NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

October 31, 2011

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

RE: Proposed Rulemaking for the Health Insurance Premium Tax Credit, REG-131491-10

Dear Secretary Geithner:

The National Women's Law Center (the Center) is pleased to submit the following comments in response to the above-referenced proposed rule promulgated by the Department of the Treasury (Treasury) on August 17, 2011. The Center strongly supports the coordinated efforts of the Department of Health and Human Services (HHS) and Treasury to implement the Patient Protection and Affordable Care Act (ACA) and make quality, affordable health insurance available to millions. We are also submitting comments to HHS on its proposed rules regarding eligibility and enrollment in Medicaid and the Exchanges, CMS-2349-P and CMS-9974-P, which we are appending to these comments to facilitate coordination on the many interrelated issues.

Since 1972, the National Women's Law Center has worked to protect and advance the progress of women and their families in core aspects of their lives, with an emphasis on the needs of low-income women. The premium tax credit is a vital component of the ACA that will help lower-income women and families afford health insurance coverage through the new system of Exchanges. In 2014, over 7 million currently uninsured women will be eligible for premium tax credits.[1] By 2019, roughly 14 million women will purchase their health coverage through an Exchange, and more than half of them will have been previously uninsured.[2]

However, women – because of their lower incomes and because they are the majority of single heads of household – are more likely than men to rely on government-sponsored health coverage and coverage linked to a spouse's employment. They also are more likely to make health care decisions for their families, taking on responsibility for ensuring that all family members have

[1] Kaiser Family Found., *Impact of Health Reform on Women's Access to Coverage and Care* (Dec. 2010), http://www.kff.org/womenshealth/upload/7987.pdf.
[2] *Id.*; Kaiser Family Found., *A Profile of Health Insurance Exchange Enrollees* (March 2011), http://www.kff.org/healthreform/upload/8147.pdf.

health care coverage.[3] Thus, for women, it is especially important that the premium credit rule enhances coordination between government-sponsored programs and the Exchanges; reduces the risk that low-income individuals and families will fall through the cracks as the new system is implemented; promotes access to affordable coverage for families, whether through employer-sponsored plans, government-sponsored coverage, or qualified health plans (QHPs) offered through an Exchange; minimizes the risk of financial penalties due to changes in family status; and protects victims of domestic violence and others who may be unable to satisfy the joint filing requirement.

We appreciate the opportunity to comment in response to the proposed rule issued on August 17, 2011 (76 Fed. Reg. 50931), regarding the health insurance premium tax credit. We support many of the provisions of the proposed rule, and appreciate Treasury's solicitation of comments on several specific issues that it did not address in the proposed rule. However, we recommend a number of changes and clarifications to strengthen the proposed rule and ensure that women and families fully benefit from the premium tax credit in the manner intended by the ACA.

26 CFR 1.36B-2 – Eligibility for premium tax credit.

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

Under the special rule, a taxpayer whose household income for a taxable year is less than 100 percent of the federal poverty line (FPL) for the taxpayer's family size is treated as an applicable taxpayer (i.e., income between 100 and 400 percent of FPL) if (i) the taxpayer or a family member enrolls in a qualified health plan (QHP) through an Exchange; (ii) the Exchange estimates at the time of enrollment that the taxpayer's household income will be between 100 and 400 percent of FPL for the taxable year; (iii) advance credit payments are authorized and paid for one or more months during the taxable year; and (iv) the taxpayer would be an applicable taxpayer if household income were between 100 percent and 400 percent of FPL for the taxpayer's family size.

We support this special rule, which aims to ensure that low-income family members whose projected household income qualifies them for premium tax credits are not rendered ineligible for the credits (and liable for repayment of advance credits received) when a year-end calculation of actual household income reveals that household members were in fact eligible for Medicaid during all or part of the year. We advise Treasury to coordinate with HHS to ensure that the final eligibility verification and redetermination provisions issued by HHS do not conflict with this policy.

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

Consistent with the special rule, paragraph (b)(7) provides that, if a taxpayer is treated as an applicable taxpayer under paragraph (b)(6), the taxpayer's actual household income for the taxable year is used to compute the premium assistance amounts using the formula proposed at

[3] *See* Nat'l Women's Law Ctr., *Exchange Issues Important to Women* (Sept. 2011), http://www.nwlc.org/sites/default/files/pdfs/rm_one_pager_final_092211.pdf.

section 1.36B-3(d). We support this provision and recommend that Treasury maintain it in the final rule.

