

3. ICRs Regarding the Exchanges and Processing Streamlined Applications (45 CFR 152.2 and 155.20, 42 CFR 600.5, and 42 CFR 435.4 and 457.320(c))

The following proposed changes will be submitted to OMB for review under control number 0938–1191 (CMS–10440).

As discussed previously, the changes proposed to the definition of ''lawfully present'' would impact eligibility to enroll in a QHP through an Exchange and for APTC and CSRs. This proposal would impact the 18 State Exchanges that run their own eligibility and enrollment platforms, as well as the Federal Government which would make changes to the Federal eligibility and enrollment platform for the States with Federally-facilitated Exchanges (FFEs) and State-based Exchanges on the Federal platform (SBE–FPs). We estimate that it would take the Federal Government and each of the State Exchanges 100 hours in 2023 to develop and code the changes to their eligibility systems to correctly evaluate and verify eligibility under the definition of ''lawfully present'' revised to include DACA recipients and certain other limited groups of noncitizens as outlined in section II.C.2. of this proposed rule.

Of those 100 hours, we estimate it would take a database and network administrator and architect 25 hours at $98.50 per hour and a computer programmer 75 hours at $92.92 per hour. In aggregate for the States, we estimate a one-time burden in 2023 of 1,800 hours (18 State Exchanges × 100 hours) at a cost of $169,767 (18 States × [(25 hours × $98.50 per hour) + (75 hours × $92.92 per hour)]) for completing the necessary updates to State Exchange systems. For the Federal Government, we estimate a one-time burden in 2023 of 100 hours at a cost of $9,432 ((25 hours × $98.50 per hour) + (75 hours × $92.92 per hour)). In total, the burden associated with all system updates would be 1,900 hours at a cost of $179,199.

''Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Benefits Exchanges, Medicaid and CHIP Agencies,'' OMB control number 0938–1191 (CMS–10440) accounts for burdens associated with the streamlined application for enrollment in the programs impacted by this rule. As such, the following information collection addresses the burden of processing applications and assisting enrollees with Medicaid, CHIP, BHP, and QHP enrollment, and those impacts are not reflected in the ICRs for Medicaid and CHIP, and BHP, discussed in sections IV.C.1. and IV.C.2. of this proposed rule, respectively.

With respect to assisting additional eligible enrollees and processing their applications, we estimate this would take a government programs eligibility interviewer 10 minutes (0.17 hours) per application at a rate of $46.70 per hour, for a cost of approximately $7.94 per application. As discussed further in section IV.C.4. of this proposed rule, we anticipate that approximately 200,000 individuals impacted by the proposals in this rule would complete the application annually. Therefore, the total application processing burden associated with the proposals in this rule would be 34,000 hours (0.17 hours × 200,000 applications) for a total cost of $1,587,800 (34,000 hours × $46.70 per hour). As discussed further in this section, we anticipate that approximately 54 percent of the application processing burden would fall on States, while the remaining approximately 46 percent would be borne by the Federal Government. We estimate these proportions as follows and seek comment on these estimates and the methodology and assumptions used to calculate them.

To start, we estimate the percentage of applications that would be processed for each of the programs: Medicaid, CHIP, Exchange, and BHP. We assume that the proportion of applications that would be processed for each program would be equivalent to the proportion of individuals impacted by the proposals in this rule that would enroll in each program. As discussed in section VI.C. of this proposed rule, we estimate that of the 129,000 individuals impacted by the proposals in this rule, 13,000 would enroll in Medicaid or CHIP (10 percent), 112,000 in the Exchanges (87 percent), and 4,000 (3 percent) in the BHPs on average each year, including redeterminations and re-enrollments. Using these same proportions, out of the 200,000 applications anticipated to

result from the proposals in this rule, if finalized, we estimate 20,000 applications would be processed for Medicaid and CHIP, 174,000 would be processed for the Exchanges, and 6,000 would be processed for the BHPs on average each year.

Next, we calculate the proportion of each program's application processing costs that are borne by States compared to the Federal Government. As discussed in section IV.B. of this proposed rule, the Federal Government contributes 50 percent of Medicaid and CHIP program administration costs. As such, we assume 50 percent of the Medicaid and CHIP application processing costs would fall on the 39 States referenced in section IV.C.1. of this proposed rule, and the remaining 50 percent would be borne by the Federal Government. As discussed in section IV.C.2. of this proposed rule, the entire information collection burden associated with changes to BHPs falls on the two States with BHPs—Minnesota and New York. As such, we assume 100 percent of the BHP application processing costs would fall on these two States. For the Exchanges, we used data from the 2022 Open Enrollment Period to estimate the proportion of applications that are processed by States compared to the Federal Government, and we determined that 47 percent of Exchange applications were submitted to FFEs/SBE–FPs, and are therefore processed by the Federal Government, while 53 percent were submitted to and processed by the 18 State Exchanges using their own eligibility and enrollment platforms.[60] As such, we anticipate that 47 percent of Exchange application processing costs would fall on the Federal Government and 53 percent of Exchange application processing costs would fall on States.

Finally, we apply the proportion of applications we estimated for each program we discussed earlier to the State and Federal burden proportions. For Medicaid and CHIP, we estimate there would be 20,000 applications processed. Using the per-application processing burden discussed earlier in this ICR (10 minutes, or 0.17 hours, per application at a rate of $46.70 per hour), and applying the 50 percent Federal contribution to Medicaid and CHIP program administration costs, this results in a burden of 1,700 hours, or $79,390, each for States and the Federal Government to process Medicaid and CHIP applications. For the BHPs, if we estimate 6,000 applications would be processed, the burden for all of those would be borne by the States. Using the per-application processing burden of 10 minutes (0.17 hours) per application at a rate of $46.70 per hour, this results in a burden of 1,020 hours, or $47,634, for States to process BHP applications. For the Exchanges, if we estimate 174,000 applications would be processed, 53 percent of those (92,220) would be processed by State Exchanges and 47 percent (81,780) would be processed by the Federal Government. Using the per-application processing burden of 10 minutes (0.17 hours) per application at a rate of $46.70 per hour, this results in a burden of 15,677 hours, or $732,135, for State Exchanges and 13,903 hours, or $649,251, for the Federal Government.

Therefore, the total burden on States to assist eligible beneficiaries and process their applications would be 18,397 hours annually (1,700 hours for Medicaid and CHIP + 1,020 hours for BHP + 15,677 hours for Exchanges) at a cost of $859,140, and the total burden on the Federal Government would be 15,603 hours annually (1,700 hours for Medicaid and CHIP + 13,903 hours for Exchanges) at a cost of $728,660. We seek comment on these estimates and the methodology and assumptions used to calculate them.

4. ICRs Regarding the Application Process for Applicants

The following proposed changes will be submitted to OMB for review under control number 0938–1191 (CMS–10440).

