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VIA ELECTRONIC SUBMISSION AT REGULATIONS.GOV

August 12, 2012

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 Final Regulations
77 Federal Register 30377 (May 23, 2012)

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 (ACA), 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 Final regulations for the Health Insurance Premium Tax Credit (77 Fed. Reg. 30377, May 23, 2012) (hereafter referred to as "Final Rule") to help the Internal Revenue Service (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 updated definition of family and family size in the Final Rule. In particular, we appreciate the clarification that for purpose of calculating premium tax credits, family and family size should include individuals who are exempt from, as well as who are not subject to, the requirement to maintain minimum essential coverage under Section 5000A (or Section 1501 of the ACA). This will help ensure alignment with the definition of applicable taxpayer at Section 1.36B-2(b)(4) and affordability for eligible family members in immigrant families.

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

The Final Rule 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 definition of "lawfully present" at 45 CFR § 152.2 provides a helpful starting point, we re-submit our recommendation in the National Immigration Law Center's comments to the Notice of Proposed Rulemaking for Health Premium Tax Credits (76 Fed. Reg. 50931 (August 17, 2011)) to expand the definition of lawfully present. Specifically, we recommend that three other lawfully present immigration categories be added to the definition of lawfully present at 1.36B-1(g): (a) certain victims of trafficking, (b) asylum applicants, and (c) individuals granted a stay of removal, as described below.

At a minimum, we request the IRS include individuals who are lawfully present in the Commonwealth of the Mariana Islands and American Samoa in the IRS' definition of "lawfully present," because they were omitted in the definition at 45 CFR §152.2 due to a technicality. Specifically, these two categories were omitted from the PCIP definition of lawfully present (at 45 CFR § 152.2) 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.

RECOMMENDATION:

Amend the definition of "lawfully present" at 1.36B-1(g) by adding the following five categories of individuals:

(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.

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

We support the definition of applicable taxpayer at 1.36B-2(b) in the Final Rule. However, we request the term "alien" in 1.36B-2(b)(5) be stricken and replaced with "an individual." This will ensure consistent terminology to refer to individuals who are or are not lawfully present is used throughout the Final Rule (see e.g., 1.36B-2(b)(4) or 1.36B-3(l)) and with the statutory language of the the ACA, without changing the meaning or intent of the rule.

RECOMMENDATION:

Amend 1.36B-2(b)(5) 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—

Applicable taxpayer § 1.36B–2(b)(4)

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

We recommend for future rulemaking that the IRS develop specific rules on how applicable taxpayers with Tax Identification Numbers (TINs) other than Social Security Numbers will be able to claim and reconcile premium tax credits for eligible dependents in a manner that is consistent with Section 6103 of the Internal Revenue Code.

Minimum Essential Coverage § 1.36B-2(c)

We support and appreciate the clarification in the Final Rule that future regulations under Section 5000A(f), defining minimum essential coverage, will unlikely consider "government-sponsored health benefit programs that offer only very limited benefits" as meeting the definition of minimum essential coverage. 77 Fed. Reg. 30377, 30380. To do otherwise would contradict the intent of the ACA and purpose of the Exchange.

Affordable coverage for "related individuals" §1.36B-2(c)(3)(v)(A)(1)

We appreciate the IRS taking into further consideration how to determine whether employer sponsored coverage is affordable or meets the minimum value for related individuals of a taxpayer. (See 77 Fed. Reg. 30377, 30380).

RECOMMENDATION:

For all the reasons stated in our comments to the NPRM on the Health Premium Tax Credit, submitted October 31, 2011, we continue to recommend amending the definition to measure

affordability based on the cost of ***family***, rather than self-only, coverage, for determining whether employer sponsored insurance is minimum essential coverage for "related individuals."

Applicable Benchmark Plan §1.36B-3(f)

We appreciate the IRS including in the Final Rule additional information regarding the application of Section 36B of the Internal Revenue Code to child-only coverage as required by Section 1201(4) of the ACA. We greatly appreciate the addition of section 1.36B-3(f)(1)(i)(C) indicating an "applicable benchmark plan" could include a plan whose "coverage family includes only one individual." The preamble discussion at 77 Fed. Reg. 30377, 30382, and the example of child only coverage provided at 77 Fed. Reg. 30377, 30391 provides further clarification as to how an applicable taxpayer may be eligible for a premium tax credit if only his/her dependent is enrolled in a Qualified Health Plan. We recommend that the IRS and HHS continue to develop additional regulations or guidance for child-only coverage to ensure eligible children are enrolled in affordable coverage in the Exchange.