Section 1.36B-2(c)(2)(i) Government-sponsored minimum essential coverage – Definition.

Under the proposed rule, an individual is considered eligible for government-sponsored minimum essential coverage if the individual meets the criteria for coverage under a government-sponsored program described in IRC section 5000A(f)(1)(A); there is one exception for individuals receiving coverage under the veteran's health care program under chapter 17 or 18 of Title 38 of the U.S. Code.

This proposed rule could be construed to mean that individuals who are receiving only Medicaid family planning supplies and services under section 1902(a)(10)(A)(ii)(XXI) of the Social Security Act as amended by the ACA – not full Medicaid services – are nevertheless considered to be receiving "government-sponsored minimum essential coverage." This interpretation would render such individuals, overwhelmingly women, ineligible for advance premium tax credits.

We strongly recommend that Treasury amend the proposed section 1.36B-2(c)(2) to create a second special rule for individuals receiving family planning supplies and services under section 1902(a)(10)(A)(ii)(XXI) of the Social Security Act to make it clear that they are not receiving minimum essential coverage. The Center's comments to HHS (attached) provide more information about this recommendation and related provisions in the HHS rules.

Section 1.36B-2(c)(2)(iii) Government-sponsored minimum essential coverage – Time of eligibility.

The proposed rule provides that an individual generally is treated as eligible for government-sponsored minimum essential coverage on the first day of the first full month in which the individual may receive benefits under the program. However, an individual who fails to complete the requirements necessary to receive benefits available under a government-sponsored program (such as Medicare) "reasonably promptly" is treated as eligible for government-sponsored minimum essential coverage as of the first day of the second calendar month following the event that established eligibility.

We recommend that the final rule extend the eligibility grace period for all individuals who fail to complete enrollment requirements through at least three full calendar months following the event that determined eligibility. This policy would align the grace period with Medicare's initial enrollment period and help mitigate the transition for individuals from QHPs to government-sponsored coverage, allowing time to complete treatment or work with health care providers to create a care transition plan. In addition, the final rule should provide a minimum standard definition of "reasonable promptness" to which states must adhere, and grant states flexibility to expand the standard's duration and make exemptions for individuals who can demonstrate good faith towards completing enrollment requirements. This is particularly important for women, who are more likely to rely on government-sponsored coverage and to be the health care decision-makers for their household.

In addition, the preamble solicits comments on whether the proposed rule should provide further flexibility if operational challenges prevent timely transition from coverage under a QHP to coverage under a government-sponsored program. We appreciate Treasury's recognition that operational problems may occur, particularly during the initial implementation of the fairly complex eligibility and enrollment system that will need to be coordinated between state Medicaid programs and the new Exchanges. To prevent gaps in coverage due to such setbacks, the final rule should provide that, where operational challenges delay coverage transitions, individuals remain eligible for premium tax credits until the first full calendar month in which they are actually able to receive benefits through government-sponsored coverage, regardless of the date of the determination of eligibility for government-sponsored coverage.

Beyond operational challenges, transitioning from a QHP to government-sponsored coverage could be challenging for individuals in the midst of a single episode of care. If an individual transitions to Medicaid or other government-sponsored coverage while receiving a specific course of treatment from a provider through her QHP, she may face problems continuing treatment if that provider does not accept the government-sponsored coverage. To avoid serious disruptions in treatment, we recommend that the final rule allow individuals who are in the midst of an acute or highly specialized episode of care to remain eligible for premium tax credits for the duration of that episode of care. At minimum, state Exchanges should be given the flexibility to continue credits for such individuals until they can safely transition to a provider accepting the applicable government-sponsored coverage.

Subparagraph (c)(2)(iii)(B) of the proposed section provides that if an individual receiving advance credit payments is determined to be eligible for government coverage that is effective retroactively (e.g., Medicaid), the individual is treated as eligible for minimum essential coverage under that program no earlier than the first day of the first calendar month beginning after the approval. We support this proposed rule and recommend that the final rule clarify that such an individual is considered eligible for minimum essential coverage, at the earliest, on the first day of the first month following her approval, but also no sooner than the first full month in which the individual can effectively terminate coverage through the QHP in which she was previously enrolled. This clarification will help ensure that households are eligible to receive premium tax credits for all coverage months for which they are financially responsible for paying premiums, according to the termination terms of their QHPs.