As required by the ACA, there is one application through which individuals may apply for health coverage in a QHP through an Exchange and for other insurance affordability programs like Medicaid, CHIP, and a BHP.[61] Some individuals may apply directly with their State Medicaid or CHIP agency; however, we assume the burden of completing an Exchange application is essentially the same as applying with a State Medicaid or CHIP agency, and therefore are not distinguishing these populations. We seek comment on this assumption.

Based on the enrollment projections discussed in the Regulatory Impact Analysis section later in this rule, we anticipate that DACA recipients would represent the majority of individuals impacted by the proposals in this rule, and we are unable to quantify the number of non-DACA recipients impacted by the other changes in this rule, but we expect the number to be small. We estimate that there are 200,000 uninsured DACA recipients based on USCIS data on active DACA recipients (589,000 in 2022)[62] and a 2021 survey by the National Immigration Law Center stating that 34 percent of DACA recipients are uninsured,[63] and as such, we anticipate that approximately 200,000 individuals impacted by the proposals in this rule would complete the application annually.

In the existing information collection request for this application (OMB control number 0938–1191), we estimate that the application process would take an average of 30 minutes (0.5 hours) to complete for those applying for insurance affordability programs and 15 minutes (0.25 hours) for those applying without consideration for insurance affordability programs.[64] We estimate that of the 200,000 individuals impacted by the proposed changes, 98 percent would be applying for insurance affordability programs and 2 percent would be applying without consideration for insurance affordability programs. Using the hourly value of time for changes in time use for unpaid activities discussed in section IV.A. of this proposed rule (at an hourly rate of $20.71), the average opportunity cost to an individual for completing this task is estimated to be approximately 0.495 hours ((0.5 hours × 98 percent) + (0.25 hours × 2 percent)) at a cost of $10.25. The total annual additional burden on the 200,000 individuals impacted by the proposed changes would be approximately 99,000 hours with an equivalent cost of approximately $2,050,290.

As stated earlier in this proposed rule, CMS, State Exchanges, and States would require individuals completing the application to submit supporting documentation to confirm their lawful presence if it is unable to be verified electronically. An applicant's lawful presence may not be able to be verified if, for example, the applicant opts to not include information about their immigration documentation such as their alien number or employment

[60] Centers for Medicare & Medicaid Services. (2022). 2022 Open Enrollment Report. *https://www.cms.gov/files/document/health-insurance-exchanges-2022-open-enrollment-report-final.pdf.*

[61] 42 U.S.C. 18083.

[62] Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2022. U.S. Citizenship and Immigration Services. *https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients_Sept_FY22_qtr4.pdf.*

[63] Tracking DACA Recipients' Access to Health Care, National Immigration Law Center, 2022. *https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.*

[64] It is possible that some individuals impacted by the proposed changes to the definition of lawful presence in this rule would apply using the paper application, but internal CMS data show that this would be less than 1 percent of applications. Therefore, we are using estimates in this RIA to reflect that nearly all applicants would apply using the electronic application.

authorization document (EAD) number when they fill out the application. We estimate that of the 200,000 individuals impacted by the changes proposed in this rule, approximately 68 percent (or 136,000) of applicants would be able to have their lawful presence electronically verified, and the remaining 32 percent (or 64,000) of applicants would be unable to have their lawful presence electronically verified and would therefore have to submit supporting documentation to confirm their lawful presence.[65] We estimate that a consumer would, on average, spend approximately 1 hour gathering and submitting required documentation. Using the hourly value of time for changes in time use for unpaid activities discussed in section IV.A. of this proposed rule (at an hourly rate of $20.71), the opportunity cost for an individual to complete this task is estimated to be approximately $20.71. The total annual additional burden on the 64,000 individuals impacted by the changes proposed in this rule that are unable to electronically verify their lawful presence and therefore need to submit supporting documentation would be approximately 64,000 hours with an equivalent cost of approximately $1,325,440. We seek comment on these estimates.

As previously stated, for the 200,000 individuals impacted by this rule, the annual additional burden of completing the application would be 0.495 hours per individual on average, which totals to 99,000 hours at a cost of $2,050,290. For the 64,000 individuals who are unable to have their lawful presence electronically verified, the total annual burden of submitting documentation to verify their lawful presence would be 64,000 hours at a cost of $1,325,440. Therefore, the average annual burden per respondent would be 0.815 hours ((0.495 hours × 68 percent of individuals) + (1.495 hours × 32 percent of individuals)), and the total annual burden on all of these individuals impacted by the proposed changes in this rule would be 163,000 hours at a cost of $3,375,730. We seek comment on these burden estimates.

D. Burden Estimate Summary

TABLE 2—SUMMARY OF PROPOSED BURDEN ESTIMATES

Regulation section(s)/ ICR provision	OMB control No./ CMS–ID	Year	Number of respondents	Number of responses	Time per response (hrs)	Total time (hr)	Hourly labor rate ($/hr)	Total labor cost ($)	State share ($)	Total beneficiary cost ($)
42 CFR 435.4 and 457.320(c) Medicaid and CHIP System Changes.	0938–1147 (CMS–10410).	2023	39	39	100	3,900	Varies	$367,828	$183,914	N/A
42 CFR 600.5 BHP System Changes.	0938–1218 (CMS–10510).	2023	2	2	100	200	Varies	18,863	18,863	N/A
45 CFR 152.2 and 155.20 Exchange System Changes.	0938–1191 (CMS–10440).	2023	19	19	100	1,900	Varies	179,199	169,776	N/A
42 CFR 435.4 and 457.320(c), 42 CFR 600.5, 45 CFR 152.2 and 155.20 Streamlined Application Processing.	0938–1191 (CMS–10440).	2024–2027	200,000	200,000	0.17	34,000	46.70	1,587,800	859,140	N/A
42 CFR 435.4 and 457.320(c), 42 CFR 600.5, 45 CFR 152.2 and 155.20 Application Process for Applicants.	0938–1191 (CMS–10440).	2024–2027	200,000	200,000	0.82	163,000	20.71	3,375,730	N/A	3,375,730

E. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection requirements. The requirements are not effective until they have been approved by OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections discussed in this section, please visit the CMS website at *www.cms.hhs.gov/PaperworkReductionActof1995,* or call the Reports Clearance Office at 410–786–1326.

We invite public comments on these potential information collection requirements. If you wish to comment, please submit your comments electronically as specified in the DATES and **ADDRESSES** section of this proposed rule and identify the rule (CMS–9894–P), the ICR's CFR citation, and OMB control number.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

A. Statement of Need

This proposed rule would update the definition of ''lawfully present'' in our regulations. This definition is currently used to determine whether a consumer is eligible to enroll in a QHP through an Exchange and for APTC and CSRs, and whether a consumer is eligible to enroll in a BHP in States that elect to operate a BHP. We are also proposing a similar definition of ''lawfully present'' that would be applicable to eligibility for Medicaid and CHIP in States that have elected to cover ''lawfully residing'' pregnant individuals and children under the CHIPRA 214 option. In addition, we propose to remove the

[65] This estimate is informed by recent data from the FFEs and SBE–FPs. While certain changes proposed in this rule may result in an increase in the proportion of applicants who are able to have their lawful presence electronically verified, we do not have a reliable way to quantify any potential increase.

exception for DACA recipients from the definitions of ''lawfully present'' used to determine eligibility to enroll in a QHP through an Exchange, a BHP, or in Medicaid and CHIP under the CHIPRA 214 option, and instead treat DACA recipients the same as other deferred action recipients. We also propose some modifications to the ''lawfully present'' definition currently at 45 CFR 152.2, and the definition in the SHO letters that incorporate additional detail, clarifications, and some technical modifications for the Exchanges, BHPs, and Medicaid and CHIP under the CHIPRA 214 option.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA.

