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November 8, 2013

CC:PA:LPD:PR (REG-132455-11)

Room 5203

Internal Revenue Service

PO Box 7604, Ben Franklin Station

Washington, DC 20044

RE: RIN 1545-BL31

**Comments on IRS Notice of Proposed Rulemaking Concerning
Information Reporting of Minimum Essential Coverage
78 Fed. Reg. 54986 (Sept. 9, 2013)**

Dear Acting Deputy Commissioner Maloy:

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, labor unions, 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.

NILC submits the following comments in response to the notice of proposed rulemaking concerning information reporting on minimum essential coverage (78 Fed. Reg. 54986 (Sept. 9, 2013)), pursuant to Section 1502 of the Patient Protection and Affordable Care Act (ACA).

INFORMATION REPORTING UNDER § 1.6055-1

A. Collection of Information

NILC acknowledges and appreciates that IRS has taken into account the difficulty insurers may face collecting certain information from the responsible individual and covered dependents, but we also think that some of the language in the guidance may fall short in recognizing particular issues as they pertain to covered individuals from mixed-status families, which contain individuals with different immigration and citizenship statuses (*e.g.* immigrant parents with U.S. citizen children). One issue we would like to highlight is an expansion of data collection that we believe is particularly harmful to mixed-status families and inconsistent with the

LOS ANGELES (Headquarters)
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC
1121 14th Street, NW, Suite 200
Washington, DC 20005
202 216-0261
202 216-0266 fax

www.nilc.org

general principles of the ACA. Additionally, we understand the agency’s concern for finding “the most efficient way for individuals to avoid the need for follow up,” and we would suggest that the guidance could be improved by taking into account additional information not contemplated by the proposed rule.

1. Collection of data from “primary insured” and “responsible individual”

The language in the proposed rule at § 6055-1(d)(1)(ii)–(iii) expands the data collection authorized in the statute in ways that may deter mixed-status families from obtaining health insurance for eligible family members. Under this subsection, the proposed rule requires information on the return to include:

- (ii) Name, address, and TIN, or date of birth if a TIN is not available, of the responsible individual;
- (iii) Name and TIN, or date of birth if a TIN is not available, of each individual covered under the policy or program

Under the definitions section of this rule, the term “responsible individual” is defined in subsection (b)(11) as “a primary insured, employee, former employee, uniformed services sponsor, parent, or other related person named on an application who enrolls one or more individuals in minimum essential coverage.” Thus the plain reading of this proposed rule would require that the Section 6055 reporting include the TIN of a “responsible individual” parent who is not covered under the policy or program, including Medicaid or the Children’s Health Insurance Program (CHIP). Such collection is not authorized under the Section 1331 of the statute, which states that the reported information must contain “the name, address and TIN of the primary insured and TIN of each other individual obtaining coverage under the policy.”¹ This language clearly contemplates that the collection of a TIN relates only to individuals covered under the policy.

The language of the proposed rule is also inconsistent with the preamble, which states that there is some information—name and address—that is necessary for a broader group, and TINs that are only necessary for covered individuals. The preamble makes clear on Section 2(a) on page 54989 that

[t]he proposed regulation provide that section 6055 information return must include the name of each individual enrolled in minimum essential coverage and the name and address of the primary insured or other related person (for example, a parent or spouse) who submits the application for coverage (the responsible individual). . . . The return also must report the TIN and months of coverage for each individual who is covered under the policy or program

¹ 26 U.S.C. § 6055(b)(1)(B)(i) (2012).

Thus the language of the proposed regulation should be changed to be consistent with this preamble language as well as the authorization in the statute. Additionally, requiring a TIN from a parent enrolling a child for health coverage in a government-funded program such as Medicaid or CHIP would run contrary to Medicaid and CHIP regulations limiting the collection of Social Security numbers (SSN) of nonapplicants at 42 C.F.R §§ 435.907(e)(3) and 457.340(b) as well as guidance issued by the Department of Health and Human Services and the Department of Agriculture that state that such collection from nonapplicants in government-funded programs implicates discrimination under Title VI of the Civil Rights Act of 1964.²

RECOMMENDATION: Section 1.6055-1(d)(1)(ii) should be changed to be consistent with the statute and preamble:

- (ii) Name, and address, ~~and TIN, or date of birth if a TIN is not available,~~ of the responsible individual;
- (iii) Name, and TIN, or date of birth if a TIN is not available, of each individual covered under the policy or program;

2. Collection of information from dependents

NILC appreciates that the proposed regulation allows an alternative to TINs for covered individuals, but we would suggest further changes to improve the language. Under Section 1.6055-1(d)(iii) of the proposed rule, an insurer must include in its return to IRS the “Name and TIN, or date of birth if a TIN is not available, of each individual covered under the policy or program” The preamble gives more guidance on the alternative method, stating that

As a backstop to reporting a TIN, the proposed regulations allow reporting entities to report date of birth [DOB] if a TIN is not available. This alternative should not be used, however, unless the reporting entity has made reasonable efforts to obtain the information by requesting that a covered individual provide the TIN.

This language implicates subsections (h)(1) and (h)(2) of the proposed regulations, which invokes the “reasonable cause” waiver found in an existing statute and detailed regulations concerning the steps an entity must follow in order to avoid penalties, a

²*Policy Guidelines Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Application for Medicaid, State Children’s Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, a tri-agency letter to state health and welfare officials from Olivia Golden, Assistant Secretary, Administration for Children and Families; Nancy-Ann Min DeParle, Administrator, Health Care Financing Administration; Shirley R. Watkins, Under Secretary, Food, Nutrition, and Consumer Services; and Thomas Perez, Director, Office for Civil Rights, U.S. Dept. of Justice, www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html.

process that includes requesting the TIN on three occasions at prescribed times over two calendar years.³

Although the rule is written generally from the perspective of the insurers and their requirements, some acknowledgment of the covered population can aid in making the process more efficient for the insuring entities as well as for the covered individuals. To be clear, the allowance for use of a DOB instead of a TIN does move toward making the system more effective, but the language explaining it should also take into account that not all individuals may have a TIN, particularly a Social Security number (SSN), or be able to obtain one.

Immigrants face particular difficulty in obtaining TINs because of the eligibility requirements for the various types of TINs. First, certain lawfully present non-citizens are not eligible for an SSN, including certain battered immigrants, Cuban or Haitian entrants, nonimmigrants whose visa does not permit them to work, some children under 14 years old whose application for asylum or withholding of deportation/removal has been pending for 180 days, and some children who applied for Special Immigrant Juvenile status. Individuals who are undocumented are also ineligible for an SSN. Individuals not eligible for an SSN may obtain an Individual Taxpayer Identification Number (ITIN) for tax filing purposes, but the collection of ITINs by insurers, especially Medicaid and CHIP agencies, would be inconsistent with final Medicaid and CHIP regulations limiting collection of TINs to the collection only of SSNs, and only in certain circumstances.⁴

Even in a situation where insuring entities were permitted to collect ITINs from individuals ineligible for SSN, if the individual has not obtained one for tax filing purposes already, there are several hurdles that may delay or prevent obtaining an ITIN. First, when an individual is not qualified for an SSN, that individual can only apply for an ITIN by filing a Form W-7 with a federal income tax return. Thus an individual that is new to the country, or has previously never needed to file taxes, would not have an ITIN until the next tax-filing year. Second, to obtain an ITIN, an individual must submit two certified documents from a list of thirteen options.⁵ This may cause a delay or prevention in obtaining an ITIN yet still require an insurer to follow the steps necessary to meet the “reasonable cause” waiver steps even when there is no number that can be obtained.

The problems that arise from such a situation are two-fold: first, more administrative steps are required for the insurer, making it a less efficient process; and second, the process required to meet the “reasonable cause” standard may serve to deter eligible non-citizens from obtaining employer-sponsored insurance, which is not limited by immigration or citizenship status. Unnecessary requests for SSNs or other TINs have been shown to deter participation of immigrants in government programs and activities.

³ 26 U.S.C. § 6724 (2012); 26 C.F.R. § 301.6724-1 (2013).

⁴ 42 C.F.R. § 435.910. [find other cites]

⁵ *Revised Application Standards*, IRS, March 19, 2013, <http://www.irs.gov/Individuals/Revised-Application-Standards-for-ITINs>.

