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Comment on: The Patient Protection and Affordable Care Act and the Health Health Care and Education Reconciliation Act of 2010 (Affordable Care Act)

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Comment on: The Patient Protection and Affordable Care Act and the Health Health Care and Education Reconciliation Act of 2010 (Affordable Care Act)

Abstract

[Excerpt] These comments on the proposed regulations on the health insurance premium tax credit are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 57 affiliated unions. The AFL-CIO, together with its community affiliate Working America, represents more than 12.2 million workers across the country. Our affiliated unions negotiate health care benefits for almost 40 million workers, retirees, and their family members while unions not affiliated with the AFL-CIO negotiate coverage for an additional 10 million. These benefits are provided through single employer and multiemployer plans, both insured and self-funded.

Keywords

AFL-CIO, Patient Protection and Affordable Care Act, Health Health Care and Education Reconciliation Act of 2010, Affordable Care Act

Comments

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Submitted by email to www.regulations.gov

October 31, 2011

CC:PA:LPD:PR (REG-131491-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Proposed Regulations on Health Insurance Premium Tax Credit
File Code: IRS REG-131491-10
Docket ID: IRS-2011-0024-0001

Ladies and Gentlemen:

These comments on the proposed regulations on the health insurance premium tax credit¹ are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 57 affiliated unions. The AFL-CIO, together with its community affiliate Working America, represents more than 12.2 million workers across the country. Our affiliated unions negotiate health care benefits for almost 40 million workers, retirees, and their family members while unions not affiliated with the AFL-CIO negotiate coverage for an additional 10 million. These benefits are provided through single employer and multiemployer plans, both insured and self-funded.

The health insurance premium credit and related cost-sharing reductions are a central component of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively, the "Affordable Care Act" or "Act"). These provisions are intended to make health care coverage affordable for individuals and families whose income falls between 100 and 400 percent of the federal poverty line by limiting their premium

¹ The proposed regulations, issued by the Department of Treasury ("Department") and the Internal Revenue Service ("IRS") are published at 76 Fed. Reg. 50931 (August 17, 2011).

contribution to a fixed percentage of income and reducing any required cost-sharing. They are also critical to achieving the goal of the Affordable Care Act of increasing the number of people with health care coverage.

While we support many of their provisions, we disagree with the interpretation in the proposed regulations that bases the affordability of employer-provided coverage for a family on the required employee contribution for self-only coverage as explained in these comments.

§1.36B-2 Eligibility for Premium Tax Credit

§1.36B-2(b)(6) Special rule for taxpayers with household income below 100 percent of the federal poverty line for the taxable year

We support the special rule in proposed section 1.36B-2(b)(6) that allows a taxpayer or family member to be eligible for the premium tax credit if the taxpayer or family member enrolls in a qualified health plan and an Exchange estimates that the taxpayer's household income will be between 100 and 400 percent of the federal poverty line for the taxable year even though household income actually ends up below 100 percent. The special rule is consistent with the goal of the Act to provide access to coverage to all individuals with household income under 100 percent of the federal poverty line. The Act does so through its expansion of Medicaid eligibility and the provision of premium tax credits for recent immigrants ineligible for Medicaid with household income under 100 percent of the federal poverty line. The special rule is also consistent with the reconciliation provisions in Code Section 36B(f) that seek to moderate the financial impact on applicable taxpayers if an Exchange overestimates household income for the taxable year.

§1.36B-2(b)(7) Computation of premium assistance amounts for taxpayers with household income below 100 percent of the federal poverty level

We support proposed section 1.36B-2(b)(7) which bases the premium assistance amounts on the taxpayer's actual household income if it is less than 100 percent of the federal poverty line. This provision will limit the possibility of reconciliation and its potential financial impact.

§1.36B-2(c)(3) Employer-Sponsored Minimum Essential Coverage

§1.36B-2(c)(3)(iv) Special rule for continuation coverage

We support the special rule for continuation coverage set forth in proposed section 1.36B-2(c)(3)(iv). Under this rule, workers and their dependents losing coverage through work will qualify for premium tax credits even if they are eligible for continuation coverage. The proposed rule provides access to health care coverage that may be more affordable than the

continuation coverage available through employment-based plans and is consistent with the goals of the Act.