Based on our estimates, OIRA has determined that this rulemaking is a significant regulatory action under section 3(f)(1) Executive Order 12866. Accordingly, we have prepared regulatory impact analysis (RIA) that to the best of our ability presents the costs and benefits of the rulemaking. Therefore, OMB has reviewed these proposed regulations, and we have provided the following assessment of their impact.

C. Detailed Economic Analysis

We prepared the economic impact estimates utilizing a baseline of ''no action,'' comparing the effect of the proposals against not proposing the rule at all.

This analysis reviews the amendments proposed under 42 CFR 435.4, 457.320(c), and 600.5, and 45 CFR 152.2 and 155.20, which would add the following changes to the definition of lawfully present by adding the following new categories of noncitizens to this definition via this regulation:

- Those granted an EAD under 8 CFR 274a.12(c)(35) and (36);
- Those granted deferred action under DACA;
- Additional Family Unity beneficiaries;
- Individuals with a pending application for adjustment of status, without regard to whether they have an approved visa petition;
- Children under 14 with a pending application for asylum, withholding of removal, or relief under the Convention Against Torture or children under 14 who are listed as a dependent on a parent's pending application, without regard to the length of time that the application has been pending; and
- Children with an approved petition for SIJ classification.

The amendments proposed under 42 CFR 435.4, 457.320(c), and 600.5 and 45 CFR 152.2 and 155.20 would also:

- Revise the description of noncitizens who are nonimmigrants to include all nonimmigrants who have a valid and unexpired status;
- Remove individuals with a pending application for asylum, withholding of removal, or the Convention Against Torture who are over age 14 from the definition, as these individuals are covered elsewhere; and
- Simplify the definition of noncitizens with an EAD to include all individuals granted an EAD under 8 CFR 274a.12(c), as these individuals are already covered elsewhere, with the exception of a modest expansion to those granted an EAD under 8 CFR 274a.12(c)(35) and (36), discussed earlier in this proposed rule.

In these respects, these proposals are technical changes or revisions to simplify verification processes, and therefore, we do not anticipate a material impact on individuals' eligibility as a result of these changes. We seek comment on estimates or data sources we could use to provide quantitative estimates for the benefit to these individuals.

The amendments proposed under 42 CFR 435.4 and 457.320(c) would also revise the description of lawfully present individuals in the CNMI in this definition. This proposed amendment is also a technical change, and although we anticipate the number of individuals who would be substantively impacted by this proposal would be small, we do not have a reliable way to quantify these impacts. We seek comment on estimates or data sources we could use to provide quantitative estimates for the benefit to these individuals.

As explained further in this section, we estimate 129,000 DACA recipients could enroll in health coverage and benefit from the proposals in this rule.[66] We are presently unable to quantify the number of additional Family Unity beneficiaries, individuals with a pending application for adjustment of status, children under age 14 with a pending application for asylum or related protection or children listed as dependents on a parent's application for asylum or related protection, and individuals with approved petition for SIJ classification that could enroll in health coverage and benefit from the proposals in this rule, but we expect this number to be small. We seek comment on estimates or data sources we could use to provide quantitative estimates for the benefit to these individuals.

The proposed changes to 42 CFR 435.4 and 457.320(c) would no longer exclude DACA recipients from the definition of ''lawfully present'' used to determine eligibility for Medicaid and CHIP under section 214 of CHIPRA and treat DACA recipients the same as other recipients of deferred action. Thus, under the proposed rule, DACA recipients who are children under 21 years of age (under age 19 for CHIP) or pregnant, including during the

[66] The estimates in this RIA are based on DHS's current policy in alignment with the ruling in *Texas* v. *United States,* 50 F.4th 498 (5th Cir. 2022), whereby DHS continues to accept the filing of both initial and renewal DACA applications, but is only processing renewal requests.

postpartum period,[67] would be eligible for Medicaid and CHIP benefits in States that have elected the option in their State plan to cover all lawfully residing children or pregnant individuals under the CHIPRA 214 option. The proposed changes to 42 CFR 600.5 would no longer exclude DACA recipients from the definition of ''lawfully present'' used to determine eligibility for a BHP in those States that elect to operate the program, if otherwise eligible. The proposed changes to 45 CFR 152.2 and 155.20 would make DACA recipients eligible to enroll in a QHP through an Exchange, and for APTC and CSRs, if otherwise eligible. We present enrollment estimates for these populations in Table 3.

TABLE 3—ENROLLMENT ESTIMATES BY PROGRAM, COVERAGE YEARS 2024–2028

	2024	2025	2026	2027	2028
Medicaid and CHIP Enrollment	13,000	11,000	9,000	8,000	6,000
BHP Enrollment	4,000	4,000	4,000	5,000	5,000
Exchange Enrollment	112,000	114,000	116,000	117,000	119,000
Total Enrollment	129,000	129,000	129,000	130,000	130,000

To estimate the enrollment impact on Medicaid, we developed estimates for the number of pregnant individuals and children who would be eligible in this group. For pregnant individuals, we estimated the number of pregnancies using the DACA population by age and gender and combined this with the fertility rates by age in the United States.[68] For the DACA population, we estimated 43 pregnant individuals per 1,000 persons in 2022, declining to 34 pregnant individuals per 1,000 persons in 2028 as the DACA population ages. We then calculated how many persons would be eligible in States that have elected the CHIPRA 214 option to cover pregnant individuals (28 States and territories, including the District of Columbia).[69] Finally, we assumed that 50 percent of all such persons would be eligible on the basis of income. We estimated about 7,000 pregnant individuals would enroll in 2024, declining to about 6,000 by 2028. For children, we estimated the number of individuals who would be eligible in States that elect the CHIPRA 214 option for children (34 States plus the District of Columbia) and by age, as States may allow for eligibility up to age 19 or up to age 21. We assumed 40 percent of these children would be eligible on the basis of income. We estimated about 6,000 children would enroll in 2024, declining to 0 by 2028 as all DACA individuals age out of eligibility.[70]

To estimate the enrollment impact on the Exchanges and BHPs, we started with an estimate of the DACA population. USCIS has estimated this count to be 589,000 persons as of September 30, 2022, the most recent available data.[71] Based on a 2021 survey from the National Immigration Law Center,[72] roughly 34 percent of DACA recipients were uninsured. Of the roughly 200,000 uninsured DACA recipients, we removed the pregnant women and children estimated to enroll in Medicaid, as discussed in the preceding paragraph. In addition, we assumed that approximately 10 percent of these individuals would be ineligible for APTC and CSRs and that approximately 70 percent of the remaining group would opt to enroll in the Exchanges and BHP. This results in an enrollment impact of about 116,000 persons for both the Exchanges and BHP. Based on data regarding the number of DACA recipients by State, we estimated that 4,000 people would enroll in the BHPs in Minnesota and New York, and the remaining 112,000 would enroll in the Exchanges. We also estimated that the 6,000 children who would age out of Medicaid or CHIP eligibility by 2028 would subsequently enroll in the Exchanges and the BHPs in Minnesota and New York. We seek comment on these estimates and the assumptions and methodology used to calculate them.