Section 1.36B-2(c)(2)(iv) Government-sponsored minimum essential coverage – Determination of Medicaid or Children's Health Insurance Program (CHIP) ineligibility.

We support the policy proposed in subparagraph (c)(2)(iv), which provides that an individual is treated as not eligible for Medicaid, CHIP or a similar program for a period of coverage under a QHP if an Exchange determines that the individual is not eligible for the program when the individual enrolls in the QHP. Under this rule, if an individual experiences an income drop during the plan year that results in Medicaid or CHIP eligibility but does not seek an eligibility redetermination from the Exchange, the individual will not be treated as eligible for Medicaid or CHIP for any part of the year and will remain eligible for the premium tax credit for that plan year. We again advise Treasury to coordinate with HHS to ensure that the final eligibility verification and redetermination provisions issued by HHS do not conflict with this provision.

Section 1.36B-2(c)(3)(v) Employer-sponsored minimum essential coverage – Affordable coverage.

At 26 CFR 1.36B-2(c)(3)(v), Treasury proposes two rules related to the determination of whether employer-sponsored coverage is affordable. For the reasons set forth below, we strongly oppose the rule proposed at section 1.36B-2(c)(3)(v)(1), which would measure affordability of an employer-sponsored plan for an employee and any eligible family members based only on the cost to cover the employee alone. However, we support the safe harbor provision at section 1.36B-2(c)(3)(v)(2) that would protect families for whom an Exchange deemed employer-sponsored coverage unaffordable at the time they enrolled in a QHP from a determination at reconciliation that they were ineligible for premium tax credits.

Under the ACA, premium tax credits are available to subsidize coverage through the Exchange for individuals and families with income between 100 and 400 percent of the federal poverty line who lack access to minimum essential coverage. Employer-sponsored coverage is considered minimum essential coverage only if it is affordable – i.e., if the premium contribution required by the employee is no more than 9.5 percent of household income.[4]

The rule proposed by Treasury at section 1.36B-2(c)(3)(v)(1) would measure the affordability of employer-sponsored coverage based solely on the cost of self-only coverage for the employee, even if the employee's family members are also eligible for the employer plan. Under the proposed rule, so long as self-only coverage costs the employee no more than 9.5 percent of household income, the plan will be deemed affordable for the employee and all eligible family members, regardless of the actual cost to enroll the family.

We oppose this construction of the affordability test, which severely undermines the coverage goals of the ACA and runs counter to the intent of the statute. As an initial matter, we believe that Treasury has incorrectly interpreted the meaning of Internal Revenue Code (IRC) section 36B(c)(2)(C) (defining employer-sponsored minimum essential coverage) and its relationship to IRC section 5000A(e)(1) (providing affordability exemption from penalty for failure to maintain minimum essential coverage).

IRC section 36B(c)(2)(C)(i) provides that "an *employee* shall not be treated as eligible for minimum essential coverage if such coverage…[is an employer-sponsored plan for which] the employee's required contribution (within the meaning of section 5000A(e)(1)(B)) with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income" (emphasis added). For an "individual eligible to purchase" employer-sponsored minimum essential coverage, IRC section 5000A(e)(1)(B) defines the required contribution as the portion of the annual premium that would be paid by the individual for self-only coverage. The "individual eligible to purchase" coverage is the employee, distinct from the individual eligible to enroll in coverage by virtue of a relationship to the employee. Thus, for employer-sponsored coverage to be considered affordable (and qualify as minimum essential coverage) for an *employee* enrolling in self-only coverage, it is clear that the employee's required contribution must not exceed 9.5 percent of household income.

[4] Employer-sponsored coverage must also meet a "minimum value" test to be considered minimum essential coverage, an issue that will be addressed in future rulemaking.