We also read the special rule to apply if an individual terminates continuation coverage before the end of the period that coverage is available. Thus, when individuals are no longer enrolled in continuation coverage, they should not be deemed eligible for minimum essential coverage. This interpretation should be clarified in the final regulations.

There are multiple instances where individuals enrolled in continuation coverage should be allowed to terminate coverage and be eligible for the premium tax credit. For example, one of two working spouses loses a job and enrolls in continuation coverage. Several months later, the other spouse loses his/her job, and the household can no longer afford continuation coverage premium payments. The enrolled spouse should be able to terminate continuation coverage and receive a premium tax credit if otherwise eligible. Another example where termination of continuation coverage should be permitted arises when continuation coverage premiums increase following enrollment. In light of the premium increase, an individual may be better off obtaining qualified health plan coverage through the Exchange with a premium tax credit.

Another circumstance to consider involves individuals who are eligible for and enroll in continuation coverage before January 1, 2014, when the premium tax credits first become effective. These individuals should not be prevented from receiving premium tax credits because the qualifying event leading to the election of continuation coverage occurred before qualified health plans become available through the Exchanges.

Finally, the proposed regulations issued by the Department of Health and Human Services provide that, in the case of a special enrollment, the first day of coverage under the qualified health plan will be either the first day of the following month or the first day of the second month if enrollment occurs after the 22nd of the month.² If the proposed beginning date rule is not modified, coverage gaps of one month or more could occur if individuals become eligible for continuation coverage after the 22nd of the month. Individuals in the midst of treatment may not be able to continue receiving care without enrolling in continuation coverage. These individuals should be eligible for premium tax credits when coverage under the qualified health plan can begin or adverse selection into continuation coverage will be exacerbated with corresponding cost increases for employment-based coverage.

² Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41866, 41917 (proposed July 15, 2011).

§1.36B-2(c)(3)(v)(1) Affordable Coverage

We oppose the provision in the proposed regulations on how the affordability of employer-sponsored health care coverage is determined, because it uses the cost of an employee's self-only coverage — but not the cost of family coverage — to determine whether the employee's family members are eligible for premium tax credits to help pay for coverage. If the final rule maintains this approach, millions of adults and children who are the dependents of workers with an offer of employer coverage would be barred from receiving subsidies through the Exchanges. The interpretation in the proposed rule would leave many people paying large portions of their household income for family coverage offered by their employers. Many others are likely to go without health insurance because of the high cost. This undermines the coverage goals of the Affordable Care Act, and it runs counter to the intent of the law.

Under the Affordable Care Act, individuals eligible for “minimum essential coverage” are ineligible for premium tax credits and cost-sharing reductions for health coverage purchased through the new Exchanges. Minimum essential coverage includes “eligible employer-sponsored plans.” However, employees will not be considered eligible for minimum essential coverage if the employee's premium contribution exceeds 9.5 percent of household income.³

The relevant provisions of the Affordable Care Act for determining the affordability of coverage are in Section 36B of the Internal Revenue Code (“Code”), the premium tax credit provision, and Section 5000A of the Code, the individual responsibility provision:

- Section 36B(c)(2)(C)(i) of the Code states that the employee's required contribution is determined “within the meaning of section 5000A(e)(1)(B),” and that the clause applies “to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee,” such as a spouse or a child.
- Section 5000A(e)(1)(B) of the Code allows an exemption from the penalty for individuals who cannot afford health care coverage. Section 5000A(e)(1)(B)(i) provides that in determining whether coverage is affordable, the required contribution for an individual eligible through an employer plan is based on the employee's contribution for self-only coverage. This provision is qualified by Section 5000(e)(1)(C), which states that “for purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.”

³ Employer provided coverage must also meet a minimum value test to be considered minimum essential coverage. Proposed section 1.36B-2(c)(3)(vi) provides that the minimum value will be determined under regulations issued by the Secretary of Health and Human Services. Those regulations have not yet been issued.