The proposed changes to 42 CFR 600.5 would no longer exclude DACA recipients from the definition of lawfully present used to determine eligibility for a BHP in those States that elect to operate the program, if otherwise eligible. There may be an effect on the BHP risk pool as a result of this change, as DACA recipients are relatively younger and healthier than the general population, based on USCIS data showing an average age of 29 years.[73] We seek comment on any estimates or data sources we could use to provide quantitative estimates for the associated effects, including benefit to these individuals.

The proposed changes to 45 CFR 152.2 and 155.20 would make DACA recipients eligible to enroll in a QHP through an Exchange, and for APTC and CSRs, if otherwise eligible. Similar to BHP eligibility, there may be a slight effect on the States' individual market risk pool. In addition, the proposals to modify the definition of ''lawfully present'' discussed in section II.C.2. of this proposed rule would reduce burden on Exchanges, BHPs, and State Medicaid and CHIP agencies by allowing the agencies to more frequently verify an individual's status with a trusted data source and to not have to request additional information from consumers. This change would promote simplicity and consistency in program administration, and further program

[67] The postpartum period for pregnant individuals includes the 60-day period described in sections 1903(v)(4)(A)(i) and 2107(e)(1)(O) of the Act or the extended 12-month period described in sections 1902(e)(16) and 2107(e)(1)(J) of the Act in States that have elected that option.

[68] National Vital Statistics Report, CDC, January 31, 2023. *https://www.cdc.gov/nchs/products/nvsr.htm.*

[69] The States and territories that have elected the CHIPRA 214 option to cover pregnant women are: American Samoa, Arkansas, California, the CNMI, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, U.S. Virgin Islands, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See *https://www.medicaid.gov/medicaid/enrollment-strategies/medicaid-and-chip-coverage-lawfully-residing-children-pregnant-women.*

[70] These estimates are based on DHS's current policy in alignment with the ruling in *Texas* v. *United States,* 50 F.4th 498 (5th Cir. 2022), whereby DHS continues to accept the filing of both initial and renewal DACA applications, but is only processing renewal requests.

[71] Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2022. U.S. Citizenship and Immigration Services. *https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients_Sept_FY22_qtr4.pdf.*

[72] Tracking DACA Recipients' Access to Health Care, National Immigration Law Center, 2022. *https://www.nilc.org/wp-content/uploads/2022/06/NILC_DACA-Report_060122.pdf.*

[73] USCIS. Count of Active DACA Recipients by Month of Current DACA Expiration as of September 30, 2022. *https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients_Sept_FY22_qtr4.pdf.*

integrity resulting from the increased reliance on a trusted Federal data source. We seek comment on estimates or data sources we could use to provide quantitative estimates for this benefit.

In addition, increased access to health coverage for DACA recipients and other noncitizens impacted by the proposals in this rule would advance racial justice and health equity, which in turn may decrease costs for emergency medical expenditures. Further, the proposals in this rule would improve the health and well-being of many individuals that are currently without coverage, as having health insurance makes individuals healthier. Individuals without insurance are less likely to receive preventative or routine health screenings and may delay necessary medical care, incurring high costs and debts. In addition to the improvement of health outcomes, these individuals would be more productive and better able to contribute economically, as studies have found that workers with health insurance are estimated to miss 77 percent fewer workdays than uninsured workers.[74]

We seek comment on these effects and any other potential benefits that may result from the proposals in this rule.

1. Costs

The proposed changes to 42 CFR 435.4 and 457.320(c) would treat DACA recipients the same as other recipients of deferred action, who are included in the definition of ''lawfully present'' used to determine eligibility for Medicaid and CHIP under section 214 of CHIPRA. We note that generally, CMS has received feedback from some States that cover lawfully present individuals under age 21 and pregnant individuals that such States are supportive of a change to include DACA recipients in the definition of lawfully present. The costs to States and the Federal Government as a result of information collection changes associated with this proposal, which include initial system changes costs to develop and update each State's eligibility systems and verification processes and application processing costs to assist individuals with processing their applications, are discussed in sections IV.C.1. and IV.C.3. of this proposed rule, and the costs to consumers as a result of increased information collections associated with this proposal, which include applying for Medicaid or CHIP and submitting additional information to verify their lawful presence, if necessary, are discussed in section IV.C.4. of this proposed rule. These proposals would also increase Federal and State expenditures for States that elect the CHIPRA 214 option due to costs associated with Medicaid and CHIP coverage for newly eligible beneficiaries.

We discuss how we calculated our Medicaid and CHIP enrollment estimates earlier in this RIA. To calculate costs, we estimated the per enrollee costs in Medicaid for pregnant individuals and children based on the projections in the President's Fiscal Year (FY) 2024 Budget. For 2024, we projected annual costs per enrollee would be about $15,700 for pregnant individuals and about $4,900 for children. These costs are projected to increase annually as the price and use of services increase. To calculate Federal versus State costs, we multiplied the total costs for each group by the FMAP for each State, with some minor adjustments to account for differences in FMAP for certain services.

Our estimates for Medicaid and CHIP expenditures as a result of the proposals in this rule, if finalized, are shown in Table 4. We seek comment on these estimates and the assumptions and methodology used to calculate them.

TABLE 4—MEDICAID/CHIP PROJECTED EXPENDITURES, FY 2024–2028

	2024	2025	2026	2027	2028
State Expenditures	$40,000,000	$45,000,000	$50,000,000	$45,000,000	$40,000,000
Federal Expenditures	60,000,000	85,000,000	80,000,000	80,000,000	75,000,000
Total Expenditures	100,000,000	130,000,000	130,000,000	125,000,000	115,000,000

States that are currently using only State funds to provide health benefits to DACA recipients are likely to see decreases in State expenditures due to this change, as Federal dollars would be available to help cover this population for the first time.[75]

The proposed changes to 42 CFR 600.5 would treat DACA recipients the same as other recipients of deferred action, who are lawfully present under the definition used to determine eligibility for BHP, if otherwise eligible. The costs to States as a result of information collection changes associated with this proposal, which include initial system changes costs to develop and update each State's eligibility systems and verification processes and application processing costs to assist individuals with processing their applications, are discussed in sections IV.C.2. and IV.C.3. of this proposed rule, and the costs to consumers as a result of increased information collections associated with this proposal, which include applying for BHP and submitting additional information to verify their lawful presence, if necessary, are discussed in section IV.C.4. of this proposed rule. States operating a BHP may choose to provide additional outreach to the newly eligible. With a potential increase in number of enrollees, there may be an increase in Federal payments to a State's BHP trust fund.

