NOTICE OF PROPOSED EXEMPT RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION

PREAMBLE

1. Sections Affected	Rulemaking Action
R9-22-1443	New Section

2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. § 36-2903; 36-2903.01

Implementing statute: A.R.S. § 36-2901.01; Arizona Laws 2010, Seventh Special Session, Chapter 10, § 34; Arizona Laws, 2011, First Special Session, Chapter 1, Section 1(B); Arizona Laws, 2011, First Regular Session, Chapter 31, Section 34.

3. The proposed effective date of the rules:

July 1, 2011

4. A list of all previous notices appearing in the *Register* addressing the proposed exempt rule:

None

5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:

Written comments concerning this proposed rule may be submitted to the AHCCCS Administration or submitted electronically via the AHCCCS website www.azahcccs.gov. Submitting comments via the website is recommended. All comments must be received no later than 5:00 p.m. June 20, 2011.

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6. An explanation of the rule, including the agency's reasons for initiating the rule, including the statutory citation to the exemption from regular rulemaking procedures:

The AHCCCS Administration is initiating this proposed exempt rule-making to comply with the legislative requirement that the Administration adopt rules regarding eligibility necessary to implement a program within available appropriations. Specifically, the Administration is proposing to establish through rule 1) closing all new eligibility beginning July 1 for persons in AHCCCS Care not designated as eligible in the Arizona State Plan under Title XIX of the Social Security Act 2) flexibility and a methodology for the Director to: delay closure of the AHCCCS Care program, re-open the AHCCCS Care program, or terminate coverage for some or all persons in the AHCCSC Care Program. These changes will be predicated on the most current information and estimates of available resources to support the Medicaid program. The proposed rule also sets forth the means by which changes in eligibility and their effective dates will be communicated to the public. Approval of this methodology by the Center for Medicare and Medicaid Services is required.

The proposed methodology will apply to persons in the "AHCCCS Care" population; that is, persons who are not designated as eligible in the Arizona State Plan for Medicaid under specific provisions of Title XIX of the Social Security Act. The State Plan is the agreement between the State and federal government that entitles the State to federal participation in the cost of providing medical care through AHCCCS. In general terms, the people affected by this rule have household income at or below 100% of the federal poverty level and are not pregnant, under age 18, a specified caretaker relative of a deprived child, age 65 or older, blind, or disabled. Operationally, AHCCCS refers to this waiver population as the "AHCCCS Care" eligibility expansion group. The federal government refers to this group (along with the MED eligibility group) as a "Waiver Population" or an "expansion population" (because they are not listed in the Arizona State Plan for Medicaid, but are listed in a separate agreement known as the Waiver or the Demonstration Project). Informally, and somewhat imprecisely, this group is also referred to as "childless adults."

Arizona Laws 2010, Seventh Special Session, Chapter 10, Section 34, provides that AHCCCS is exempt from the rule making requirements of title 41, chapter 6, Arizona Revised Statutes, for two years after the effective date of this act, for the following purpose of "establishing and maintaining rules regarding standards, methods and procedures for determining eligibility necessary to implement a program within the available appropriation." That Act also requires the agency to provide public notice and an opportunity for public comment on proposed rules at least thirty days before rules are adopted or amended. Subsequently, the Arizona Legislature reiterated its directive. Arizona Laws, 2011, First Special Session, Chapter 1, Section 1(B), provides that

> "… the Arizona health care cost containment system administration shall adopt rules regarding standards, methods and procedures for determining eligibility necessary to implement a program within the monies

> available from the Arizona tobacco litigation settlement fund established by section 36-2901.02, Arizona Revised Statutes, the proposition 204 protection account established by section 36-778, Arizona Revised Statutes, and any other legislative appropriation and federal monies made available for the support of the program. To the extent that monies available for the program established pursuant to this subsection are insufficient to fund all existing programs, the administration, subject to approval by the secretary of the United States department of health and human services, may suspend any programs or eligibility for any persons or categories of persons established under title 36, chapter 29, Arizona Revised Statutes."

During its most recent session, the Arizona Legislature again directed AHCCCS to establish and maintain "rules regarding standards, methods and procedures for determining eligibility necessary to implement a program within the available appropriation." Arizona Laws, 2011, First Regular Session, Chapter 31, Section 34.

For the State Fiscal Year ending June 30, 2012, AHCCCS has projected that maintaining eligibility standards as they exist today would cost $9,981,831,300 in total funds. Of those total funds, $3,178,180,700 would be the nonfederal funds that the State and political subdivisions of the State would be required to contribute toward the cost of the program. The difference is provided through federal matching funds. The SFY12 budget recently signed into law appropriates $2,636,350,700 in nonfederal funds (including funds in the Arizona Tobacco Litigation Settlement fund under ARS 36-2901.02). This is $541,830,000 short of the amount of non-federal funds that are projected to be necessary to maintain the status quo with respect to eligibility.