What is less clear under section 36B(c)(2)(C)(i) is the meaning of the last sentence: "This clause shall also apply to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee." For an employee purchasing coverage for herself and related individual(s), did Congress intend to measure affordability based on the self-only standard in the cross-referenced section 5000A(e)(1)(B)(i) – a clause written to apply only to the employee "eligible to purchase" employer-sponsored coverage? Or did it intend to add the required contribution for covering any related individual to the employee's required contribution for self-only coverage, so that affordability would be determined based on whether the *total* required contribution exceeds the 9.5 percent threshold specified in section 36B(c)(2)(C)(i)(II)?

The latter interpretation evidently is the reading that Treasury has applied to IRC section 5000A(e)(1)(B) and the "special rule" for related individuals in section 5000A(e)(1)(C). The preamble notes: "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 required contribution for employer-sponsored family coverage." 76 Fed. Reg. 50931, 50935. To reach this outcome, Treasury must conclude that section 5000A(e)(1)(C) – which provides that the penalty determination "shall be made with reference to [the] required contribution of the employee" – refers to the required contribution of the employee to cover herself *and* the related individual(s). This is the proper reading of the special rule; had Congress intended the affordability determination for family members to be based only on the employee's cost for self-only coverage, it would have no need of a special rule to define the required contribution for related individuals.

Despite Treasury's understanding of the rule in section 5000A(e)(1)(C), in determining the affordability of employer-sponsored coverage, Treasury would narrowly apply only 5000A(e)(1)(B) and ignore the special rule for related individuals. It is unlikely, however, that Congress intended affordability to be determined one way to assess whether a family is exempt from the application of the individual mandate and another way to establish whether an employer-sponsored plan qualifies as minimum essential coverage.[5] A more cohesive and logical reading indicates that, in defining affordability for purposes of employer-sponsored coverage by reference to the affordability exemption from the individual responsibility requirement, Congress intended that the entire rule in section 5000A(e)(1) be applied, including the special rule regarding the application of the affordability test for related individuals. Section 36B(c)(2)(C) should thus be read in conjunction with the cross-referenced section 5000A(e)(1) as a whole to reach a consistent result, determining affordability based on whether the *total* required contribution of the employee exceeds 9.5 percent of household income – the result that effectuates the statute's policy objectives.

[5] As noted in the preamble, the Joint Committee on Taxation (JCT) reads IRC section 36B(c)(2)(C)(i) to define unaffordable coverage as "coverage with a premium required to be paid by the employee that is more than 9.5 percent of the employee's household income, based on the self-only coverage." However, unlike Treasury, JCT also reads the "special rule" in IRC section 5000A(e)(1)(C) to mean that for "individuals who are eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination of whether coverage is affordable…is made by reference to the required contribution of the employees for self-only coverage." Staff of J. Comm. on Taxation, 112th Cong., General Explanation of Tax Legislation Enacted in the 111th Congress 281 (J. Comm. Print 2011). We believe that JCT's reading of these statutory provisions, while consistent, is incorrect; both section 36B(c)(2)(C)(i) and section 5000A(e)(1)(C) should be read to determine affordability based on the total cost to cover an employee and related individuals under an eligible employer-sponsored plan.

As written, the proposed rule would exacerbate hardship for lower-income families struggling to make ends meet. For example, if a working parent supporting a family of four on $44,700 a year (200 percent of the federal poverty line) has an offer of employer coverage that costs $150 a month for the employee and $400 a month to cover the employee and spouse, both the employee and the spouse would be deemed to have access to affordable minimum essential coverage, even though a $400 monthly premium amounts to nearly 11 percent of the household's income. (The children could be enrolled in the state's Children's Health Insurance Program, which in most states would require an additional premium payment.) Because the spouse would not be eligible for a premium tax credit through the Exchange if the employee enrolled in self-only coverage, this family would be forced to choose between two undesirable outcomes: pay an outsize portion of their limited household income to purchase employer-sponsored coverage for the spouse, or allow the spouse to go uninsured.