We discuss how we calculated our BHP enrollment estimates earlier in this RIA. BHP funding from the Federal Government to State BHP trust funds is based on the amount of PTC enrollees would receive had they been enrolled in Exchange coverage. Therefore, to calculate costs, we used data from USCIS to determine the average age of a DACA recipient, which is 29, and we used PTC data to determine the average PTC for a 29-year-old, which is estimated to be $289 per month, and multiplied this by 12 months per year and by the projected number of enrollees per year to arrive at annual costs. Our estimates for BHP expenditures as a result of the proposals in this rule, if finalized, are shown in Table 5. We seek comment on these estimates and the assumptions and methodology used to calculate them.

[74] Dizioli, Allan and Pinheiro, Roberto. (2016). *Health Insurance as a Productive Factor.* Labour Economics. *https://doi.org/10.1016/j.labeco.2016.03.002.*

[75] As of December 2022, those States are California, the District of Columbia, Illinois, Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington. ''Health Coverage and Care of Immigrants,'' Kaiser Family Foundation, *https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-and-care-of-immigrants/.* Accessed March 2, 2023.

TABLE 5—BHP PROJECTED EXPENDITURES, FY 2024–2028

	2024	2025	2026	2027	2028
Expenditures	$15,000,000	$20,000,000	$15,000,000	$15,000,000	$15,000,000

The proposed changes to 45 CFR 152.2 and 155.20 would make DACA recipients eligible to enroll in a QHP through an Exchange, and for PTC and CSRs, if otherwise eligible. The costs to State Exchanges and the Federal Government as a result of information collection changes, which include initial system changes costs to develop and update each State's eligibility systems and verification processes and application processing costs to assist individuals with processing their applications, are discussed in section IV.C.3. of this proposed rule and the costs to consumers as a result of increased information collections associated with this proposal, which include applying for Exchange coverage and submitting additional information to verify their lawful presence, if necessary, are discussed in section IV.C.4. of this proposed rule. This proposed change may result in slightly increased traffic during open enrollment for the 2024 coverage years and beyond. Further, there may be a potential administrative burden on States and regulated entities that choose to conduct outreach and education efforts to ensure that consumers, agents, brokers, and assisters are aware of the changes proposed in this rule associated with the updated definitions of ''lawfully present'' for the purposes of the Exchanges and BHP and ''lawfully residing'' for the purposes of Medicaid and CHIP under the CHIPRA 214 option. We anticipate that the costs of this additional outreach and education would be minimal and seek comment on that assumption.

Whether the effects discussed above as ''costs'' are appropriately categorized depends on societal resource use. To the extent that resources (for example, labor and equipment associated with provision of medical care) are used differently in the presence of the proposed rule than in its absence, then the estimated effects are indeed costs. If resource use remains the same but different entities in society pay for them, then the estimated effects would instead be transfers. We request comment that would facilitate refinement of the effect categorization.

2. Transfers

Transfers are payments between persons or groups that do not affect the total resources available to society. They are a benefit to recipients and a cost to payers. The proposals at 45 CFR 152.2 and 155.20 would generate a transfer from the Federal Government to consumers in the form of increased PTC payments due to individuals who would be eligible for Exchange coverage and APTC, if the proposals in this rule are finalized.

We discuss how we calculated our Exchange enrollment estimates earlier in this RIA. To calculate costs, we used data from USCIS to determine the average age of a DACA recipient, which is 29. For 2024, the average PTC for a 29-year-old is estimated to be $289 per month. We multiplied this by 12 months per FY and by the number of enrollees to arrive at annual costs.[76] These costs are projected to increase using the trends assumed in the President's FY 2024 Budget.

We present these estimates in Table 6 and seek comment on the estimates and the assumptions and methodology used to calculate them.

TABLE 6—EXCHANGE PROJECTED EXPENDITURES, FY 2024–2028

	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
PTC Expenditures	$300,000,000	$390,000,000	$320,000,000	$310,000,000	$320,000,000

3. Regulatory Review Cost Estimation

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed rule, we estimate the cost associated with regulatory review. There is uncertainty involved with accurately quantifying the number of entities that would review the rule. However, for the purposes of this proposed rule, we assume that medical and health service managers would review this rule. Therefore, at least one person from each of the three State Exchanges on the Federal platform would review for applicability, and at least three people from each of the 18 State Exchanges would review, for a total of 57 individuals for the Exchanges. For Medicaid, CHIP, and BHP, we assume at least one person from every State agency and territory would review for applicability; at least two additional people from the 35 States, the District of Columbia, and three territories that have elected the CHIPRA 214 option would review; and at least one person from the two States with BHPs would also review, for a total of 134 individuals for Medicaid, CHIP, and BHP. Combined with reviewers for the Exchanges, this results in an estimate of 191 reviewers. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. We welcome any comments on the approach in estimating the number of entities which would review this proposed rule.

Using the wage information from the Bureau of Labor Statistics for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $115.22 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes_nat.htm*). Assuming an average reading speed of 250 words per minute, we estimate that it would take approximately 1.4 hours for each individual to review the entire proposed rule (approximately 21,000 words/250 words per minute = 84 minutes). Therefore, we estimate that the total one-time cost of reviewing this regulation is approximately $30,910 ([$115.22 × 1.4 hours per individual review] × 191 reviewers).

[76] The estimate for FY 2024 only includes 9 months, assuming these individuals will enroll in a QHP and receive APTC beginning January 1, 2024. It is possible that individuals impacted by this rule could enroll in coverage effective December 1, 2023, and receive APTC beginning on that date, but we do not have a reliable way to estimate how many individuals would enroll with that coverage effective date.

D. Regulatory Alternatives Considered

With regard to the changes to CMS definitions of ''lawfully present'' proposed in this rule, we considered proposing to update the current regulatory definition at 45 CFR 152.2 that applies to Exchanges and BHPs, and separately updating our SHO guidance that applies to Medicaid and CHIP in States that elect the CHIPRA 214 option, instead of proposing to define a definition of lawfully present at 42 CFR 435.4. While this approach would have had a similar impact to the changes proposed in this rule, we are of the view that the proposed definition of lawfully present that applies to Medicaid and CHIP eligibility in States that elect the CHIPRA 214 option promotes transparency by giving the public an opportunity to review and comment on these proposals. We are also of the view that this approach promotes transparency and lessens administrative burden by making key eligibility information more accessible to State Medicaid and CHIP agencies that are tasked with applying these definitions when determining consumers' eligibility for their programs. Finally, we believe that proposing a definition of ''lawfully present'' in regulation, rather than maintaining a definition in guidance, provides a greater degree of stability for the individual beneficiaries and State agencies that rely on this definition.

