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VIA ELECTRONIC SUBMISSION

October 31, 2011

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

RE: **IRS REG-131491-10**
Health Insurance Premium Tax Credit

Dear Sir/Madam:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, non-profit organizations and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members. With the implementation of the Affordable Care Act, it is critical to ensure that newly available health insurance purchased through the exchanges are affordable and accessible for eligible individuals, including low-income and working immigrant families.

Below are our comments on the Notice of Proposed Rulemaking and Notice of Hearing for the Health Insurance Premium Tax Credit (76 Fed. Reg. 50931, August 17, 2011) (hereafter referred to as "NPRM") to help the IRS ensure that health insurance is affordable to all eligible individuals, as intended under the Affordable Care Act.

Definition of family and family size §1.36B-1(d):

We support the NPRM's current definition of family and family size. We agree that family and family size should include individuals who are exempt from the requirement to maintain coverage under Section 1501 of the ACA.

However, we recommend that the definition of family and family size include individuals who are ***excluded*** as well as exempted from the requirement under Section 1501. This includes individuals who are not lawfully present but who may be the sole income earner and tax filer in the family. Although individuals who are not lawfully present are ineligible to purchase health insurance through the exchange, other family members may be eligible for insurance and premium tax credits. Their family size should be based on the actual number of individuals in the family.

This recommendation would help ensure alignment with the definition of applicable taxpayer in the NPRM at Section 1.36B-2(b)(4) which correctly clarifies that individuals who are not lawfully present (and thus excluded from the individual mandate) may be considered an applicable taxpayer for purposes of applying for and obtaining premium tax credits for eligible family members. The definition of family and family size should recognize that some individuals in a family may not be subject to the individual mandate.

Congress created a rule specifying how the IRS should calculate the income of families that include lawfully present and not lawfully present individuals, for purposes of determining eligibility for the premium tax credit.[1] To the extent that the income of every individual in a family is counted, individuals who are not lawfully present should also be included in the definition of family and family size. Their inclusion in the definition of family and family size does not bestow any eligibility upon those who are not lawfully present.

RECOMMENDATION:

Amend 1.36B-1(d) as follows:

(d) Family and family size. A taxpayer's family means the individuals for whom a taxpayer properly claims a deduction for a personal exemption under section 151 for the taxable year.

Family size means the number of individuals in the family. Family and family size include an individual who is exempt ***or excluded*** from the requirement to maintain minimum essential coverage under section 5000A.

Definition of "lawfully present" §1.36B-1(g):

The NPRM adopts the definition of "lawfully present" for eligibility for premium tax credits per Section 1401(e)(2) of the ACA that is currently used in the Pre-Existing Condition Insurance Plan (PCIP), at 45 CFR §152.2. Although the PCIP definition provides a helpful starting point, we recommend that the definition of lawfully present for premium tax credits be expanded to incorporate all individuals who are lawfully present in the U.S. This will help ensure that all eligible individuals who are subject to the requirement to have insurance can obtain affordable health insurance.

First, the definition should include two categories that are listed in the lawfully present definition in Medicaid and CHIP rules under Section 214 of the Children's Health Insurance Program Reauthorization Act (CHIPRA). [2] We recommend that the IRS include individuals who are lawfully present in the Commonwealth of the Mariana Islands and American Samoa, under the

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[1] Section 1401(e) of the ACA; Section 1.36B-3(l)(2) of the NPRM.

[2] CMS State Health Officials Letter, "Medicaid and CHIP Coverage of 'Lawfully Residing' Children and Pregnant Women" (July 1, 2010), available at https://www.cms.gov/smdl/downloads/SHO10006.pdf.

law that applies in those territories. These two categories were omitted from the PCIP definition of lawfully present solely because Congress did not authorize the U.S. territories to operate a PCIP. By contrast, as explained in the preamble to the PCIP regulations, Congress specifically allows the territories to establish an Exchange. 75 Fed Reg. 45017 (July 30, 2010). These lawfully present individuals, who are applicable taxpayers under Section 36B of the IRS Code, should be eligible to enroll in health insurance exchanges and if otherwise eligible, secure premium tax credits under the regulations.