If Treasury's final rule does not consider the cost of family coverage in determining the affordability of employer-sponsored plans, millions of individuals related to workers eligible for employer-sponsored coverage would be denied access to genuinely affordable health insurance, as they would have to pay well over 9.5 percent of household income to enroll in an employer plan but would be barred from receiving subsidies through the Exchange. The Kaiser Family Foundation estimates that failing to account for the affordability of employer-sponsored family coverage would render 3.9 million non-working dependents ineligible for subsidies; on average, these family members would have to pay 14 percent of their income to access the employer coverage.[6] This policy would be especially detrimental to women, who are less likely than men to be insured through their own employer and more likely to obtain coverage as a dependent; in 2010, 40 percent of women (18-64) with employer-sponsored insurance were covered as a dependent, while only 25 percent of men were.[7]

To ensure that the final rule carries out the coverage goals of the ACA, we urge Treasury to adopt the legal reading of IRC section 36B(c)(2)(C) set forth here, and base the determination of whether employer-sponsored coverage is affordable on the contribution required for an employee to cover all eligible family members. This interpretation of affordability should apply with regard to both the definition of employer-sponsored minimum essential coverage and the exemption from the individual responsibility requirement.

In addition, we urge Treasury to maintain the "employee safe harbor" in the proposed rule at section 1.36B-2(c)(3)(v)(2), which treats an employer-sponsored plan as unaffordable for the entire plan year if an Exchange determines that the employer coverage is unaffordable when the eligible employee and/or related individual(s) enroll in a qualified health plan. We strongly support this provision; without it, individuals and families would risk large repayment liability if the cost of employer coverage went below 9.5 percent of their household income for any months

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[6] Larry Levitt & Gary Claxton, Kaiser Family Found., *Measuring the Affordability of Employer Health Coverage* (Aug. 24, 2011). 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 ACA.

[7] Nat'l Women's Law Ctr. analysis of 2010 health insurance data from U.S. Census Bureau, Current Population Survey (CPS) Table Creator for the Annual Social and Economic Supplement, http://www.census.gov/hhes/www/cpstc/cps_table_creator.html (last visited Oct. 26, 2011).

during the taxable year. For example, if an employee's spouse received an unexpected bonus, the family's income for the taxable year could be greater than anticipated, and the cost of the employer-based coverage could turn out to be less than 9.5 percent of the household's 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 at all. A family in this situation would have to repay the entire amount of advance credits received even though the Exchange correctly determined that the family was eligible for premium credits at the time of application. The policy at 26 CFR 1.36B-2(c)(3)(v)(2) in the proposed rule will avoid this result, and it should be retained in the final rule.

26 CFR 1.36B-3 – Computing the premium assistance credit amount.

The allocations and calculations required to compute the premium credit amount under this section of the proposed rule are complex. We recommend below changes that could simplify the calculations required in the final rule. In addition – particularly if Treasury and/or HHS do not adopt these changes – we recommend that the final rule require the IRS to provide direct consumer assistance and education regarding the premium tax credit calculations. The taxpayer assistance program within the IRS should be responsible for providing consumer assistance on premium tax credit calculations and questions. In addition, the IRS website should include links to the Exchange and Navigator websites for each state, and the Taxpayer Assistance line should have contact information for state Exchanges and Navigators. We recommend that the IRS also be responsible for educating consumer assistance programs and taxpayer assistance programs on premium tax credit rules to enable these programs to best assist consumers.

Section 1.36B-3(f)(2)-(3) Applicable benchmark plan – Family coverage/Second lowest cost silver plan not covering the taxpayer's family.

The general rule proposed at section 1.36B-3(f)(1) describes the plan that will be used as the benchmark for purposes of calculating the premium credit. Paragraphs (f)(2) and (f)(3) specify how to determine the appropriate benchmark plan(s) for family coverage. Treasury's proposed rule provides that, if the applicable benchmark plan does not cover a taxpayer's full family, the applicable benchmark plan premium is the sum of the premiums for the benchmark plans that cover the taxpayer's family. The preamble notes that family coverage under some QHPs may not extend to certain tax dependents (e.g., a niece).

Because about three out of four dependents other than the taxpayer's own children (such as nieces and nephews, grandchildren, and elderly parents) who do not live with a married couple live in families headed by women,[8] women are likely to be disproportionately burdened by a rule allowing QHPs to limit family coverage to a subset of family members. The best way to avoid many of the complications regarding the benchmark plan premium and credit amount contemplated in Treasury's proposed rule is for HHS to require that QHPs extend coverage to all dependents in the eligible taxpayer's family.