- Section 5000A(e)(1)(A) provides the test for determining whether coverage is unaffordable for purposes of the exemption from the penalty. The exemption applies if the individual must pay more than 8 percent of household income.

To summarize, when a family has an offer of employer coverage, the test of whether that coverage is affordable depends on the employee's required contribution as a percentage of household income. In general, if available coverage costs more than 8 percent of household income, an individual does not have to pay a penalty for failing to have coverage. For an employee with an offer of employer coverage, the required contribution is defined as the amount the employee must pay for self-only coverage. For dependents of the employee, the statute includes a "special rule" stating that the determination "shall be made by reference to the required contribution of the employee."

The Joint Committee on Taxation (JCT) reads the "special rule" to mean that the cost of *self-only* coverage is used to determine affordability for *family* coverage.⁴ As a result, JCT also would use the cost of self-only coverage in determining whether the employee and dependents are exempt from the penalty. In effect, JCT reads the "special rule" for dependent coverage as requiring the same measure of affordability for families as for employees. However, the rule for employees specifies that the employee contribution used to determine affordability is the cost of *self-only coverage*. Had Congress intended the special rule for dependents to use the same measure, it could have used similar language — or it could have omitted the special rule altogether. The special rule states that the determination of affordability should be made with reference to the "required contribution of the employee." The better reading of that provision is that the measure of affordability should be the "required contribution of the employee" *for coverage of his or her dependents*.

The reading of the special rule in Section 5000A(e)(1)(C) of the Code we offer is also consistent with how employment-based health coverage works. The cost of coverage is often shared between employers and employees. Dependents of employees—individuals "... eligible for ... coverage through an employer by reason of a relationship to an employee"—do not directly pay for coverage themselves. Instead, the employee adds them to the offered coverage and pays any additional required contribution.

The proposed regulations on the premium tax credit appear to agree with this interpretation of the special rule – that it requires the use of the cost of family coverage in assessing whether coverage is affordable for workers and their dependents. But the proposed rule only applies this test to the individual responsibility requirement, not the premium tax credit.

⁴ Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 111th Congress*, (March 2011) at p. 281.

The preamble states:

Although the affordability test for related individuals for purposes of the premium tax credit is based on the cost of self-only coverage, future proposed regulations under section 5000A are expected to provide that the affordability test for purposes of applying the individual responsibility requirement to related individuals is based on the employee's contribution for employer-sponsored family coverage. *Section 5000A addresses affordability for employees in section 5000A(e)(1)(B) and, separately, for related individuals in section 5000A(e)(1)(C).*

76 Fed. Reg. at 50935 (emphasis added).

The Department and the IRS interpret the special rule in Section 5000A(e)(1)(C) of the Code to use the cost of family coverage to determine the affordability of employer coverage for the employee and dependents. However, in determining affordability for the premium tax credit, the proposed regulations apply only Section 5000A(e)(1)(B) and ignore the special rule that qualifies the application of the affordability test to dependents in Section 5000A(e)(1)(C). The better reading of the statute is that, in requiring the use of the same test for premium tax credit eligibility as for the individual responsibility requirement, Congress intended that the entire rule be applied, including the special rule for dependents. It is unlikely that Congress intended affordability to be determined one way in considering whether a family is exempt from the individual mandate and another way for premium tax credit eligibility. It is far more likely that by incorporating the test from Section 5000A(e)(1)(B) to Section 36B(c)(2)(C), Congress intended that the special rule for dependents should also apply.

As written, the proposed regulations would cause serious harm to families already having a hard time making ends meet. One example is a family of four earning 200 percent of the federal poverty line, or \$44,700 annually, with one parent working. The available employer coverage requires a monthly contribution of \$150 for the employee and a monthly contribution of \$400 to cover the employee and spouse. (The children are enrolled in the state's Children's Health Insurance Program.) The family cannot afford coverage for the spouse as monthly contributions of \$400 amount to nearly 11 percent of the household's income, so only the employed parent is covered by the employer plan. As the preamble to the proposed rule indicates, the spouse would be exempt from the penalty for not having coverage. But she would remain uninsured.