Next, the definition of lawfully present should include all individuals whose immigration status makes them eligible to apply for an Employment Authorization Document (EAD or "work permit") regardless of whether they have secured a work permit. An immigrant's lawful status does not depend on whether he or she has an EAD. The EAD requirement, which applies to some of the categories in the PCIP definition, imposes particular burdens on low-income children and persons with disabilities who cannot work. Low-income families and individuals cannot easily afford the fee (currently $380) to apply for and obtain a work permit, particularly if they do not otherwise need it. The final rule should eliminate this requirement.

We recommend that three other lawfully present immigration categories be added to the definition: (a) certain victims of trafficking, (b) asylum applicants, and (c) individuals granted a stay of removal, as described below.

Victims of human trafficking can be granted continued presence in the U.S. by the Department of Homeland Security (DHS) in order to aid in the prosecution of traffickers in persons. This category of non-citizens already was eligible for Medicaid and CHIP under 22 U.S.C. §7105(b), and therefore did not appear in CMS' list of newly covered immigrants for the purpose of implementing CHIPRA § 214.

Asylum applicants should be considered "lawfully present" without regard to whether they are eligible for employment authorization**,** since they have a right to remain in the U.S. throughout the pendency of their asylum adjudication, a process that can take years. Asylum applicants are not eligible for employment authorization until 180 days after the asylum application has been filed, and errors and delays in the administration of this waiting period have made the wait much longer for many applicants, as noted in the USCIS Ombudsman's recent report on this problem.[3]

[3] USCIS Ombudsman, "Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication (August 26, 2011) available

Stays of removal generally are granted to individuals with cases pending before an immigration judge, the Board of Immigration Appeals, or a court, allowing them to remain in the U.S. lawfully while often lengthy proceedings continue. Grants of prosecutorial discretion under the Obama Administration's recent Department of Homeland Security guidelines will include stays of removal and similar discretionary relief. Individuals granted such relief, including some teenagers and young adults who have grown up in the U.S., should be recognized as lawfully present.

Because these individuals should be able to enroll in the exchange, may be "applicable taxpayers," and have family members in their household who are eligible for the exchange and affordability credits, the IRS should include them among the lawfully present categories for health insurance premium tax credits under the ACA. We are making the same recommendation to HHS regarding the lawfully present categories used to determine eligibility for the Exchange. It is important that any individual eligible for the Exchange also have the opportunity to apply for premium tax credits. The IRS' definition of lawfully present should be consistent with those used by HHS for eligibility for health coverage.

It is also critical that the IRS employ this definition of lawfully present in determining eligibility for premium tax credits because lawfully present immigrants with incomes between 0% and 133% FPL who are ineligible for Medicaid must apply instead for premium tax credits through the exchange in order to obtain affordable insurance. As a result, many lawfully present immigrants can meet their responsibility of maintaining health insurance under the individual mandate only if insurance purchased through the exchanges is made affordable through premium and cost-sharing reductions offered under the ACA.

Finally, we recommend that, to avoid unnecessary burdens and increase administrative efficiency, the final rule should provide flexibility to states to include new lawfully present categories as they develop. Immigration law frequently changes, producing new statuses and document requirements. *The regulation should recognize that the list is not exhaustive.*

RECOMMENDATION:

Amend the definition of "lawfully present" by adding the following five categories of individuals:

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at http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf

> (1) who are lawfully present in the Commonwealth of the Northern Mariana Islands under 48 U.S.C. § 1806(e);
>
> (2) who are lawfully present in American Samoa under the immigration laws of American Samoa;
>
> (3) whose status makes them eligible to apply for work authorization under 8 C.F.R. §274a.12;
>
> (4) granted a stay of removal by administrative or court order, statute or regulations;
>
> (5) who are victims of human trafficking who have been granted continued presence;

and by revising the current category pertaining to asylum applicants as follows:

> (6) A pending applicant for asylum under section 208(a) of the Immigration and Nationality Act (INA) or for withholding of removal under section 241(b)(3) of the INA or under the Convention Against Torture, whose application has been accepted as complete.

RECOMMENDATION:

Provide that states may continue using existing administrative mechanisms for determining eligibility, as long as the rules are no more restrictive than federal law.