We recognize that HHS has requested comments in the Exchange NPRM on whether QHPs should be required to cover all members of the family if they live in the same Exchange service area. The Center's comments to HHS (attached) recommend that it adopt this policy, and we

[8] Nat'l Women's Law Ctr. calculations from 2010 U.S. Census Bureau Current Population Survey data.

urge Treasury to recommend to HHS that it adopt this approach. Allowing insurers to cover only certain family members under a family plan is likely to unnecessarily complicate coordination of coverage among members of a single household and make the determination of the cost of benchmark plans for purposes of calculating the premium tax credit far more difficult.

The preamble to the Treasury rule solicits comments on additional methods that should be used to determine a family's benchmark plan premium when multiple plans are needed to cover the entire coverage family. Although we hope that the final rules will facilitate coverage of all family members (i.e., tax dependents) in one plan, when multiple plans are needed, we support retaining the method proposed in subsection (f)(3), which determines a family's benchmark premium based on the sum premium cost of all the benchmark plans needed to cover the entire coverage family.

The alternative methods suggested in the preamble consider basing a family's benchmark premium on the lesser of (1) the premium for a combination of plans that cover the taxpayer's entire family, or (2) the premium for a single plan that covers the taxpayer's entire family and is more expensive then the second lowest cost silver plan. These alternative methods would not provide adequate or equitable premium assistance to families unable to purchase a single plan that covers all family members. As the premium cost of multiple plans will likely be substantially greater than the cost of a single family plan premium, such a method could result in families having to contribute a percentage of their income greater than that required by statute in order to provide coverage to their entire family. The method set forth at proposed section 1.36B-3(f)(3) is superior to the alternative approaches considered in the preamble and should be retained in the final rule.

1.36B-3(h) Plan covering more than one family

We support the proposed rule at section 1.36B-3(h), which provides that if a single QHP covers more than one family (e.g., a parent and her 25-year-old child who is no longer a tax dependent), each applicable taxpayer covered by the plan may claim a premium tax credit if otherwise allowable, with the premiums paid allocated to each taxpayer in proportion to the premiums for each taxpayer's benchmark plan.

26 CFR 1.36B-4 – Reconciling the premium tax credit with advance credit payments.

The ACA provides that the amount of the credit allowed under IRC section 36B will be reconciled with the advance credit payments received on a taxpayer's income tax return for a taxable year, so that a taxpayer whose allowable credit exceeds the advance payments received will be due a refund, while a taxpayer whose advance payments exceed the allowable credit will owe the excess as additional income tax liability (subject to certain caps on liability for taxpayers with income less than 400 percent of FPL). The reconciliation process outlined by the ACA is codified at IRC section 36B(f).

In establishing a structure in which premium credits are paid primarily in advance based on household income data from prior years' tax returns (*see* ACA section 1412), Congress understood that the advance payments would have to be coordinated with the final credit determined under section 36B and granted HHS and Treasury the flexibility necessary to implement an eligibility determination and reconciliation process that accommodates changes in

income and circumstances. Section 1412(b) of the ACA authorizes the Secretary of HHS to 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." In addition, IRC section 36B(g) directs the Secretary of the Treasury to prescribe regulations necessary to implement the premium credit provisions, "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."

The regulatory authority provided to the Secretary under section 36B(g) to administer the premium credits is broad. Paragraph (2) of section 36B(g) specifically directs the Secretary to ensure through regulation that the reconciliation process accommodates changes in filing status during the taxable year, implying that the Secretary has the regulatory flexibility to avoid requiring taxpayers experiencing a change in filing status (e.g., a newly married couple) to pay back all of the subsidies the couple (or one member of the couple) received before getting married. And paragraph (1) is far more general than paragraph (2), indicating that the Secretary's authority to regulate the reconciliation process to account for changes in circumstances is not limited to situations where a change in filing status (such as from a marriage or divorce) has occurred.