There are three primary drivers of cost in the Arizona Health Care Cost Containment System: eligibility standards, the scope of covered healthcare services, and the rates of reimbursement to healthcare providers. During recent fiscal years, AHCCCS has already implemented significant changes to reduce costs in each of these areas and has pursued opportunities to increase program revenues. Nevertheless, there are legal and practical constraints on the ability of AHCCCS to continue to reduce costs with respect to eligibility standards, the scope of services, and reimbursement rates. As a condition of receiving federal financial support for the AHCCCS program, the State must comply with the requirements of the Medicaid Act, unless those requirements are waived by the Secretary of the United States Department of Health & Human Services ("the Secretary") under section 1115 of the Social Security Act, 42 U.S.C. § 1315.

Regarding reimbursement to healthcare providers, section 1902(a)(30)(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), requires the State to provide assurances to the Secretary that the State has established:

> "methods and procedures relating to … the payment for … care and services available under the plan … as may be necessary … to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."

The United States Court of Appeals for the 9th Circuit has ruled that, in most cases, the reimbursement rates established by the State must bear a reasonable relationship to efficient and economical costs of providing quality services. *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 652 (9th Cir. Cal. 2009). Therefore, the State cannot reduce provider reimbursement indefinitely and continue to attract a number of providers reasonably sufficient to assure access comparable to the general population. During recent fiscal years (including the current fiscal year) AHCCCS has implemented reductions in its capped fee-for-service provider rates, and the legislature has directed that inflationary adjustments otherwise required by statute be suspended. During the most recent session, the Legislature reset inpatient hospital rates, continued the suspension of inflationary increases to rates, eliminated reimbursement for certain hospital claims with extraordinary costs per stay, and granted AHCCCS authority to reduce rates further. Within the constraints imposed on the program by law and by market forces, AHCCCS continues to explore methodologies that provide fair and reasonable reimbursement to health care providers consistent with the provision of efficient quality care while reducing costs to the system. Based on this analysis, the program is anticipating the implementation of additional rate reductions on October 1, 2011.

Regarding the scope of covered healthcare services, the Medicaid Act lists the categories of medical services that are eligible for federal matching dollars. 42 U.S.C. § 1396d(a)(1) – (29). As a condition of participation in the Medicaid program, every State must cover certain services - such as hospital services and physician services - unless the requirement is waived by the Secretary. Other types of services - such as prescription drugs, dental services, and physical therapy - can, at the State's option, be covered by the State Medicaid program, and the cost of those services are eligible for federal matching funds. 42 U.S.C. 1396a(a)(10). In addition, the Medicaid Act permits States to place limits on the amount, duration, and scope of both mandatory and optional services, so long as the services are offered in an amount adequate to meet the intended purpose." During recent fiscal years, AHCCCS has eliminated or limited the scope of services for adults with respect to the services of podiatrists, dental care, physical therapy, preventative care services, orthotics and medical supplies and equipment. AHCCCS is currently reviewing the impact and potential cost savings associated with limits on the number of hours of respite care that will be covered for persons in home & community based settings, and the number of inpatient hospital days and emergency department visits that will be covered per year. AHCCCS will also be requesting that CMS approve the elimination of Non-emergency transportation services for select populations in certain geographic locations.

Regarding eligibility standards, the Medicaid Act as amended by the Affordable Care Act, now codified as 42 U.S.C. § 1396a(gg), mandates that the State must maintain the eligibility standards established by the State as of March 2010. This is referred to as the "maintenance of effort" requirement (MOE). However, by letter dated February 15, 2011 from the Secretary to the Governor of Arizona, the State was informed that it could, consistent with that federal requirement, eliminate eligibility for the categories covered not through the Arizona State Plan for Medicaid, but solely under the authority in the current Demonstration Project by not renewing its request to cover

those expansion populations under a new Demonstration Project. By doing so, the Secretary stated, the State would not violate the MOE requirements of the Medicaid Act. In the same letter the Secretary expressed uncertainty about her legal ability to waive the MOE requirements for State Plan populations.

The 2000 Arizona Ballot Propositions included Proposition 204 which added section 36-2901.01 to the Arizona Revised Statutes. Specifically, the first subsection of that statute requires AHCCCS to cover all residents with income at or below the federal poverty level. To accomplish this objective the second subsection dedicated the funds received through the Arizona Tobacco Litigation Settlement fund plus "any other *available* sources including legislative appropriations and federal monies" (emphasis added). As stated in greater detail below, the funds in the Arizona Tobacco Litigation Settlement Fund and the Proposition 204 Protection Account of the Tobacco Products Tax Fund are inadequate to pay for the cost of covering everyone defined as an eligible person by A.R.S. § 36-2901.01. As stated above, the other funds appropriated by the Arizona legislature are inadequate to cover the cost of services to populations subject to the maintenance of effort requirements of 42 U.S.C. § 1396a(gg) and the full cost of continuing services to everyone included in the expanded definition of eligible person in A.R.S. § 36-2901.01.