Exchange § 1.36B-1(k)

We recommend that the U.S. Department of Treasury ("Treasury") and the U.S. Department of Health and Human Services (HHS) clarify the definition of "Exchange" at § 1.36B-1(k). Unfortunately, by defining the Exchange to include both the individual market and the small business group market, also known as the SHOP, important distinctions between the different markets are blurred. One important distinction is that the ACA's immigrant restrictions are confined to the individual market; employers are already verifying immigration status of their employees, rendering secondary immigration verification in the small group insurance market unnecessary. We recommend that all ACA regulations, including in the final rule of this NPRM, clearly and consistently distinguish between the SHOP Exchange and the Individual Market Exchange, even where states choose to merge some functions. Otherwise, the efficiencies and needs of the different markets will not be adequately addressed by federal and state rulemaking.

RECOMMENDATION:

Amend §1.36B-1(k), "Exchange," to add the following sentence at the end: "Pursuant to §1401 of the ACA, "Exchange" as applied to those sections consistent with subparagraph (a), refers to the Individual Market Exchange, not the SHOP Exchange."

Applicable taxpayer § 1.36B–2(b)(4)

We appreciate the explicit clarification in Section 1.36B-2(b)(4) of the NPRM that individuals in a family who are not lawfully present may be applicable taxpayers so that lawfully present family members can seek and obtain the premium tax credits for which they are eligible.[4]

For future rulemaking, we recommend that the Treasury and HHS also develop specific rules on how applicable taxpayers without a Social Security Number will be able to claim and reconcile premium tax credits for eligible dependents that is consistent with confidentiality and privacy protections under the Internal Revenue Code and under Section 1411(g) of the ACA.

RECOMMENDATION:

As discussed earlier, we recommend clarification in the NPRM that the term Exchange refer to the Individual Market Exchange and not the SHOP exchange. Specifically, we recommend the following revisions to §1.36B–2(b)(4):

(4) Individuals not lawfully present or incarcerated. An individual who is not lawfully present in the United States or is incarcerated (other than incarceration pending disposition of charges) may not be covered by a qualified health plan through an ***Individual Market*** Exchange. However, the individual may be an applicable taxpayer if a family member is eligible to enroll in a qualified health plan. See sections 1312(f)(1)(B) and 1312(f)(3) of the Affordable Care Act (42 U.S.C. 18032(f)(1)(B) and (f)(3)) and § 1.36B–3(b)(2).

Lawfully present individuals who are applicable taxpayers § 1.36B–2(b)(5)

We appreciate the explicit clarification in the Section 1.36B-2(b)(5) of the NPRM that many lawfully present immigrants with incomes below 100% FPL, who are ineligible for Medicaid solely because of their immigration status, are eligible for premium tax credits and as a result should be treated as

[4] (4) Individuals not lawfully present or incarcerated. An individual who is not lawfully present in the United States or is incarcerated (other than incarceration pending disposition of charges) may not be covered by a qualified health plan through an Exchange. However, the individual may be an applicable taxpayer if a family member is eligible to enroll in a qualified health plan. See sections 1312(f)(1)(B) and 1312(f)(3) of the Affordable Care Act (42 U.S.C. 18032(f)(1)(B) and (f)(3)) and § 1.36B–3(b)(2).

an applicable taxpayer.[5] This will help ensure that exchanges accept and approve applications for premium tax credits from lawfully present individuals whose income is below 100% if they are ineligible for Medicaid.

To further improve clarity for eligibility for lawfully present individuals for premium tax credits, we recommend the following revisions to this section of the NPRM:

RECOMMENDATION 1:
To ensure that consistent terminology is used in the NPRM, we recommend that the language in this section be revised as follows:

(5) Individuals lawfully present. If a taxpayer's household income is less than 100 percent of the federal poverty line for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an ~~alien~~ ***individual who is*** lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—

RECOMMENDATION 2:
After 2014, Medicaid will be available for all citizens and many immigrants who earn less than 133% FPL. However, many lawfully present immigrants with incomes below 133% FPL will remain ineligible for Medicaid solely due to their immigration status, and as a result, must seek premium tax credits and cost sharing reductions in the exchange for affordable coverage. To ensure that such individuals are not automatically presumed to be ineligible for premium tax credits based on their income alone, we recommend that the IRS clarify in this section that not only are individuals with incomes below 100% FPL eligible for premium tax credits, but that lawfully present individuals with incomes between 0% FPL and 133% FPL are eligible for premium tax credits if they are ineligible for Medicaid. This clarification could help ensure that lawfully present immigrants can easily enroll in the affordable health coverage and tax credits for which they are eligible in a streamlined manner.