In the comments that follow, we recommend that Treasury exercise its authority to adopt provisions in the final rule that address reconciliation where taxpayers have changed marital status during the taxable year, or where married taxpayers are unable to file a joint return, as these changes are likely to have the greatest impact on women. However, these recommendations should not be considered exhaustive. As a general matter, we note that many families experience changes in income or circumstances over the course of the year that will affect their need for premium assistance or the amount of the assistance for which they qualify. If families experiencing such changes incur large repayment obligations despite "playing by the rules" and receiving appropriate subsidies during their period of need, it is likely that many families will be deterred from seeking premium credits and will remain uninsured, contrary to the intent of the ACA. The Center on Budget and Policy and Priorities and others have submitted comments on additional circumstances that may need to be accounted for at reconciliation – such as a change in number of dependents or income change resulting in ineligibility for the premium tax credit – and we urge Treasury to give serious consideration to these additional proposals.

Section 1.36B-4(b)(1) Changes in filing status – In general.

Under the proposed rule at 26 CFR 1.36B-4(b)(1), a taxpayer who marries during the taxable year computes the premium tax credit by using the applicable benchmark plan(s) for the taxpayer's marital status as of the first day of each coverage month, but the taxpayer's

contribution amount is determined using the taxpayer's household income and family size at the end of the taxable year. As Example 1 in the proposed rule illustrates, this provision can result in additional tax liability upon reconciliation for taxpayers who marry, even if they promptly reported their change in filing status to the Exchange and received advance premium credits that were appropriately calculated each month. We appreciate that Treasury recognizes this potential marriage penalty and has requested comments on relief to individuals who would owe additional tax because they marry during a taxable year when one or both of the individuals received advance credit payments prior to marriage.

To avoid creating a marriage penalty and ensure that the reconciliation process accurately captures the premium assistance to which taxpayers are entitled, we recommend that Treasury modify the proposed rule to prorate the premium credit for taxpayers who marry during the year. The proposed rule already requires determining the appropriate benchmark plan based on family size on a monthly basis. In addition, the final rule should establish a procedure for allocating income for the coverage months prior to and after marriage.

For example, under the circumstances presented in Example 1, P receives advance premium credits of $700 from January through June and Q receives advance credits of $6,036 during the same period. After marrying, P and Q jointly receive an advance credit totaling $3,486 from July through December. Using the proposed methodology that considers P and Q married all year, they are entitled to a credit of $9,575, leaving them liable to repay $647. However, calculating the total credit at reconciliation based on (1) P's and Q's separate household incomes and family sizes, advance payments received, and applicable benchmark plans for January through June, and (2) P's and Q's joint household income and family size, advance payment received, and applicable benchmark plan for July through December would result in a credit equal to the advance payments that P and Q received during the year ($10,222). While reconciliation could still result in additional tax liability due to variations from Exchange projections unrelated to the change in marital status, employing the calculation described will result in a more fair and accurate determination of credit eligibility for newly married couples. The same proration should apply even if a couple did not report the change in their marital status to the Exchange.

A reasonable estimate of the household income allocable to each spouse for the coverage months before and after marriage may be ascertained from jointly filed information. The federal return currently requires separate identification of earnings, including from husband-wife partnerships and Schedule C small businesses (e.g., qualified husband-wife joint ventures), and forms could be revised or created to assist taxpayers with the proration calculation and request any additional information necessary to properly allocate household income prior to marriage. If allocation is deemed not feasible, the final rule should provide a one-year waiver of reconciliation that applies to newly married couples (a "marriage safe harbor").

Section 1.36B-4(b)(2) Taxpayers not married to each other at the end of the taxable year.

Divorce (or legal separation) occurring during the taxable year presents additional complications in determining the appropriate premium tax credit for each formerly married taxpayer. For newly divorced taxpayers who were enrolled in the same qualified health plan while married, the proposed rule would require qualified health plan premiums, benchmark plan premiums, and advance credit payments to be allocated between the taxpayers for the months in which they

were married. The divorced taxpayers may agree to any allocation between them; failing agreement, the rule would allocate 50 percent of the QHP premiums, benchmark plan premiums, and advance credit payments to each taxpayer.

We support the provision in the proposed rule allowing divorced taxpayers to agree to allocate these items between them according to the proportion they deem appropriate. However, where divorced taxpayers do not agree, we recommend that the default allocation be based on household income using the method demonstrated in Example 3 in the proposed rule, rather than 50 percent. Applying income-based allocation is more accurate and equitable, and is consistent with the income-based allocation we recommend for newly married couples.

Section 1.36B-4(b)(3) Married taxpayers filing separate tax returns.