In developing this rule, we also considered not proposing the technical and clarifying changes to CMS's definitions of ''lawfully present,'' discussed in section II.C.2. of this proposed rule, as these changes are expected to impact fewer individuals than the proposal to treat DACA recipients the same as other recipients of deferred action. However, in our comprehensive review of current CMS definitions of ''lawfully present,'' we determined that the proposed changes discussed in section II.C.2. of this proposed rule would simplify our eligibility verification processes and increase efficiencies for individuals seeking health coverage and State and Federal entities administrating insurance affordability programs. Additionally, the small number of individuals included in the proposed eligibility categories would benefit from increased access to health coverage and insurance affordability programs.

E. Accounting Statement and Table

As required by OMB Circular A–4 (available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf*), we have prepared an accounting statement in Table 7 showing the classification of the impact associated with the provisions of this proposed rule. We prepared these impact estimates utilizing a baseline of ''no action,'' comparing the effect of the proposals against not proposing the rule at all.

This proposed rule proposes standards for programs that would have numerous effects, including allowing DACA recipients to be treated the same as other deferred action recipients for specific health insurance affordability programs, and increasing access to affordable health insurance coverage. The effects in Table 7 reflect qualitative assessment of impacts and estimated direct monetary costs and transfers resulting from the provisions of this proposed rule for the Federal Government, State Exchanges, BHPs, Medicaid and CHIP agencies, and consumers.

TABLE 7—ACCOUNTING TABLE

Benefits:

Qualitative:

- Additional enrollment in Medicaid and CHIP, anticipated to be 13,000 individuals in 2024, 11,000 in 2025, 9,000 in 2026, 8,000 in 2027, and 6,000 in 2028 due to the proposals in this rule.
- Additional enrollment in the BHP, anticipated to be 4,000 individuals in 2024–2026 and 5,000 individuals in 2027–2028.
- Additional enrollment in the Exchanges, which would be subsidized depending on individuals' household incomes, anticipated to be 112,000 in 2024, 114,0000 in 2025, 116,000 in 2026, 117,000 in 2027, and 119,000 in 2028.
- Increased access to health coverage for DACA recipients and certain other noncitizens, which would advance racial justice and health equity, which in turn may also decrease costs for emergency medical expenditures.
- Improved health and well-being of many DACA recipients and certain other noncitizens currently without health care coverage.
- Greater economic contribution and productivity of DACA recipients and certain other noncitizens from improving their health outcomes.
- Reduced burden on Exchanges, BHPs, and Medicaid and CHIP agencies to determine applicants' immigration statuses.

Costs:	Estimate	Year dollar	Discount rate	Period covered
Annualized Monetized ($/year)	$109.68 Million	2023	7 percent	2023–2027
	$112.21 Million	2023	3 percent	2023–2027

Quantitative:

- Increased State Medicaid and CHIP expenditures of $40 million in 2024, $45 million in 2025, $50 million in 2026, and $45 million in 2027 due to increased enrollment as a result of the proposed changes to the definition of ''lawfully residing'' for purposes of Medicaid and CHIP under the CHIPRA 214 option.
- Increased Federal Medicaid and CHIP expenditures of $60 million in 2024, $85 million in 2025, $80 million in 2026, and $80 million in 2027 due to increased enrollment as a result of the proposed changes to the definition of ''lawfully residing'' for purposes of Medicaid and CHIP under the CHIPRA 214 option.
- Increased Federal BHP expenditures of $15 million in 2024, $20 million in 2025, $15 million in 2026 and $15 million in 2027 due to increased enrollment as a result of proposed changes to the definition of ''lawfully present'' for purposes of a BHP.
- Initial system changes costs estimated at $183,914 for States and $183,915 for the Federal Government in 2023 to develop and code changes to each State's eligibility systems and verification processes to include the categories of noncitizens impacted by this proposed rule with respect to Medicaid and CHIP eligibility.
- System changes costs estimated at $18,863 in 2023 for States to develop and code changes to their eligibility systems and verification processes to include the categories of noncitizens impacted by this proposed rule with respect to BHP eligibility.
- System changes costs estimated at $169,767 for State Exchanges and $9,432 for the Federal Government in 2023 to develop and code changes to each Exchange's eligibility systems and verification processes to include the categories of noncitizens impacted by this proposed rule with respect to Exchange and Exchange-related subsidy eligibility.
- Application processing costs estimated at $859,140 for States and $728,660 for the Federal Government per year starting in 2024 to assist individuals impacted by this proposed rule with processing their applications.

TABLE 7—ACCOUNTING TABLE—CONTINUED

- Costs to individuals impacted by the proposals in this rule of $3,375,730 per year starting in 2024 to apply for Medicaid, CHIP, BHP, or Exchange health coverage, including costs to submit additional information to verify their lawful presence status if it is unable to be verified electronically through the application.

Qualitative:

- Potential administrative burden on States and regulated entities that choose to conduct increased education and outreach related to the updated definitions of ''lawfully present'' for the purposes of the Exchanges and BHP and ''lawfully residing'' for the purposes of Medicaid and CHIP under the CHIPRA 214 option.

Transfers:	Estimate	Year dollar	Discount rate	Period covered
Annualized Monetized ($/year)	$255.00 Million	2023	7 percent	2023–2027
	$260.15 Million	2023	3 percent	2023–2027

Quantitative:

- Increased PTC expenditures from the Federal Government to individuals of $300 million in 2024, $390 million in 2025, $320 million in 2026, and $310 million in 2027 due to increased enrollment and subsidy eligibility as a result of the proposed changes to the definition of ''lawfully present'' for purposes of the Exchanges.

F. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that small businesses, nonprofit organizations, and small governmental jurisdictions are small entities as that term is used in the RFA. The great majority of hospitals and most other health care providers and suppliers are small entities, either because they are nonprofit organizations or they meet the Small Business Administration (SBA) definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). Individuals and States are not included in the definition of a small entity.

For purposes of the RFA, we believe that health insurance issuers and group health plans would be classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of $47 million or less would be considered small entities for these NAICS codes. Issuers could possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be $44.5 million or less.[77] We believe that few, if any, insurance companies underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) fall below these size thresholds. Based on data from medical loss ratio (MLR) annual report submissions for the 2021 MLR reporting year, approximately 78 out of 480 issuers of health insurance coverage nationwide had total premium revenue of $44.5 million or less.[78] This estimate may overstate the actual number of small health insurance issuers that may be affected, since over 76 percent of these small issuers belong to larger holding groups, and many, if not all, of these small companies are likely to have non-health lines of business that will result in their revenues exceeding $44.5 million.

In this proposed rule, we propose standards for eligibility for Exchange enrollment and APTC and CSRs, BHP, and Medicaid and CHIP under the CHIPRA 214 option. Because we believe that insurance firms offering comprehensive health insurance policies generally exceed the size thresholds for ''small entities'' established by the SBA, we do not believe that an initial regulatory flexibility analysis is required for such firms. Furthermore, the proposals related to Medicaid and CHIP would impact State governments, but as States do not constitute small entities under the statutory definition, an impact analysis for these provisions is not required under the RFA.