Immediately prior to the passage of Proposition 204, AHCCCS covered families with income below an amount that is equal to about 23% of the current federal poverty level. At that time, AHCCCS also covered Supplemental Security Income recipients (and similar cases) whose income was below the federal benefit rate. As a result, Proposition 204 required AHCCCS to add eligibility for (1) families between approximately 23% and 100% of the federal poverty level, (2) Supplemental Security Income recipients with income between the federal benefit rate and the federal poverty level, and (3) individuals eligible under the AHCCCS Care program. AHCCCS amended its agreement with the Secretary (known as "the State Plan" for Medicaid) to extend coverage to the first two expansion groups. As categories covered under the Medicaid State Plan, those first two categories are subject to the maintenance of effort requirements of 42 U.S.C. § 1396a(gg). In accordance with the Secretary's letter of February 15, 2011, the third expansion category covered under Proposition 204 is not because it is a "Waiver Population." Therefore, closing new eligibility beginning July 1 for persons in AHCCCS Care who are not otherwise eligible under the State Plan is consistent with federal authority.

For the State Fiscal Year ending June 30, 2012, the estimated non-federal contributions for the cost of providing coverage to the first two groups is $234,704,700. The total funds in the Arizona Tobacco Litigation Settlement Fund and the Proposition 204 Protection Account of the Tobacco Products Tax Fund for that same period are forecast to be $148,579,200. This represents a shortfall in the voter designated fund of $86,125,500 for the anticipated cost of just the first two Proposition 204 eligibility groups listed above (both of which are subject to the federal maintenance of effort requirements discussed above). If allocated in this manner, no funds remain from the voter designated fund for purposes of providing the non-federal funds necessary to support the AHCCCS Care "Waiver Population." For the State Fiscal Year beginning July 1, 2011, AHCCCS will use the other funds

appropriated by the Legislature to cover: (1) the remainder of the costs associated with the first two Proposition 204 State Plan expansion categories listed above, (2) the costs associated with other eligibility groups listed in the State Plan that are subject to the MOE requirements unless those requirements are waived by the Secretary, and (3) to fund continuation of the AHCCCS Care program if it is closed to new enrollment.

The State is electing not to seek authority under future Demonstration Projects for coverage of the AHCCCS Care population as described in the current Demonstration Project. Instead, AHCCCS is requesting waiver authority to claim federal financial participation for a non-entitlement program for persons not otherwise covered under the State Plan (non-disabled childless adults) at an income level that can be adjusted as necessary to maintain a program within State appropriations. In addition, certain persons in this new waiver expansion population would be required to pay an enrollment premium to discourage controllable behaviors adverse to health such as smoking and obesity.

Budgeting and financial planning for the AHCCCS program is a dynamic process. A budget is predicated on a serious of estimates such as projected enrollment, projected costs per enrollee and projected savings associated with cost containment strategies. While, absent further legislative action, the amount of available state funding is set in law, there are a number of other factors that affect the estimate of the availability of funds in support of the AHCCCS program. To state the obvious, AHCCCS cannot predict with absolute certainty, the number of persons who will apply and be determined eligible in the future. As mentioned above, AHCCCS has implemented, and plans to implement, changes to eligibility, to the scope of benefits, and to reimbursement rates to address the State's continuing fiscal shortfall.. There is some uncertainty with respect to the cost savings associated with each of these and with the timing of those cost savings. For instance, the estimates of the cost savings associated with closing MED to new enrollment assumes that MED enrollment will decline at a fixed rate; however, there may be fewer or more persons who retain eligibility late into the phase out timeframe. Estimated savings associated with limitations in benefits are still being finalized. As a result of the Affordable Care Act, AHCCCS, beginning in the Spring of this year, is able to participate in the Medicaid Drug Rebate program. While AHCCCS expects to collect significant rebates from drug manufacturers as a result, the precise amount and the amount of the federal share of those rebates are unknown at this time. CMS also must approve components of the Governor's Medicaid Reform Plan and there may be elements of that Plan that do not receive federal government approval. In addition, while AHCCCS is confident that its plan of action is within its legal authority, it is anticipated that there will be litigation regarding aspects of the AHCCCS plan to reduce costs. Judicial intervention, in the form of preliminary or permanent injunctions, could impose additional constraints on the use of available funds and/or require AHCCCS to consider changes to other aspects of the program not subject to any such court order. As a result, this rule making establishes an expeditious and flexible approach to the management of eligibility as one of the primary drivers of cost with the goal of minimizing the number of persons losing coverage. While AHCCCS anticipates the need to close the AHCCCS Care program to new enrollment beginning July 1, it proposes through this rule making to provide flexibility to the Director to implement changes to the AHCCCS Care program based on the