Under the approach in the proposed rule, many families would face similar difficulties. Failing to account for the affordability of employer-sponsored family coverage would make an estimated 3.9 million non-working dependents ineligible for subsidies, according to an analysis

by the Kaiser Family Foundation. On average, these family members would have to pay 14 percent of their income to access the employer coverage.⁵

An analysis by the Urban Institute shows that basing the determination of the affordability on self-only coverage would have a significant impact on coverage for children particularly if federal funding for CHIP is not extended beyond 2015, when the current authorization expires. The Urban Institute found that 6.3 million children are in families that have to pay more than 9.5 percent of their income for employer-based family coverage. Of these 6.3 million children, 1.7 million are currently uninsured and would likely remain uninsured even after premium credits become available in 2014. If CHIP is not extended, the number of uninsured children would be substantially higher.⁶

By failing to take the cost of family coverage into account in determining eligibility for premium credits and cost-sharing reductions, the proposed rule would fail to ensure that these family members have access to affordable coverage as the Act intends. They could instead try to scrape together a significant portion of their household income to purchase coverage, but the high cost would likely cause many people to forgo coverage and remain uninsured.

The proposed rule also creates disincentives for employers to continue offering coverage to low-income workers. Workers in firms with a higher percentage of lower-wage workers contribute a larger percentage of the premium for family coverage than workers at firms with a lower percentage of lower-wage workers.⁷ Many workers in these firms may prefer to have no offer of coverage from their employers, making the family eligible for premium tax credits and improving their financial situation by reducing their health care contribution. Over time, workers whose family members do not have other access to coverage will move to employers

⁵ Larry Levitt and Gary Claxton, *Measuring the Affordability of Employer Health Coverage*, Kaiser Family Foundation, August 24, 2011 available at http://healthreform.kff.org/notes-on-health-insurance-and-reform/2011/august/measuring-the-affordability-of-employer-health-coverage.aspx?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+NotesOnHL+%28Notes+on+Health+Insurance+and+Reform+%28Headlines%29+-+Kaiser%27s+Health+Reform+Source%29. The analysis relies on 2008 demographic and insurance data from the Medical Expenditure Panel Survey and employee premium contribution information from the Kaiser/HRET Employer Health Benefits Survey. It assumes no behavior changes by employers in response to the health reform law.

⁶ Matthew Buettgens, Genevieve M. Kenney, "Implications of Relying on a Single-Only Affordability Test for Families," The Urban Institute, May 6, 2011 (unpublished memorandum).

⁷ Kaiser Family Foundation and Health Research & Education Trust, *Employer Health Benefits 2011 Annual Survey*, (September 2011), Exhibit 6.20. Lower-wage workers are defined as those earning \$23,000 or less annually. The employee contribution for family coverage is 38 percent in those firms where at least 35 percent of workforce is lower-wage workers, while the contribution is 27 percent for firms employing fewer lower-wage workers.

that do not offer coverage. Employers will recognize that an offer of health care coverage does not have the same recruitment and retention benefits as in the past, and many may stop offering coverage to low-income workers.

To ensure that the final regulations are consistent with the statute and carry out the coverage goals of the Affordable Care Act, we urge the Department and the IRS to base the determination of whether employer-sponsored coverage is unaffordable for workers and their dependents on the employee's contribution for family coverage for both eligibility for premium tax credits and cost-sharing reductions and the exemption from the penalty for not having coverage.

§1.36B-2(c)(3)(v)(2) Employee safe harbor

We support the proposed employee safe harbor, which treats employer-sponsored coverage as unaffordable for the entire plan year if the Exchange determines the coverage was not affordable when an employee or related individual enrolls in a qualified health plan. Without the proposed safe harbor, individuals and families would be at risk of repaying large sums if the cost of employer coverage fell below 9.5 percent of their household income for any months during the taxable year. For example, if an employee's spouse received an unexpected bonus, the family's income could be greater than anticipated, and the cost of the employer coverage could end up being less than 9.5 percent of household income. Without the protection of a safe harbor, a retroactive determination of affordability at tax filing could result in a finding that the family was not eligible for premium credits. A family in this situation would have a large repayment obligation even though the Exchange correctly determined the family was eligible for the premium credit at the time of enrollment. The policy in the proposed rule avoids this result, and it should be retained in the final regulation.