As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the requirements in this proposed rule. Therefore, the Secretary has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. While this rule is not subject to section 1102 of the Act, we have determined that this proposed rule would not adversely affect small rural hospitals. Therefore, the Secretary has certified that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately $177 million. Based on information currently available, we expect the combined impact on State, local, or tribal governments and the private sector does not meet the UMRA definition of unfunded mandate.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency

[77] *https://www.sba.gov/document/support--table-size-standards.*

[78] Available at *https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.html.*

must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications.

While developing this rule, we attempted to balance States' interests in running their own Exchanges, BHPs, and Medicaid and CHIP programs with CMS's interest in establishing a consistent definition of ''lawfully present'' for use in eligibility determinations across CMS programs. We also attempted to balance States' interests with the overall goals of the ACA, as well as the goals of DHS's DACA policy and the provisions of the DHS DACA Final Rule. By doing so, we complied with the requirements of E.O. 13132.

In our view, while the provisions of this proposed rule related to the Exchanges (45 CFR 152.2 and 155.20) and the BHP (42 CFR 600.5) would not impose substantial direct requirement costs on State and local governments, this regulation has federalism implications due to potential direct effects on the distribution of power and responsibilities among the State and Federal governments relating to determining standards related to eligibility for health insurance through Exchanges and BHPs. For example, State Exchanges and BHPs would be required to update their eligibility systems in order to accurately evaluate applicants' lawful presence, and State Exchanges and BHPs may wish to conduct outreach to groups such as DACA recipients who would newly be considered lawfully present under the rule. By our estimate, these requirements do not impose substantial direct costs on States. In addition, we anticipate that these federalism implications are mitigated because States have the option to operate their own Exchanges and the optional BHP. After establishment, Exchanges must be financially self-sustaining, with revenue sources at the discretion of the State. Current State Exchanges charge user fees to issuers. As indicated earlier, a BHP is optional for States. Therefore, if implemented in a State, it provides access to a pool of Federal funding that would not otherwise be available to the State. Accordingly, federalism implications are mitigated if not entirely eliminated as it pertains to a BHP.

Additionally, the proposals in this rule related to Medicaid and CHIP may impose substantial direct costs on State governments. The Medicaid and CHIP policies also have federalism implications by creating a change in eligibility that may not align with a State's position. However, we believe this effect is mitigated because the eligibility change is under an option that States have the discretion to adopt and maintain. In addition, Medicaid and CHIP costs are shared between the Federal Government and States, further mitigating the impacts of compliance with these new requirements. As such, the costs to States by our estimate do not rise to the level of specified thresholds for significant burden to States.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on April 6, 2023.

List of Subjects

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs—health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 457

Administrative practice and procedure, Grant programs—health, Health insurance, Reporting and recordkeeping requirements.

42 CFR Part 600

Administrative practice and procedure, Health care, health insurance, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 152

Administrative practice and procedure, Health care, Health insurance, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 155

Administrative practice and procedure, Advertising, Aged, Brokers, Citizenship and naturalization, Civil rights, Conflicts of interests, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organizations (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Intergovernmental relations, Loan programs—health, Medicaid, Organization and functions (Government agencies), Public assistance programs, Reporting and recordkeeping requirements, Sex discrimination, State and local governments, Taxes, Technical assistance, Women, Youth.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below.

Title 42—Public Health

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

■ 1. The authority citation for part 435 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 2. Part 435 is amended by—
■ a. Removing all instances of the words ''non-citizen'' and ''non-citizens'' and adding in their places the words ''noncitizen'' and ''noncitizens'', respectively; and
■ b. Removing all instances of the word ''Non-citizen'' and adding in its place the word ''Noncitizen''; and
■ c. Removing all instances of the words ''Qualified Non-Citizen'' and adding in its place the words ''qualified noncitizen''.
■ 3. Section 435.4 is amended by adding the definitions of ''Lawfully present'' and ''Lawfully residing'' in alphabetical order to read as follows:

§ 435.4 Definitions and use of terms.

* * * * *

Lawfully present means a noncitizen who—

(1) Is a qualified noncitizen;

(2) Is in a valid nonimmigrant status, as defined in 8 U.S.C. 1101(a)(15) or otherwise under the immigration laws (as defined in 8 U.S.C. 1101(a)(17));

(3) Is paroled into the United States in accordance with 8 U.S.C. 1182(d)(5) for less than 1 year, except for a noncitizen paroled for prosecution, for deferred inspection or pending removal proceedings;

(4) Is granted temporary resident status in accordance with 8 U.S.C. 1160 or 1255a;

(5) Is granted Temporary Protected Status (TPS) in accordance with 8 U.S.C. 1254a;

(6) Is granted employment authorization under 8 CFR 274a.12(c);

(7) Is a Family Unity beneficiary in accordance with section 301 of Public Law 101–649 as amended; or section 1504 of the LIFE Act Amendments of 2000, title XV of H.R. 5666, enacted by reference in Public Law 106–554 (see section 1504 of App. D to Pub. L. 106–554);

(8) Is covered by Deferred Enforced Departure (DED) in accordance with a decision made by the President;

(9) Is granted deferred action, including, but not limited to individuals granted deferred action under 8 CFR 236.22;

(10) Has a pending application for adjustment of status;

(11)(i) Has a pending application for asylum under 8 U.S.C. 1158, for

withholding of removal under 8 U.S.C. 1231, or for relief under the Convention Against Torture; and

(ii) Is under the age of 14;

(12) Has been granted withholding of removal under the Convention Against Torture;

(13) Has a pending or approved petition for Special Immigrant Juvenile classification as described in 8 U.S.C. 1101(a)(27)(J);

(14) Is lawfully present in American Samoa under the immigration laws of American Samoa; or

(15) Is a Commonwealth of the Northern Mariana Islands (CNMI) resident as described in 48 U.S.C. 1806(e)(6).

Lawfully residing means an individual who is a noncitizen who is considered lawfully present under this section and satisfies the State residency requirements, consistent with § 435.403.

* * * * *

■ 4. Section 435.12 is added to read as follows:

§ 435.12 Severability.

(a) Any part of the definitions of ''lawfully present'' and ''lawfully residing'' in § 435.4 held to be invalid or unenforceable, including as applied to any person or circumstance, shall be construed so as to continue to give the maximum effect to the provision as permitted by law, along with other provisions not found invalid or unenforceable, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

(b) The provisions in § 435.4 with respect to the definitions of ''lawfully present'' and ''lawfully residing'' are intended to be severable from one another and from the definitions of ''lawfully present'' established at 42 CFR 600.5 and 45 CFR 155.20.

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 5. The authority citation for part 457 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 6. Section 457.320 is amended by adding paragraph (c) to read as follows:

§ 457.320 Other eligibility standards.

* * * * *

(c) *Definitions.* (1) *Lawfully present* has the meaning assigned at § 435.4 of this chapter.