We recommend that the language in this section be revised as follows:
(5) Individuals lawfully present. If a taxpayer's household income is less than 100 percent of the federal poverty line ***or between 100 and 133 percent of the federal poverty line*** for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an ~~alien~~ ***individual who is*** lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—

Computation of premium assistance for taxpayers with incomes below 100% FPL § 1.36B–2(b)(7)

[5] (5) Individuals lawfully present. If a taxpayer's household income is less than 100 percent of the federal poverty line for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an alien lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—
(i) The taxpayer or family member is not eligible for the Medicaid program; and

We applaud the IRS for clarifying in the NPRM that the premium assistance amount for lawfully present immigrants and other eligible individuals with household incomes below 100% FPL should be determined using the taxpayer's **actual** income rather than an artificial income level.[6] This section codifies Congressional intent with regard to the implementation of Section 1401(c)(1)(B) of the ACA.[7] The proposed regulation will help ensure that low-income, lawfully present immigrants obtain the appropriate level of affordability credits that will make health coverage in the exchanges truly affordable.

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

One of the key goals of the ACA was to ensure that as many eligible individuals in the U.S. as possible could obtain quality health coverage that was affordable to them and their family. Many families today may have one or more members who have access to health insurance through work or through government programs, but others in the family remain uninsured due to the patchwork of eligibility rules or lack of affordable options. In addition to expanding and streamlining eligibility for health coverage for all members in a family, the ACA intended to encourage families to purchase health coverage for everyone, including young and healthy individuals, by making coverage affordable. We are concerned that the NPRM's proposed definition of affordable coverage at Section 1.36B-2(c)(3)(v)(A)(1) runs contrary to and undermines the goals and intent of the ACA by determining affordability of employer-sponsored coverage for a family based on the cost of self-only, rather than family coverage. Thus, for the reasons discussed below, we oppose the current definition of affordable coverage in the NPRM and recommend amending the definition to measure affordability based on the cost of family coverage, not self-only coverage, for determining whether employer sponsored insurance is minimum essential coverage.

Under the ACA, individuals eligible for "minimum essential coverage" are ineligible for premium tax credits and cost-sharing reductions in the insurance exchanges, a provision often referred to as the "firewall." Minimum essential coverage includes "eligible employer-sponsored plans," but employees will not be considered eligible for minimum essential coverage if the employee's required contribution to the cost of the premium exceeds 9.5 percent of household income. Because this coverage would be deemed unaffordable,

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[6] (7) Computation of premium assistance amounts for taxpayers with household income below 100 percent of the federal poverty line. If a taxpayer is treated as an applicable taxpayer under paragraph (b)(5) or (b)(6) of this section, the taxpayer's actual household income for the taxable year is used to compute the premium assistance amounts under § 1.36B–3(d).

[7] Senators Menendez and Baucus clarified in a colloquy on the Senate floor that the intent of language in Section 1401(c)(1)(B) is to ensure that "the size of those tax credits should be based on the families' actual income, not an artificial level of 100 percent of the poverty line. I expect this provision will be implemented as such." See CONG. REC., S2079 (daily ed. March 25, 2010)(Statements of Senators Menendez and Baucus).

employees and their dependents would instead be able to apply for coverage through the exchange and be eligible for premium tax credits and cost-sharing reductions to obtain affordable coverage and meet their requirement to maintain essential coverage.

Under the NPRM, however, affordable coverage under §1.36B-2(c)(3)(v)(A)(1) for an employee or his or her dependents (referred to as "a related individual" in the NPRM) is defined as coverage for which the premium cost for self-only coverage is less than 9.5% of household's income. Self-only coverage provides coverage to only one member of the household - often the primary subscriber who is the employee - and does not include coverage for dependents. While comparing one's income to the cost of self-only coverage would be a fair and accurate test for affordability for a single individual, the current definition fails to completely address what affordable coverage would be for a family of two or more.