The proposed safe harbor also recognizes that employees and their family members may not be able to enroll in employer coverage during a plan year without being eligible for a special enrollment period.⁸ A change in household income does not trigger a special enrollment period. The proposed safe harbor will avoid leaving workers and their families without access to affordable coverage because they could not anticipate an increase in income.

§1.36B-2(c)(3)(vii) Enrollment in an eligible employer-sponsored plan

Section 1511 of the Affordable Care Act requires employers with 200 or more full-time employees who offer health benefits coverage to automatically enroll all eligible employees in a plan. We are concerned that there may be some administrative difficulties when employers first

⁸ As provided in Code Section 9801(f), special enrollment periods are available only when continuation coverage is exhausted, eligibility for coverage is lost or employer contributions to coverage are terminated.

implement automatic enrollment that could result in workers being incorrectly enrolled in coverage that does not satisfy the affordability and minimum value requirements. For example, an employee may not receive notice of the opportunity to opt out either because the employer fails to follow proper procedure or the procedure itself has gaps that result in some employees not receiving notice. Alternatively, a family member may be reenrolled in a plan without his or her knowledge because the notice to opt out is provided to the employee. Administrative errors by an employer or a plan may result in mistakenly enrolling an employee or family member who opted out of coverage or chose a different coverage option. While we expect these instances to be few, they could have a significant impact on taxpayers and their family members who should not be prevented from accessing a premium tax credit because of a mistake by an employer or a plan.

In addition, the automatic enrollment regulations have not yet been issued, and it is possible that employees will be able to opt out of coverage even after they are enrolled. In these circumstances, employers would retroactively disenroll those employees choosing to opt out. Employees who opt out of employer coverage following an automatic enrollment should not be prevented from becoming eligible for premium tax credits.

To address these possibilities, the final regulations should include a special rule providing that a taxpayer or family member is eligible for premium tax credits if: (1) the taxpayer or family member never received notice of the opportunity to opt out; (2) the taxpayer or family member was enrolled in an employer-sponsored plan even though the employer or plan was notified of the decision to opt out of coverage; or (3) the taxpayer or family member opts out and is retroactively disenrolled from coverage.

§1.36B-4 Reconciling the Premium Tax Credit with Advance Credit Payments

The provisions in the proposed regulations on reconciling the premium tax credit with advance credit payments fail to appropriately take into account situations of families experiencing major changes in household income during the year. We are concerned that this omission will lower participation of healthier-than average people in the Exchanges, drive up premium costs in the Exchanges, and undermine support for the Affordable Care Act.

Over the course of the year, many families gain or lose a job. Many others get married or divorced or have children who obtain a job and leave the household. In many cases, these changes will have a large effect on a household's income, measured as a percentage of the federal poverty line, and on the family's need for health coverage. For example:

- Due to a mid-year job loss, a family could lose its employer-based coverage and see its income plummet, lowering the family's current income well below 400 percent of the federal poverty line and making coverage unaffordable unless advance premium credits

reflect the income loss. But the family's income for the year might still be above 400 percent of the federal poverty line because of the income received before the job loss.

- Another family may have low income for part of the year and receive advance premium credits to enable it to buy coverage, but a new job in the later in the year raises its annual income modestly above 400 percent of the federal poverty line.
- The income of a family receiving advance premium credits could rise above 400 percent of the federal poverty line, making the family ineligible for a premium credit *without any change in its income*, because a child in the family gets a job and leaves the household. The smaller family size would raise the family's income as a percentage of the poverty line.
- Two people who each have incomes below 400 percent of the federal poverty line and are receiving advance premium credits, but who then marry each other during the year, could see their combined income rise above 400 percent of the poverty line for a family of two, making them ineligible for the credits they have been receiving.