According to the ACA, married taxpayers are eligible for the premium tax credit only if they file joint returns. However, as Treasury correctly recognizes, some taxpayers who are married at the time they enroll in a qualified health plan and begin to receive advance credit payments may not be able to file a joint return for the coverage year. We appreciate that Treasury has requested comments on rules to provide relief for those married taxpayers who have received advance credit payments but face challenges in being able to file a joint return. Though exceptions to the joint filing requirement for married taxpayers applying for other tax benefits (such as the Earned Income Tax Credit) are quite limited, the premium tax credit established by the ACA is distinguishable in important ways. In contrast to the EITC, which is general assistance that is distributed after tax filing, the premium credit will be primarily paid in advance to subsidize health insurance coverage that taxpayers will be required by law to obtain. Moreover, as noted above, the ACA grants Treasury broad legal authority to implement the premium credit provisions. We recommend that Treasury exercise this authority to incorporate certain exceptions to the joint filing requirement into the final rule, as outlined below.

The preamble to the proposed rule acknowledges that in situations involving domestic abuse, when a divorce is pending but not yet final, or when one spouse is incarcerated, filing a joint return may not be possible or prudent. Although an individual who is legally separated from his or her spouse (or a married individual supporting a child and living apart from the spouse for at least six months) is not considered married under the tax code, there are a number of additional circumstances in which taxpayers deemed married under the statutory definition do not share a household in the manner presumed by the joint filing requirement.

In guidance to spouses requesting equitable relief from joint and several liability under IRC sections 6015(f) or 66(c), Treasury has already recognized that economic hardship, abuse, mental or physical health and divorce or separation are factors weighing in favor of equitable relief. Rev. Proc. 2003-61, 2003-32 I.R.B. (Aug. 11, 2003). By definition, premium tax credits are issued only to households facing some degree of economic hardship – but if spouses find it necessary to file separate tax returns, an entire family, including any dependents, may be disqualified from premium assistance altogether. It is therefore especially important that the tax system not impose additional hardship and barriers to coverage by ignoring those circumstances where joint filing is not appropriate.

We recommend that the final rule implementing IRC section 36B allow exceptions to the joint filing requirement in cases involving physical or mental abuse or incarceration, as well as in

situations where spouses are in the process of a divorce or separation or are otherwise living apart but do not meet all of the statutory requirements to file as a single person or head of household. For example, an exception should be available for victims of domestic violence, as joint filing requires communication between a victim and her abusive spouse that may reveal a victim's new physical address, phone number, employer, and bank account, with dangerous results. Other circumstances present logistical difficulties that merit an exception; for instance, an abandoned spouse may be unable to locate her husband for purposes of both divorce proceedings and tax filing.

The IRS could capture the reason for an exception with a "check-off" box signed under penalty of perjury, similar to Form 8857 (Request for Innocent Spouse Relief). In cases where the spouses jointly received an advance credit, the IRS could allocate the advance credit and calculate the benchmark premium according to household income in the manner proposed for couples who divorce during the year, with the absent spouse's income determined by his tax filing. For the taxpayer qualifying for the exception, the repayment limit for single individuals should apply, according to income. If the taxpayer's spouse does not also qualify for the exception (e.g., the abusive spouse of a domestic violence victim), the spouse would be required to fully repay his allocated portion of the credit. If the absent spouse does not file a tax return or if the filing spouse does not know the absent spouse's social security number, the default allocation should be 50 percent.

Treasury has also requested comments on whether such exceptions should take into account whether (1) the spouses have filed jointly for the preceding taxable year; (2) the spouses attested to an expectation to file jointly for purposes of receiving the advance credit payments; and (3) the spouses should be allowed relief of this type for more than one year.

Family situations may change during a year without notice to one of the spouses, especially in cases of abuse, and complicated divorce or separation proceedings may take more than a year to resolve. Accordingly, prior years' filing status and expressed intention to file jointly should not be determinative. We believe that limiting exceptions to three consecutive years reasonably balances tax administration with the need to protect vulnerable women.

Conclusion

We appreciate the opportunity to comment on this proposed rule, and look forward to working with the Treasury Department as it develops forms, instructions, and public education materials to implement the final rule.

Sincerely,

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