Employees must often pay an additional contribution to the employer in order to add "related individuals," or dependents, to employer-sponsored coverage, which will vary based on the number and age of the dependents in need of coverage. Yet, under the NPRM's current definition, any additional amount of premium paid to cover one or more dependents under family coverage, regardless of the amount, is completely ignored in determining whether affordable coverage for dependents in a family is available to them through employer sponsored coverage or whether they instead should be eligible for premium tax credits to be able to obtain affordable coverage through the exchange. Thus, if the employee's contribution to the cost of <u>self-only</u> coverage is less than 9.5% of the entire household's income, <u>all</u> family members in that household will be found ineligible for premium tax credits and in effect are excluded from purchasing health insurance in the exchange, whether or not they could afford the employer sponsored coverage offered that would actually cover the family. Because the cost of premiums for family coverage through an employer will inevitably cost more than self-only coverage, a family will likely be required to pay more than 9.5% of their household income in order to cover all family members. When forced to choose between paying more than 9.5% of their household income to cover dependents and paying for basic necessities with no access to premium tax credits for eligible dependents, it is likely many dependents in working families – including spouses and children –will remain uninsured. For all these reasons, the NPRM's current definition would continue to keep members of a working family uninsured without access to employer sponsored coverage or affordable coverage through the exchange.

The ACA anticipates individuals with coverage through employer sponsored coverage will be able to maintain that coverage. For many families, employer sponsored coverage provides affordable quality health care for all its members. Yet the availability and accessibility of employer coverage for

employees as well as their dependents have been on the decline for many working families due to the rising costs of premiums as well as economic downturn.[8] By failing to accurately account for the affordability of employer-sponsored family coverage, an estimated 3.9 million non-working dependents could be found ineligible for premium tax credits and cost-sharing reductions.[9] On average, these family members would have to pay 14 percent of their household income to access the employer coverage.[10] In addition, 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. [11] 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.[12] An employer will have little incentive after 2014 to ensure family coverage under an employer sponsored plan is affordable to its employees, let alone to make sure family coverage is offered, if affordability of employer coverage is measured against the cost of self-only rather than family coverage. This will likely lead to further unavailability and inaccessibility of employer sponsored coverage for dependents in a family. As a result, millions of children and spouses of working families will be left in "no man's land" for affordable coverage options and will simply remain uninsured after 2014.

RECOMMENDATION:

We recommend that the definition of affordable coverage at Section 1.36B-2(c)(3)(v)(A)(1) of the NPRM be amended so that whether an individual is determined to be ineligible for premium tax credits due to access to minimum essential coverage through an employer be based on whether the employee's required contribution for employer sponsored coverage to cover the employee and any related individuals (often referred to as family coverage), not an artificial contribution for self-only coverage, is more than 9.5% of the taxpayer's household income. This determination should be applied for the purposes of the firewall as well as the affordability exemption under the individual mandate.

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[8] For instance, the latest Kaiser Family Foundation 2011 Employer Health Benefits Survey found private health insurance premiums, in particular ESI, continue to increase and that employers continue to shift the rising costs of health insurance to their workers. See *Employer Health Benefits: 2011 Survey*, Kaiser Family Foundation and Health Research & Educational Trust, 2011, available at: http://ehbs.kff.org/pdf/2011/8225.pdf (accessed October 2011). In addition, despite their high level of participation in the nation's workforce, only 38.2% of Latinos had access to ESI in 2010 according to the U.S. Census.

[9] Larry Levitt and Gary Claxton, *Measuring the Affordability of Employer Health Coverage*, Kaiser Family Foundation, August 24, 2011.

[10] Ibid.

[11] Matthew Buettgens, Genevieve M. Kenney, *Update of Implications of Relying on a Single-Only Affordability Test for Families*, The Urban Institute, May 27, 2011. (unpublished memorandum)

[12] Ibid.

Below are suggested amendments to Section 1.36B-2(c)(3)(v)(A)(1) of the NPRM to incorporate this recommendation:

> (v) Affordable coverage—(A) In general—(1) Affordability. Except as provided in paragraph (c)(3)(v)(A)(2) of this section, an eligible employer sponsored plan is affordable for an employee ***and*** ~~or a~~ related individual***s*** if the portion of the annual premium the employee must pay, whether by salary reduction or otherwise (required contribution), for ~~self-only~~ coverage ***for the employee and related individuals*** for the taxable year does not exceed the required contribution percentage (as defined in paragraph (c)(3)(v)(B) of this section) of the applicable taxpayer's household income for the taxable year.