These situations demonstrate the need to take changes in circumstances into account. Every household in these situations would be at risk of being required to pay thousands of dollars back to the IRS if the household's change in circumstances is not taken into account in determining the amount of the premium credit for which it qualifies and the amount it may be required to repay. If, with no exceptions, the amount of the excess credit is based on a household's income for the entire year — including the part of a year when a household did not receive (or need) an advance premium credit — then substantial numbers of people who received a subsidy appropriate for their circumstances for part of the year will face repayment. Similar problems will arise for families with annual incomes below 400 percent of the federal poverty line. While their liability for excess advance payments is capped, they still can be required to pay back significant amounts relative to their incomes.

The Affordable Care Act is intended to fill gaps in health coverage that occur due to unemployment or other circumstances. If reconciliation requires repayment of the advance premium credits received during the periods when families' incomes are low and they lack other insurance, applicants for premium credits will need to be warned in advance, and many will decline to participate. Moreover, some people whose income drops during the year may not be considered eligible for a premium credit or they may be eligible for an insufficient credit because their projected income for the year is higher than their current income.

We believe the Act provides legal authority to implement reconciliation in a way that takes changes in circumstances into account and avoids these harmful effects. While reconciliation is under the authority of the Treasury and the IRS, responsibility for administering the premium tax credit is shared with the Secretary of Health and Human Services ("HHS"). In

general, HHS is charged with establishing standards and procedures for the eligibility determination process.⁹

In providing for the payment of premium assistance through premium tax credits, Congress understood people would need payments in advance and that these advance payments would have to be coordinated with the final credit determined under Code Section 36B. This is clear from Section 36B(g) which directs the Secretary of the Treasury to:

Prescribe such regulations as may be necessary to carry out the provisions of this section, including regulations which provide for —

- (1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and
- (2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

Section 1412 of the Act provides that the advance determination of the premium credit amount will be based on information from the most recent tax year for which complete information is available. To accommodate changes in income and circumstances, HHS may establish procedures for making advance determinations of premium credit eligibility and amounts using other information “in cases where information included with an application form demonstrates substantial changes in income, changes in family size or other household circumstances, change in filing status, the filing of an application for unemployment benefits, or other significant changes affecting eligibility.” It is presumably this information that the Exchanges must provide to the IRS under Code Section 36B(f)(3), which requires Exchanges to report “any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of” the credit.

Changes in circumstances will not just be reported when an initial application for premium credits is made, typically during an open enrollment period. Under Section 1412 (b)(1)(A) of the Act, HHS may provide for a determination of advance credits during both the regular open enrollment period and “such other enrollment period as may be specified by the Secretary.” Regulations defining these special enrollment periods were included in the July

⁹ Sections 1411 and 1412 of the Act direct HHS to establish procedures to determine eligibility for the premium tax credits and a program, in consultation with Treasury, for making advance eligibility determinations allowing for advanced payments of the credit.

proposed rule issued by HHS.¹⁰ Individuals and families receiving credits likely will be required to report changes in income and family circumstances during the year, such as a change in the availability of affordable employment-based coverage that affects their eligibility for premium credits.¹¹ The information provided by taxpayers in such circumstances will then be reported by the Exchanges to the IRS.

The regulatory authority provided to the Secretary under Code Section 36B(g) to administer the premium credits is broad. Section 36B(g) (2) specifically directs the Secretary to prescribe “regulations which provide for...the application of subsection (f) where the filing status for the taxable year is different from such status used for determining the advance payment of the credit.” This implies that the Secretary has the regulatory flexibility to avoid requiring people like a newly married couple to pay back all of the subsidies the couple (or one member of the couple) received before getting married.

A reasonable reading of the statute also leads to the conclusion that the Secretary’s regulatory authority is not limited to situations where a change in filing status has occurred. Section 36B(g)(1) of the Code is far more general than Section 36B(g)(2). As noted, it directs the Secretary to issue such regulations as may be necessary for the coordination of the credit determined under Section 36B with the advance payment of the credit. This implies a broad range of regulatory discretion, which is needed given that coordination will require consideration of many factors and circumstances. Congress recognized the need for flexibility in leaving to the implementing agencies the details of how coordination should be carried out.

