



Via electronic submission at www.regulations.gov

May 2, 2013

CC:PA:LPD:PR (REG-148500-12)
Room 5203
Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

RE: REG-148500-12

Dept. of Treasury NPRM: Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage
78 Fed. Reg. 7314 (February 1, 2013)

Dear Madam/Sir:

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 NPRM with the goal of identifying and eliminating potential barriers for immigrant families that could arise if the proposed rule becomes final.

§1.5000A-3(c): Exempt non-citizens

We SUPPORT the definition of “exempt non-citizens” at §1.5000A-3(c).

We SUPPORT including two categories of individuals within the exemption for non-citizens: those who meet the qualifications of a “non-resident alien” per section 26 USC §7701(b)(1)(B) (for the taxable year that includes the month), and individuals whose immigration status is outside the definition of “lawfully present” at 45 CFR §155.20 (on any day in the month). The simple listing of these two distinct categories will help prevent common confusion and the often mistaken conclusion that a “non-resident alien” for purposes of the IRS is an individual who is not lawfully present in the U.S. for purposes of the U.S. Department of Homeland Security (DHS). In fact, there are many lawfully present non-citizens who may be considered a non-resident alien under the Internal Revenue Code (IRC) and there are individuals who are not lawfully present but are resident aliens for purposes of tax liability.

It is also important to make clear that an individual whose immigration status is not listed within the definition of “lawfully present” at 45 CFR § 155.20 should not be assumed to be unlawfully

present under immigration law or for other purposes. There are individuals who considered to be lawfully present by DHS, but are excluded from the definition of “lawfully present” for purposes of the Affordable Care Act. For example, individuals who have been granted deferred action status by DHS under the Deferred Action for Childhood Arrivals (DACA) program are lawfully present under immigration law, but were excluded from the definition of “lawfully present” at 45 CFR § 155.20. As a result, if an individual claims the non-citizen exemption from the requirement to maintain essential coverage, no conclusion can be made about his or her actual immigration status or lawful presence in the U.S. under immigration law. We RECOMMEND the final rule include this caution.

We also RECOMMEND that future guidance and instructions relating to the non-citizen exemption clearly require compliance with Section 6103 of the IRC as well as other confidentiality and information sharing protections.

§1.5000A-3(k)(3) Claiming exemptions from the shared responsibility payment

We SUPPORT the proposed rule’s categorization of the statutory exemptions as defined under Section 1501(b) of the ACA into three groups: exemptions requiring certification by an Exchange, exemptions that may be claimed either via Exchange certification or on a Federal income tax return, and exemptions that shall be solely claimed on the tax return.

The U.S. Department of Health & Human Services (HHS) stated in the Preamble of their recent proposed rule on eligibility for exemptions in the Exchange¹ that the exemption for individuals who are not lawfully present be implemented exclusively through the tax-filing process. As NILC stated in our March 18, 2013 comments to HHS’s proposed rule:

We SUPPORT the proposed rule that application for an exemption for individuals who are not “lawfully present” (as provided by Section 5000A(d)(3) of the Internal Revenue Code (IRC)) should be implemented solely through the tax filing process.

However, there is no similar reference or indication in the IRS’s NPRM that the exemption for non-citizens falls within the category of “Exemptions that are claimed on the Federal income tax returns” at §1.5000A-3(k)(3). In fact, there is no reference to the non-citizen exemption anywhere in Section 1.5000A-3(k), “Claiming exemptions from the shared responsibility payment.”

We RECOMMEND the final rule include reference to the non-citizen exemption under Section 1.5000A-3(k) even if the details of how to claim this exemption will be in future guidance.

We RECOMMEND the final rule include the non-citizen exemption among the exemptions that are claimed on federal income tax returns under Section 1.5000A-3(k)(3). This is consistent with HHS’s proposal.

¹, “Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions,” CMS-9958-P, Preamble at 78 Fed Reg 7355.

We RECOMMEND the final IRS rule also clearly explain that an individual seeking the non-citizen need not seek a certificate of exemption from the exchange and instead shall claim it at the time they file federal taxes.

Recommendations for claiming the non-citizen exemption

The NPRM does not explicitly indicate whether future guidance will be provided regarding the procedure to claim the non-citizen exemption. We RECOMMEND the final rule include the IRS' intent to provide (or not) additional guidance regarding the non-citizen exemption.

We assume the IRS is developing guidance regarding the non-citizen exemption and would like to provide the following general recommendations for this guidance:

- We recommend that applicants for the exemption are not required to attest that they are not lawfully present. Doing so would likely violate Section 6103 of the IRC as well as undermine compliance with the nation's tax laws as well as the requirements under the ACA.
- We recommend instead that other general questions should be proposed to applicants of the non-citizen exemption that allow them to truthfully answer without fear or other consequences. For example, indicating yes or no to "I am claiming the non-citizen exemption for purposes of the ACA"
- Another suggestion is to allow tax filers to claim any of the exemptions through one declaration. For example, the tax form can instruct the filer to declare that s/he is entitled to claim one of the exemptions from an aggregate list of those exemptions that are claimed exclusively through the return.
- Another suggestion would be to create a separate schedule to be filed by tax filers claiming the non-citizen exemption. However this would likely create additional burdens and still may have the effect of having the applicant "out" himself causing confidentiality concerns.
- Finally, the applicant could answer a general question such as "I do not have access to affordable coverage" and the reason for this lack of access could be assumed. Moreover, the sequencing of this question or the others listed above could help allow the tax filer to specify the correct exemption after ruling out other possible exemptions.

1.5000A-1 Maintenance of minimum essential coverage and liability for the shared responsibility payment.

Section 1.5000A-1(c)(2) of the NPRM indicates a tax filer will be liable if a nonexempt dependent lacks coverage. We understand the rationale for this requirement. However, we are concerned that there may be unintended consequences for immigrant families where the tax filer and the dependents have different immigration statuses (mixed-status family). Unfortunately, we

do not have a specific recommendation at this time that might address any barriers or confusion due to this specific rule regarding the liability of dependents, but would at least like to make the IRS aware that the application of this rule for mixed status family may present challenges. We look forward to working with the IRS to attempt to address any potential problem if needed.

Thank you for the opportunity to provide these comments. If you have any questions, you may contact Sonal Ambegaokar at ambegaokar@nilc.org or at (213) 639-3900 ext. 114.

Sincerely,

A handwritten signature in cursive script that reads "Sonal Ambegaokar".

Ms. Sonal Ambegaokar
Health Policy Attorney
National Immigration Law Center