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

We support the special rule for continuation coverage provided in Section1.36B-2(c)(3)(iv), which ensures that an individual must have actually enrolled in the continuation coverage in order for the exchange to determine that the individual is eligible for minimum essential coverage, and thus ineligible for premium tax credits. This special rule properly uses the Treasury's regulatory authority to fulfill the intent of the ACA that individuals have access to affordable health coverage. The special rule also fulfills the intent of the Consolidated Omnibus Budget Reconciliation Act (COBRA) to protect access to health coverage for individuals experiencing a transition in employment that results in the loss of group health coverage.

RECOMMENDATION:

Support including §1.36B-2(c)(3)(iv) in the final rule to help ensure an individual will be found to be eligible for minimum essential coverage only if the individual actually enrolls in continuation coverage.

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

NILC supports the employee safe harbor rule at Section 1.36(B)-2(c)(3)(v)(2) of the NPRM, which protects an employee's access to affordable coverage through the exchange once the exchange determines that the employee's eligible employer-sponsored plan is not affordable for the entire plan year. The provision will protect individuals from having to change plans in the middle of a plan year, with potential disruptions in care, network changes, and other plan differences. The safe harbor is also important because there is no special enrollment period for employees and related individuals for employer sponsored insurance due to a change in household income during the plan year. The proposed rule will avoid situations where individuals and families are left without access to affordable coverage because they could not foresee an income increase.

RECOMMENDATION:

Support Section 1.36B-2(c)(3)(v)(A)(2), which provides an employee safe harbor that allows an employee to obtain and keep coverage through the

exchange for the plan year, regardless of change in income, once the exchange has made a determination that the eligible employer-sponsored plan is not affordable at the time of enrollment in the exchange. Recommend adoption of this section in the final rule.

Minimum Value §1.36(B)-2(c)(3)(vi)

We support that the minimum value calculation is to be determined under regulations issued by the Secretary of Health and Human Services. However, because of the important role this calculation will have in determining access for the premium tax credits for millions of working families, we recommend that a strong minimum value calculation be put into place. An employer plan offering the minimum value should be offering benefits at least equal in coverage to a bronze plan available in the exchange. While we recognize that employer-sponsored health benefit plans and plans offered in the large group market do not need to meet all the requirements of the qualified health plans (QHPs) offered through the exchanges and that some requirements for QHPs in the exchange which will apply to plans in the small group market but not the large group market, we believe the intent of Congress was to ensure consistency of the actuarial determinations among affordable coverage options to level the playing field for consumers seeking health coverage. For instance, Section 1302(d)(2)(C) of the ACA requires the Secretary of Health and Human Services to apply the same rules in determining the actuarial value of a QHP offered in the exchanges and the total allowed costs of benefits provided under a group health plan or health insurance coverage. In order to meet the requirements of the statute, the calculation of whether an employer-sponsored plan is providing minimum value must be based on the cost of coverage of the essential benefits, whether or not the plan covers all the essential benefits.

RECOMMENDATION:

The Treasury should recommend that HHS include the costs of covering all essential health benefits in the calculation of whether an employer-sponsored plan provides minimum value and that the minimum value should be at least equal to a bronze plan offered in an exchange.

Computing the premium assistance credit amount § 1.36B–3

Under Section 1201(4) of the ACA, child-only coverage must be offered by qualified health plans in the exchanges. NILC strongly supports this requirement due to the number of mixed status families in the U.S. and to ensure eligible members of those families are able to seek affordable coverage. However, the NPRM does not address the computation of a premium tax credit for child-only coverage. We recommend that the Department of Treasury and the Department of Health and Human Services develop specific rules on how eligible individuals for child-only coverage can fairly and easily obtain premium tax credits as well as cost-sharing reductions for eligible members based on the taxpayer's household income.