The preamble to the proposed rule acknowledges the direction in the Affordable Care Act to specify how advance credits will be reconciled when the taxpayer’s filing status on his or her tax return is different from the filing status used to determine advance payments. As proposed, however, the rule does not adjust the process of reconciliation for taxpayers experiencing a change in filing status or any other change, although comments are requested on special rules for taxpayers who marry during the taxable year and for married taxpayers who face challenges in being able to file a joint return.

In order for the advanced payment process to be most effective and minimize potential repayment obligations, it will be critically important to have an eligibility determination system based on income and family circumstances that are as up-to-date and accurate as possible as well as a system that makes it easy for individuals and families to report changes and have their

¹⁰ Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41866 (proposed July 15, 2011).

¹¹ In fact the proposed rule issued by HHS would require individuals to report all changes to the Exchange within 30 days. Patient Protection and Affordable Care Act; Exchange Functions in the Individual Market; Eligibility Determinations; Exchange Standards for Employers, 76 Fed. Reg. 51202 (proposed August 17, 2011).

premium credits adjusted during the course of the year. But, as the examples noted at the earlier in these comments show, this will not be enough to eliminate the risks of reconciliation.

We make the following recommendations to alleviate potential harm to individuals and families and more generally to effectively implement the Affordable Care Act:

- **Prorate the caps on liability based on the number of months a household received premium credits.** The best way to deal with a mid-year change in circumstances for families that receive advance payments of premium credits for part of the year would be to reconcile the advance payments based on income and family circumstances during the months the advance payments were received. While this approach is well within the Secretary's authority, it could be difficult to administer and may be inconsistent with current IRS practice. An alternative approach is prorating the repayment caps by the portion of the year that the family or individual received advance payments. For example, if a family with annual income of 375 percent of the poverty line received premium credits for six months of the year when its income was 200 percent of the poverty line, the maximum amount the family would have to pay would be \$1,250, one-half of the \$2,500 cap that would otherwise apply based on its annual income. Prorating the caps should be relatively simple for the IRS to administer, requiring only a simple calculation based on readily available information. The IRS will receive information on the number of months that individuals and families receive premium credits over the course of the year as well as the amount of advance payments received.
- **Provide a safe harbor for households that are eligible for credits in the months they were received even if their taxable income exceeds 400 percent of the federal poverty line.** Many families could correctly receive premium credits for some months in the year but end up having to repay the entire amount because their annual income exceeds 400 percent of the poverty line. This can occur when a family gains or loses a job and employer-based coverage during the year or even when an adult child gets a job and leaves the household mid-year. Families in this situation should be provided with a safe harbor that treats them as if their annual income was 400 percent of the federal poverty line and prorates the cap in the same way as described above.
- **Treat couples that marry during the year based on their status during the coverage months.** The proposed rule would reconcile advance payments made to two single people who marry during the year based on their filing status as a married couple and their annual income despite the direction in Code Section 36B(g) to issue regulations addressing this situation. We recommend a change in the proposed rule to compute the contribution amount for the couple that allocates their annual income based on whether they were married or single during the coverage months. The following example shows how this would work

(using the poverty line for 2011 and a benchmark premium of \$5,200 for an individual and \$10,000 for a couple) :

Example 1: P's projected income is \$21,780 (200 percent of the poverty line), and Q's projected income is \$16,335 (150 percent of the poverty line).

P and Q marry in July, but from January to June, they received advance credit payments as single individuals. P's advance credit payments totaled \$1,914. Q's credit payments totaled \$2,274 during that period.

P and Q's projected combined annual income is \$38,115 (259 percent of the poverty line), and from July through December, they receive advance payments totaling \$3,416.

At reconciliation, their annual household income ends up being \$40,000 (272 percent of the poverty line). The final credit would be computed as follows:

Assume P and Q each had annual income of \$20,000 from January to June (188 percent of the poverty line). On this assumption, they each should have received \$2,025 during this period. From July through December, assume their annual income was \$40,000. They should have received \$3,262 during that period.