Premiums paid by others §1.36B-3(c)(2):

We appreciate that the Final Rule will treat premiums paid by another person related to the taxpayer as paid by the taxpayer. Section 1.36B-3(c)(2) will help mixed status families and split families be able to enroll eligible members in affordable coverage in the Exchange.

Income counting rules for families including individuals not lawfully present § 1.36B–3(l)(2)

We appreciate consideration of a "comparable method" for income counting for mixed status families as allowed by Section 1401(e)(1)(B)(ii) of the ACA.[1]

Although Section 1.36B-3(l)(2) of the Final Rule adopts the "statutory method" for income counting per 1401(e)(1)(B)(i) of the ACA, we continue to express our concern with use of the "statutory method." Our fundamental concerns with this method are that the application of the formula would require non-applicants to provide information they are not otherwise required to provide under the ACA, and the formula would require the IRS to collect immigration status contrary to its long-standing policies and practices. (See e.g., preamble regarding Information Reporting in the Final Rule at 77 Fed. Reg. 30377, 30385). Specifically, under the statutory method, individuals who are eligible for premium tax credits will have to inform the IRS not only of 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 of the calculation. Thus the IRS and the Exchange will be required to solicit, collect, and record information about the status of non-applicants and share that

[1] (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]

information as needed to administer the premium tax credits. This barrier would likely prevent eligible individuals in mixed status families from applying and enrolling for coverage in the Exchange.

The Final Rule did not adopt our recommendation to use the Medicaid income calculation for a comparable method because it "may not reach the same result as the statutory method." (77 Fed. Reg. 30377, 30383) We would appreciate the opportunity to discuss with the IRS the gaps in our recommendation and to share other suggestions for a "comparable method" for this income counting rule due to the concerns with the "statutory method" described above. We greatly appreciate the Final Rule stating that "the Commissioner may provide a comparable method in additional published guidance." (See Section 1.36B-3(l)(2)(ii), 77 Fed. Reg. 30377, 30383). We look forward to working with the IRS to hopefully develop a "comparable method" for income counting rules that will encourage and make it simpler for eligible family members in mixed status families to apply for and receive the correct premium tax credit.

Information reporting by Exchanges § 1.36B–5

We appreciate the IRS clarifying that no additional confidentiality protections for immigration status is needed in the Final Rule because "the IRS does not require information on immigration status of any individual in order to administer the premium tax credit and will not obtain this information. The Exchange [not the IRS] will verify that an individual is a citizen or lawfully present and eligible to enroll in coverage through the Exchange." 77 Fed. Reg. 30377, 30385. We fully support this analysis and look forward to working with HHS and IRS to ensure that subsequent ACA implementing regulations do not conflict with IRS policy.

Use of TIN in Information reporting by Exchanges §1.36B-5(a)(4)

The ACA requires that the Tax Identification Number (TIN) of individuals be used for the purpose of ensuring compliance with minimal essential coverage requirements. IRS as well as HHS must allow for the full range of TINs in regulations and cannot limit this inquiry only to Social Security Numbers. There are a variety of situations where an eligible taxpayer or eligible individual may have a TIN other than a Social Security Number or may not yet have applied for a Social Security Number. For instance, certain lawfully present individuals have lawful immigration status but are in the process of obtaining or do not need a Social Security Number for work purposes. Domestic violence survivors who are petitioning for status under the Violence Against Women Act may also lack a Social Security Number but are "lawfully present" individuals.

In order to ensure consistency in terminology, we recommend that the Final Rule requires the Exchange to provide to IRS the Tax Identification Number (TIN), rather than the Social Security Number, for specified individuals in Section 1.36B-5. In fact, we recommend the IRS include the term TIN rather than Social Security Number in any future IRS rule regarding the premium tax credit and other ACA information reporting requirements with the IRS to be consistent with statutory language and to avoid excluding eligible individuals unintentionally.

Furthermore, there is no reference to Social Security Numbers in the statutory language of Section 1401 of the ACA/ Section 36B of the Internal Revenue Code (IRC). More specifically, Section 36B(f)(3)(D) of the IRC (as created by Section 1401(a) of the ACA) states the Exchange shall provide the IRS with "*the name, address, and **TIN** of the primary insured and the name and **TIN** of each other individual obtaining coverage under the policy*." (emphasis added).