SSNs have been used erroneously by government agencies as a proxy for immigration status, and lack of SSNs has been used to draw inferences about unlawful status. Requiring multiple attempts to obtain a TIN may be perceived as onerous and invasive and deter eligible non-citizens from obtaining health insurance due to fear of immigration enforcement. Because an insurer is subject to penalties under sections 6721 and 6722 of the Internal Revenue Code for failing to report, there is a strong incentive for the insurers, including employers in the case of self-insured plans, to be overly intrusive in their methods, which itself may be a significant deterrent to individuals obtaining health care for themselves or their family. To promote simplified enrollment as well as equity and fairness, it is important that policies not deter and disadvantage eligible individuals or their family members from enrolling in coverage that is more easily available to other employees' dependents because they are citizens.

RECOMMENDATION: The regulatory language should provide more protection for insurers so that they are not required to follow through with “reasonable cause” waiver requirements when a covered individual provides a DOB because he/she does not have a TIN.

Change proposed 26 C.F.R. § 1.6055-1(h)(1)–(2) such that the end of each subsection, include the following text: “For purposes of this rule, use of a date of birth in place of a TIN does not constitute a failure to include required information.”

RECOMMENDATION: The final rule should take a different approach from referring to the DOB as a “backstop” and instead provide guidance to insurers that some individuals may not have access to a TIN so may need to use a DOB in its place. If using the language above, we suggest the preamble make clear the meaning of this as well.

B. Privacy and Confidentiality

Other ACA programs limit collection of information from the insured to only that which is “strictly necessary” to determine eligibility⁶ and places confidentiality protections for any personally identifiable information collected as part of an eligibility determination.⁷ As HHS has recognized in other health care programs, the request for information that is not needed to carry out the program and does not assure the confidentiality of the information collected may discourage eligible individuals from accessing health care coverage because of fear that information will be shared with immigration enforcement

⁶ Pub. L. 111-148, § 1411(g), 124 Stat. 119, 230 (2010) [hereinafter ACA]. *See also* 45 C.F.R. § 155.715 (2012)(c)(3) (requiring that SHOP exchanges only collect the “minimum information necessary for verification of eligibility.”)

⁷ *Id.* § 1414(a). *See also* 45 C.F.R. §§ 155.260, 155.270 (requiring that Exchanges and entities contracted with Exchanges follow restrictions that “Personally identifiable information should be created, collected, used, and/or disclosed only to the extent necessary to accomplish a specified purpose(s) and never to discriminate inappropriately.”)

officials.⁸ Such privacy and confidentiality protections are also inherent in 6103 of the Internal Revenue Code, which states that return and return information “shall be confidential” and that no person who has access to such information “shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise”⁹ NILC is concerned that the regulations for reporting of information do not recognize any confidentiality protections for this data as it pertains to the insured individuals and responsible individual. Of particular relevance is the fact that some insuring entities are self-insured employers, and there is a risk that misuse of information collected to comply with the reporting requirement could affect the employment of covered individuals.

RECOMMENDATION: HHS has already promulgated rules that reinforce important confidentiality restrictions on any information regarding information collected as part of a health care program. We encourage IRS to add language consistent with 45 C.F.R. §§ 155.260 and 155.260. In this context, the language may take the form of making explicit reference to confidentiality and disclosure protections found in Section 6103 of the Internal Revenue Code. We would also recommend including language consistent with the intent of 45 CFR § 155.715, which (for SHOP exchanges) restricts the use of information collected from employees or employers to the specific purpose for which it is collected.

Thank you for the opportunity to provide these comments. If you have any questions, you may contact Jenny Rejeske at rejeske@nilc.org or 202-683-1994.

Sincerely,

Jenny Rejeske
Health Policy Analyst
National Immigration Law Center

⁸ *Dept. Health and Human Services and Department of Agriculture, Policy Guidelines Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Application for Medicaid, State Children’s Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, a tri-agency letter to state health and welfare officials from Olivia Golden, Assistant Secretary, Administration for Children and Families; Nancy-Ann Min DeParle, Administrator, Health Care Financing Administration; Shirley R. Watkins, Under Secretary, Food, Nutrition, and Consumer Services; and Thomas Perez, Director, Office for Civil Rights, U.S. Dept. of Justice,

www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html.

⁹ 26 U.S.C. § 6103(a) (2012).