RECOMMENDATION:
We recommend that future Treasury rulemaking address the process for applying for, claiming and calculating a premium tax credit for child-only coverage. We also recommend that in the absence of specific rules for premium tax credits for child-only coverage that the final rule for premium tax credits explicitly protects the availability of premium tax credits for children in complex family situations.

Premiums paid by others §1.36B-3(c)(2):
We support Section 1.36B-3(c)(2) of the NPRM recognizing that premiums paid by another person related to the taxpayer are treated as paid by the taxpayer.[13] This provision will help ensure that payments for eligible individuals in mixed status families are determined accurately, and that eligible individuals can receive premium tax credits regardless of which member of the taxpayer's family pays for the coverage of the eligible family members.

Income counting rules for families including individuals not lawfully present § 1.36B–3(l)(2)
We agree with the inclusion in Section 1.36B-3(l)(2) of the NPRM of the special income counting rules for mixed status families when determining premium tax credits per Section 1401(e)(1)(B) of the ACA.[14] The formula provides for a realistic assessment of the household's actual income and a determination of the number of family members who must be supported by that income to ensure that eligible members of the family have access to affordable health coverage.

As authorized by Congress in Section 1401(e)(1)(B)(ii), we recommend that Treasury adopt in the final rule a "comparable method" for income counting rules for premium tax credits for mixed status families rather than adhering strictly to the "statutory method" described in Section 1.36B-3(l)(2)(i). The primary concern with the statutory method is not its mathematical result, but that implementation of the statutory method violates the confidentiality (§1411(g)) and non-discrimination (§1557) requirements in the ACA and in Section 6103 of the Internal Revenue Code, and thereby create barriers for

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[13] (2) Premiums paid for the taxpayer. Premiums another person pays for coverage of the taxpayer, taxpayer's spouse, or dependent are treated as paid by the taxpayer.

[14] (2) Revised household income computation—(i) Statutory method. For purposes of paragraph (l)(1) of this section, household income is equal to the product of the taxpayer's household income (determined without regard to this paragraph (l)(2)) and a fraction—
(A) The numerator of which is the federal poverty line for the taxpayer's family size determined by excluding individuals who are not lawfully present; and
(B) The denominator of which is the federal poverty line for the taxpayer's family size determined by including individuals who are not lawfully present.
(ii) Comparable method. [Reserved]

eligible individuals to seek premium tax credits. Specifically, under the statutory method, individuals who are eligible for premium tax credits will have to accurately declare not only the number of individuals in their family, but exactly how many of them are not lawfully present in order to provide the correct number to include in the numerator. Thus agencies will be required to solicit, collect, and record information about the status of non-applicants and share that information as needed to administer the premium tax credits.

Under Section 1411(g) of the ACA as well as long-standing HHS policies,[15] individuals in the household who are non-applicants should not be required to provide their own immigration status or other personal information since they are not seeking the tax credit or other benefits. These inquiries, which are not otherwise necessary to determine the eligibility of eligible family members for the exchange or affordability credits, are likely to deter **eligible** individuals in mixed status families from applying for premium tax credits, leaving these individuals without affordable coverage and uninsured. Even in the event that the exchange or HHS is required to solicit this information from non-applicants, in violation of Section 1411(g), implementation of the statutory method would also require the IRS to collect, record, and store information regarding immigration status of non-applicants, which violates its own long-standing confidentiality policies. Moreover, the solicitation and collection of information from non-applicants in order to obtain premium tax credits for eligible individuals from the IRS could have the effect of deterring these families from filing taxes. Finally, it is unclear how eligibility based on the statutory method will be measured during the IRS' reconciliation process for tax credits the following year. The IRS must ensure that eligible individuals who were determined under the statutory method are not incorrectly assessed for a tax refund or penalty at the time of reconciliation. This creates additional complexity and risk of error not only at the initial eligibility determination of the premium tax credit, but also at reconciliation.