The total amount of advance payments the couple received was \$7,604. Under this alternative approach, the final credit amount would be \$7,312, which reflects the slight increase in actual income over what they anticipated. However, if the Treasury approach is used, their final credit amount would be only \$6,524 leaving them with an overpayment over \$1,000. The difference of about \$700 is solely because they were married during the year; it does not in any way reflect that they received excess payments.

If P or Q had dependents, a similar approach could be used that would allocate income on a proportional basis during the months prior to marriage.

Example 2: R's projected income is \$16,335 (150 percent of the poverty line). From January to June, R receives advance payments of premium credits totaling \$2,274. In July, R marries S and becomes eligible for employer-based coverage as S's dependent.

At reconciliation, the couple's annual income is \$60,000 (408 percent of the poverty line). Under the proposed rule, the couple would have to repay the entire amount of premium credits R received before their marriage even though the amount was correct when received. Under the alternative approach, R's income would be assumed as \$30,000 from January through June (275 percent of the poverty line). R should have received \$1,283 in credits, so the excess payments would be \$991 rather than \$2,274.

- **Apply special rules for married couples filing separately.** Under the Act, married filing couples filing separately cannot claim premium credits, which is also the rule for the earned income tax credit and other credits. However, premium tax credits are different, because they will be used to purchase health coverage which will be required beginning in 2014. Therefore, as recognized in the preamble, relief is needed in some circumstances for married taxpayers who file their taxes separately.

There are several legitimate reasons that it may be inadvisable or even impossible for married taxpayers to file jointly. One obvious reason is that victims of domestic violence may be keeping their whereabouts a secret. In these cases, it would be inappropriate to require a woman to file a joint return. In fact, domestic violence was a condition discussed extensively during the health care debate when it was discovered that women with a history of domestic violence were often considered uninsurable by health plans. As a result, section 2705 of the Public Health Services Act, as added by section 1201 of the Act, expressly prohibits discrimination by insurers against conditions arising out of acts of domestic violence. It is appropriate that the IRS make a similar distinction for this class of individuals and allow an exception from the joint filing requirement for victims of domestic violence.

Abandoned spouses also warrant special protection. Such individuals have no choice but to file a separate return in cases when they cannot locate their spouse. Incarceration is another possible barrier to joint filing, particularly if a tax filer has not obtained power of attorney for the incarcerated spouse. In addition, there should be exceptions in the case of a spouse living out of the country.

Taxpayers could certify on the schedule used to calculate the premium tax credit whether one of these conditions applies. The list of exceptions should capture general categories (domestic abuse, abandoned spouse, incarceration, spouse out-of-the-country). They should also be allowed to make such a certification when they apply for advance payments of premium credits at the Exchange. In other words, the exception should not just be applied to individuals who expect to file a joint return, receive advance payments on that basis, and then have to file their tax returns separately.

When such exceptional circumstances are identified, the individual should be permitted to file separately and still receive a premium tax credit. In cases where both spouses, at some point in the year, were enrolled in the same insurance plan, the IRS could allocate the advance credit and calculate the benchmark premium based on household income (with the absent spouse's income being determined by their tax filing) in the same way as proposed for couples who divorce during the year. This would help protect the lower-income spouse. If the absent spouse did not file a tax return or if the filing spouse does not know their spouse's Social Security number, a reasonable allocation is 50 percent. In these cases, the repayment limits for single individuals should apply.

The preamble to the proposed rule requests comment on whether the rule should take into account whether a couple filed together in the previous year and whether they attested their expectation to file jointly in order to obtain tax credits. An attestation should not be a bar to eligibility for an exception, because changes can occur during the year. For example, a couple may indicate that they intend to file together when applying for credits in November 2013 but face a completely different scenario 17 or 18 months later when it is time to reconcile the premium tax credit on their tax return. It is reasonable to expect that these exceptions would have limitations, but restricting the exception to one year may be too restrictive since many situations, such as a complicated divorce involving custody or criminal charges, may take a long time to resolve. Limiting the exception to three consecutive years would be helpful to accommodate these types of situations.

We appreciate the opportunity to submit these comments on the proposed regulations on the health insurance premium tax credit. If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karin S. Feldman', written in a cursive style.

Karin S. Feldman
Benefits and Social Insurance Policy Specialist