most current fiscal data. The AHCCCS Administration is committed to regular review of the program's financial status and prompt adjustment of eligibility standards to respond to budgetary changes. Through this rulemaking, AHCCCS proposes a means to operate the program within available funding while retaining health coverage for as many Arizonans as is reasonably possible.

Under the Special Terms and Conditions of the current Demonstration Project, if the State does not seek authority to continue coverage for the waiver expansion populations" (such as AHCCCS Care) beyond September 30, 2011, the State must stop enrolling new individuals and families into that program during such period as specified in the Demonstration phase-out plan. As a result, this proposed rule prohibits the AHCCCS Administration or the Department of Economic Security (which also determines eligibility for AHCCCS Care) from making any new determinations of AHCCCS Care eligibility beginning July 1, 2011 except for redeterminations for persons who were determined eligible prior to that date and have remained continuously eligible. With respect to applications that are pending as of that date, the AHCCCS Administration and the Department will complete the eligibility determination process, but will only approve AHCCCS Care eligibility for persons that meet all eligibility criteria before July 1, 2011.

7. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

8. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable.

9. The summary of the economic, small business, and consumer impact:

The Administration will not be making any new eligibility determinations for the AHCCCS Care population. There are currently about 221,000 members in the AHCCCS Care program. Due to turnover or movement on and off the program (sometimes referred to as "churn"), AHCCCS estimates that, because of this turnover, closing new enrollment for this program will result in a decrease in the AHCCCS Care population of about 50% one year after closing eligibility. Absent a change in circumstances, these persons would not be eligible under any other category of AHCCCS eligibility. This action is expected to save the State General Fund approximately $190 million over a 12 month period.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

Not applicable.

11. A summary of the comments made regarding the rule and the agency response to them:

None have been received yet.

12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable.

13. Incorporations by reference and their location in the rules:

None.

14. Was this rule previously made as an emergency rule? If so, please indicate the *Register* citation:

No.

15. The full text of the rules follows:

TITLE 9. HEALTH SERVICES

CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION

ARTICLE 14. AHCCCS MEDICAL COVERAGE FOR FAMILIES AND INDIVIDUALS

Section

ARTICLE 14. AHCCCS MEDICAL COVERAGE FOR FAMILIES AND INDIVIDUALS

R9-22-1443. Closing New Eligibility for Persons Not Covered under the State Plan.

A. Subject to subsection (B) and approval by the Center for Medicare and Medicaid Services, neither the Department nor the Administration shall approve as eligible for coverage individuals who apply on or after July 1, 2011 who do not otherwise meet the eligibility criteria for an optional or mandatory Title XIX coverage group described in the Arizona State Plan for Medicaid: that is, neither the Department nor the Administration shall approve eligibility with effective dates on or after July 1, 2011 for the population described in ARS §36-2901.01 and AHCCCS Rule R9-22-1428(4), referred to in this rule as "AHCCCS Care."

1. With respect to any applications that are pending as of July 1, 2011, the Department shall not approve any individual as eligible for AHCCCS Care who has not met all eligibility requirements prior to July 1, 2011.
2. This rule does not prohibit the redetermination of an individual as eligible for AHCCCS Care on or after July 1, 2011, if the individual was determined eligible for AHCCCS Care prior to July 1, 2011 and has remained continuously eligible since the date of the determination of eligibility that occurred prior to July 1, 2011.

B. At least monthly, the Director shall review the most recent estimate of the anticipated expenditures for the remainder of the state fiscal year as compared to funds remaining in the appropriations made to the agency for the state fiscal year as well as any other known or reasonably anticipated sources of other funding. Based on that review, the Director may:

1. Delay implementation of the closure of new enrollment into the AHCCCS Care program.
2. Re-open the AHCCCS Care program to new enrollment following the closure of the AHCCCS Care program.
3. Terminate coverage for some or all persons eligible for the AHCCCS Care program based on date of eligibility and/or such other factors that the Director determines are equitable and consistent with the objective of ensuring coverage for as many persons as possible within available funding.

C. Public notice of any changes to the AHCCCS Care program shall be provided thirty days prior to the effective date of the change via publication on the AHCCCS website unless shorter notice is necessary to maintain a program that is reasonably anticipated to remain within available funding.