RECOMMENDATION:
To ensure consistency with the statutory language at Section 36B(f)(3)(D) of the IRC, amend Section 1.36B-5(a)(4) as follows:

(4) The name, address, and ~~Social Security Number (SSN)~~ ***Tax Identification Number (TIN)*** of the primary insured and the name and ***TIN*** ~~SSN or adoption taxpayer identification number~~ of each other individual covered under the policy;

ADDITIONAL REQUEST FOR COMMENTS

The Final Rule requests comments on a few specific issues related to Section 36B. We are providing comments on the following two requests for comments:

A. Wellness Incentives and Affordability

The Final Rule requests comments on how wellness incentives provided by an employer should affect "the affordability of eligible employer-sponsored coverage for employees and related individuals." 77 Fed. Reg. 30377, 30380

RECOMMENDATION:
We strongly recommend that any wellness incentive provided by an employer should not be a factor in any way when determining affordability of eligible employer-sponsored coverage for the purpose of implementing Section 36B.

Congress intended the ACA to accomplish multiple goals; to ensure and encourage employers to provide affordable health insurance to their employees, to allow uninsured individuals purchase affordable health insurance through an Exchange, and to begin to change how the health care system as a whole performs. This last goal includes efforts to improve quality of care, improve health outcomes, and reduce costs; all of which requires increased focus on prevention and wellness. The wellness incentives provided by employers is only one of the many tools in the ACA that can help achieve the ACA's goals of a health care system that takes care of those who are healthy and prevents individuals from getting sick in the first place. Yet the wellness incentives must work together with access to affordable health care services, which affordable health insurance provides. As such, affordability of employer sponsored coverage should be evaluated on it is own, without wellness incentives, if the goal is to ensure health insurance is truly affordable to everyone. Employers should not be given an incentive to minimize the importance of providing

affordable health insurance to its workers and instead to replace affordable health insurance and access to health care services with wellness incentives.

B. Calculation of advance premium tax credit for married couples who cannot file jointly at the end of the tax year due to special circumstances

The Final Rule requests comments on "the documentation that a taxpayer could provide to establish that he ors he cannot file a joint tax return because of the domestic abuse, abandonment, or other similar circumstances," to include in future regulations on the eligibility of a married taxpayer for premium tax credits who is filing separately at the end of the tax year. 77 Fed. Reg. 30377, 30385

RECOMMENDATION:

We recommend that the IRS allow the taxpayer in this situation to self-attest to the circumstances that prevent him or her from filing a joint return for the sole purposes of calculating his or her premium tax credit. Throughout HHS' regulations regarding determining eligibility to enroll in a qualified health plan and be eligible for a premium tax credit, self-attestation is a preferred method for documenting an individual's eligibility criteria. However, when an individual's self-attestation conflicts with other information provided by the individual or with other sources of data, the self-attestation will be compared and may only be accepted if it is "reasonably compatible" with other information. If not, the individual will be asked to provide additional documentation.

We recommend that the IRS follow a similar approach with regards to documentation required by a taxpayer who is unable to file a joint return due to special circumstances. First, this approach would be consistent with eligibility procedures used by the Exchange. Second, this approach would reduce administrative burden and costs on the IRS that would be necessary if specific documentation had to be provided by the taxpayer and reviewed and approved by the IRS. For instance, notice and appeal rights would need to be created by the IRS so that taxpayers could appeal denials of a requested exemption.

Finally, allowing self-attestation with the ability to ask for further documentation in the event the self-attestation is not reasonably compatible with other information known to the IRS would address the inherent complexity in attempting to determine what specific documentation would adequately prove a taxpayer's special circumstances. For instance, a taxpayer may be unable to file jointly due to domestic violence; however, requiring the taxpayer to provide a police report or copy of a restraining order is yet another barrier a domestic violence survivor must face in his/her recovery and reinforces the stigma of being a domestic violence survivor and having to prove, yet again, the abuse suffered. On a more practical note, family law varies state to state so that documentation to prove special circumstances such as domestic violence or abandonment may vary or may not exist in a specific state. It would be a challenge for the IRS to find documentation of special circumstances that is uniform and consistent among the states.

For all these reasons, we recommend that the IRS create a new IRS form and publication specific to the premium tax credit eligibility and calculation for married taxpayers. Within this form, a taxpayer would be able to request an exemption if they cannot file a joint return and self-attest to the special circumstances, if any, for the exemption. If review of the tax return and other information available to the IRS contradicts the self-attestation, the IRS could request additional documentation be provided by the taxpayer seeking the exemption.

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/
Sonal Ambegaokar
Heath Policy Attorney
National Immigration Law Center