(2) *Lawfully residing* has the meaning assigned at § 435.4 of this chapter, except that State residency requirements must be consistent with paragraph (e) of this section.

* * * * *

PART 600—ADMINISTRATION, ELIGIBILITY, ESSENTIAL HEALTH BENEFITS, PERFORMANCE STANDARDS, SERVICE DELIVERY REQUIREMENTS, PREMIUM AND COST SHARING, ALLOTMENTS, AND RECONCILIATION

■ 7. The authority citation for part 600 continues to read as follows:

Authority: Section 1331 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, 124 Stat. 119), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 124 Stat 1029).

■ 8. Section 600.5 is amended by revising the definition of ''Lawfully present'' to read as follows:

§ 600.5 Definitions and use of terms.

* * * * *

Lawfully present has the meaning given in 45 CFR 155.20.

* * * * *

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301, the Department of Health and Human Services proposes to amend 45 CFR subtitle A, subchapter B, as set forth below.

Title 45—Public Welfare

PART 152—PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM

■ 9. The authority citation for part 152 continues to read as follows:

Authority: Sec. 1101 of the Patient Protection and Affordable Care Act (Pub. L. 111–148).

■ 10. Section 152.2 is amended by revising the definition of ''Lawfully present'' to read as follows:

§ 152.2 Definitions.

* * * * *

Lawfully present has the meaning given the term at 45 CFR 155.20.

* * * * *

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

■ 11. The authority citation for part 155 continues to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083.

■ 12. Section 155.20 is amended by revising the definition of ''Lawfully present'' to read as follows:

§ 155.20 Definitions.

* * * * *

Lawfully present means a noncitizen who—

(1) Is a qualified noncitizen as defined at 42 CFR 435.4;

(2) Is in a valid nonimmigrant status, as defined in 8 U.S.C. 1101(a)(15) or otherwise under the immigration laws (as defined in 8 U.S.C. 1101(a)(17));

(3) Is paroled into the United States in accordance with 8 U.S.C. 1182(d)(5) for less than 1 year, except for a noncitizen paroled for prosecution, for deferred inspection or pending removal proceedings;

(4) Is granted temporary resident status in accordance with 8 U.S.C. 1160 or 1255a;

(5) Is granted Temporary Protected Status (TPS) in accordance with 8 U.S.C. 1254a;

(6) Is granted employment authorization under 8 CFR 274a.12(c);

(7) Is a Family Unity beneficiary in accordance with section 301 of Public Law 101–649 as amended; or section 1504 of the LIFE Act Amendments of 2000, title XV of H.R. 5666, enacted by reference in Public Law 106–554 (see section 1504 of App. D to Pub. L. 106–554);

(8) Is covered by Deferred Enforced Departure (DED) in accordance with a decision made by the President;

(9) Is granted deferred action, including but not limited to individuals granted deferred action under 8 CFR 236.22;

(10) Has a pending application for adjustment of status;

(11)(i) Has a pending application for asylum under 8 U.S.C. 1158, for withholding of removal under 8 U.S.C. 1231, or for relief under the Convention Against Torture; and

(ii) Is under the age of 14;

(12) Has been granted withholding of removal under the Convention Against Torture; or (13) Has a pending or approved petition for Special Immigrant Juvenile classification as described in 8 U.S.C. 1101(a)(27)(J).

* * * * *

■ 13. Section 155.30 is added to read as follows:

§ 155.30 Severability.

(a) Any part of the definition of ''lawfully present'' in § 155.20 held to be invalid or unenforceable, including as applied to any person or circumstance, shall be construed so as to continue to give the maximum effect to the provision as permitted by law,

along with other provisions not found invalid or unenforceable, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

(b) The provisions in § 155.20 with respect to the definition of ''lawfully present'' are intended to be severable from one another and from the definitions of ''lawfully present'' and ''lawfully residing'' that are established or cross-referenced in 42 CFR 435.4 and 457.320.

Dated: April 19, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–08635 Filed 4–24–23; 4:15 pm]

BILLING CODE 4150–28–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 107, 171, 172, 173, 178, and 180

[Docket No. PHMSA–2020–0102 (HM–219D); Notice No. 2023–06]

RIN 2137–AF49

Hazardous Materials: Adoption of Miscellaneous Petitions and Updating Regulatory Requirements

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On March 3, 2023, PHMSA published a notice of proposed rulemaking (NPRM), entitled ''Hazardous Materials: Adoption of Miscellaneous Petitions and Updating Regulatory Requirements (HM–219D),'' proposing changes to update, clarify, improve the safety of, or streamline various regulatory requirements. In response to a request for an extension of the comment period submitted by Worthington Industries, PHMSA is extending the comment period for the HM–219D NPRM for an additional 45 days. Comments to the HM–219D NPRM will now be due by June 16, 2023.

DATES: Comments should be received on or before June 16, 2023. To the extent possible, PHMSA will consider late-filed comments.

ADDRESSES: Comments should reference Docket No. PHMSA–2020–0102 (HM–219D) and may be submitted in the following ways:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Dockets Management System, U.S. Department of Transportation, Dockets Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* To the Docket Management System: Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

Instructions: All submissions must include the Agency name and Docket Number (PHMSA–2020–0102) for this notice at the beginning of the comment. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to the Federal Docket Management System (FDMS) and will include any personal information you provide.

Docket: For access to the dockets to read associated documents or comments received, go to *https://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its process. DOT posts these comments without change, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA; 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN'' for ''proprietary information.'' Submissions containing CBI should be sent to Steven Andrews, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary that PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Steven Andrews, Standards and Rulemaking Division, 202–366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

PHMSA published the HM–219D NPRM [1] on March 3, 2023, in response to 18 petitions for rulemaking submitted by the regulated community between May 2018 and October 2020 that requested PHMSA address a variety of provisions, including but not limited to those pertaining to packaging, hazard communication, and the incorporation by reference of certain documents. These proposed revisions maintain or enhance the existing high level of safety under the Hazardous Materials Regulations while providing clarity and appropriate regulatory flexibility in the transport of hazardous materials. On April 6, 2023, PHMSA received a comment to the HM–219D NPRM docket submitted by Worthington Industries requesting that PHMSA rescind certain elements of the HM–219D NPRM or (in the alternative) extend the comment period for responding to the NPRM.

II. Comment Period Extension

PHMSA initially provided a 60-day comment period for the HM–219D NPRM, which closes on May 2, 2023. In response to a request to extend the comment period from Worthington Industries, PHMSA is extending the comment period for an additional 45 days. The comment period will now close on June 16, 2023. This extension provides the public with an additional 45 days and should provide adequate opportunity for the public to submit comments; however, PHMSA may at its discretion extend the comment period further if necessary. To the extent possible, PHMSA will also consider late-filed comments.

[1] See *Hazardous Materials: Adoption of Miscellaneous Petitions and Updating Regulatory Requirements NPRM* [88 FR 13624] at *https://www.federalregister.gov/documents/2023/03/03/2023-03366/hazardous-materials-adoption-of-miscellaneous-petitions-and-updating-regulatory-requirements.*