To avoid these unintended consequences, we recommend that the final rule indicate that a comparable method as authorized by Section 1401(e)(1)(B)(ii) will be used to calculate income eligibility for premium tax credit. We recommend that the IRS adopt the comparable income-counting and family size determination procedures used by many states in their Medicaid program be used in calculating income eligibility for premium tax credits for mixed status families: count the taxpayer's entire household income as defined in §1401(d)(2) of the ACA, divide it by the number of individuals in the family size as defined in §1401(d)(1), and determine income eligibility for premium

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[15] See e.g., U.S. Department of Health and Human Services, *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits* (2000)(commonly referred to as the "Tri-Agency Guidance") http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html

tax credits only for those individuals in the family who are otherwise eligible. This formula yields the same mathematical results as the statutory formula. Yet this recommended comparable method is significantly less complicated and less prone to errors to implement than the formula in the statutory method and would avoid the concerns implementing the statutory method raised above. Moreover, many state and federal agencies are familiar with this more straightforward methodology. Finally, applying consistent income calculations for mixed status families in determining eligibility for Medicaid and the premium tax credits facilitates accurate eligibility determinations, reduces confusion and administrative burdens, and helps to simplify a state's business rules in the new exchanges.

Thus, to simplify and correctly determine eligibility, encourage participation of eligible individuals, ensure accurate reporting, and reduce administrative burdens, the final rule should adopt a comparable method for income eligibility determinations for premium tax credits in mixed status families as authorized by Congress. We recommend that the comparable method for calculating premium tax credits align with existing income counting rules commonly used in Medicaid for mixed status families. The final rule should recommend the adoption of this comparable method in place of the statute's first alternative method in order to promote confidentiality and non-discrimination of eligible individuals and ensure accurate and fair calculation of premium tax credits for eligible individuals in a mixed status family so that health coverage is truly affordable.

RECOMMENDATION:

We recommend that Section 1.36B-3(l)(2) be amended as follows:

(2) Revised household income computation—(i) ***For individuals who are lawfully present and eligible for premium assistance, the taxpayer's household income as required in paragraph (g) of this section is computed by comparing the sum of the household income, including incomes of individuals who are not lawfully present, with the taxpayer's actual family size.***
(ii) Statutory method. For purposes of paragraph (l)(1) of this section, household income is equal to the product of the taxpayer's household income (determined without regard to this paragraph (l)(2)) and a fraction—
(A) The numerator of which is the federal poverty line for the taxpayer's family size determined by excluding individuals who are not lawfully present; and
(B) The denominator of which is the federal poverty line for the taxpayer's family size determined by including individuals who are not lawfully present.
(***iii***) Comparable method. [Reserved]

Information reporting by Exchanges § 1.36B–5

The IRS has a long-standing policy of declining to collect information from taxpayers about their citizenship or immigration status because this information is irrelevant to an individual's primary responsibility to file and pay taxes. Nothing in the ACA affects this rule. NILC strongly supports this policy as it encourages and allows more individuals to meet their tax obligations. The NPRM should codify this long-standing policy and prohibit the collection and sharing of immigration information of applicable taxpayers between the exchange and the IRS for purposes other than the administration of the premium tax credit. To promote maximum compliance with the ACA as well as tax laws, it is essential that exchange of information between HHS, the exchanges, and the IRS for determining premium tax credits for eligible individuals or other ACA-related purposes be strictly limited and clearly defined. In addition, the NPRM should be strengthened by explicitly including reference to Sections 1411(g)(2) and (h) of the ACA which prohibit using information provided to the IRS from the exchange(s) for any purpose other than "ensuring efficient operation of the Exchange." In fact, this prohibition on the disclosure of information appears to be stronger than the Internal Revenue Code's ("Code") confidentiality protection at § 6103.

There are four million citizen children of mixed-status families, approximately three-quarters of whom are U.S. citizens by birth. One in four (25 percent) of these citizen children with at least one undocumented parent is uninsured, compared to an uninsured rate of one in twelve (8%) for citizen children with U.S.-born parents. It is critical that the Treasury, HHS, and the exchanges ensure that protections under §1411(g)(2) and (h) or § 6103 of the Code are strictly adhered so that all individuals will be able to seek and obtain the affordable health coverage for which they are eligible.

RECOMMENDATION:

Amend § 1.36B-5(a) to require exchanges to strictly define and limit the use and disclosure of immigration status information for any purpose other than "ensuring efficient operation of the Exchange," as set forth in §§ 1411(g)(2) and (h) of the ACA.

Thank you for considering our comments. If you have any questions, please feel free to contact me at (213) 639-3900 ext. 114 or at ambegaokar@nilc.org.

Sincerely,
/s/
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