



October 31, 2011

Internal Revenue Service
Department of the Treasury
Attention: CC:PA:LPD:PR
IRS REG—131491—10
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Addendum to Comments on Proposed Rule on Health Insurance Premium Tax Credit (IRS REG-131491-10)), Pertaining to Immigrant Children and Families

Dear Secretary Geithner and Commissioner Shulman:

We appreciate the opportunity to provide this addendum to comments on the proposed rule regarding the health insurance premium tax credit that implements important parts of the Patient Protection and Affordable Care Act (ACA). This addendum is focused on proposed rules and recommendations of concern specifically to immigrant families in the U.S. Disproportionate numbers of immigrants and their family members are uninsured, despite their high levels of participation in the nation's workforce, and immigrant eligibility rules differ from those of citizens. These factors warrant review and comment through the lens of immigrants' special circumstances regarding access to coverage and care. With the implementation of the ACA, it is critical to ensure that the premium tax credits provide robust access to affordable health coverage for all eligible residents, especially vulnerable populations such as immigrant families. There are an estimated 3.5 to 5.5 million children living in mixed-status immigrant households.¹ Three-quarters of the children are citizens, one in four of whom is uninsured.

Georgetown University's Center for Children and Families (CCF) is an independent, nonpartisan policy and research center whose mission is to expand and improve health coverage for America's children and families. CCF is providing this comment addendum on the premium tax credit included in the Notice of Proposed Rulemaking (NPRM) for 26 CFR Part 1, in hopes of ensuring that the unique needs of children in mixed-status immigrant families are addressed by various aspects of the ACA as it continues to unfold. Specifically, CCF is providing comments on the following sections and we urge the Department of the Treasury to consider the recommendations.

¹ J. Passel, D.Cohn, "A Portrait of Unauthorized Immigrants in the United States," (April 14, 2009), Pew Hispanic Center, available at <http://www.pewhispanic.org/reports/report.php?ReportID=107>. See also S. McMorrow, G.M. Kenney, & C. Coyer, "Addressing Coverage Challenges for Children under the Affordable Care Act," Urban Institute (May 2011), available at http://www.urban.org/uploaded_pdf/412341-Affordable-Care-Act.pdf.

- 1) Premium tax credit definitions
- 2) Eligibility for premium tax credit
- 3) Computing the premium assistance credit amount
- 4) Information reporting by Exchanges

PREMIUM TAX CREDIT DEFINITIONS (1.36b-1)

§ 1.36B-1(d) Family and family size

In the definition of “family and family size” at § 1.36B-1(d), CCF supports inclusion of individuals who are exempt from the requirement to maintain minimum essential coverage, because some members of mixed-status immigrant families are not required to maintain minimum essential coverage. Inclusion of such individuals in the definition promotes accuracy and fairness as regards computation of household income and thus computation of eligibility for and amount of the premium tax credit.

§ 1.36B-1(f) Lawfully present

CCF supports the definition of “lawfully present” proposed in § 1.36B-1(f) of the NPRM as the same meaning given the term currently used in the Pre-Existing Condition Insurance Plan (PCIP) at 45 CFR § 152.2. However, CCF urges Treasury to work with the Department of Health and Human Services (HHS) to expand this definition slightly to provide additional categories of lawfully present immigrants an opportunity to access the Exchange and the tax credits. For example, the PCIP definition at 45 CFR § 152.2 is not as comprehensive as the definition currently used in Medicaid and the Children’s Health Insurance Program (CHIP), pursuant to the CHIP Reauthorization Act of 2009 (P.L. 111-3). CCF recommends that § 1.36B-1(f) be revised to use the current CHIPRA definition as a starting point and, in addition, to expand the definition of asylum applicant and to include three additional categories: (1) victims of human trafficking who have been granted “continued presence,” (2) individuals whose status makes them eligible to apply for work authorization under 8 CFR. § 274a.12, and (3) individuals granted a stay of removal/deportation by administrative or court order, statute, or regulations. Using the CHIPRA definition will also promote administrative simplicity for states who are using this definition in their Medicaid and CHIP programs.

The CHIPRA definition, unlike the proposed definition, includes individuals who are lawfully present in both the Commonwealth of the Mariana Islands, and in American Samoa, under the law that applies in those territories.¹ These categories were not included in the § 155.20 definition which applied to the PCIP because Congress did not authorize the U.S. territories to operate a PCIP. By contrast, it is essential to include these groups in the premium tax credit rules because Congress specifically allows the territories to establish an Exchange.

A third addition especially important to families is the inclusion of persons whose immigration status makes them *eligible* for an Employment Authorization Document (EAD or “work permit”), as opposed to the requirement in the current definition that immigrants also actually have an EAD in their possession. The requirement that even though they are

eligible for an EAD they must also actually have one is an unnecessary barrier. Some immigrants who are eligible for a work permit choose not to obtain one because the application process is costly and time-consuming, and either they cannot work – due to age or a disability, for example – or they choose not to seek employment. An immigrant’s lawful status does not depend on whether he or she has an EAD. The requirement that an immigrant actually have an EAD in order to be eligible for coverage under the ACA especially burdens low-income families with children and/or persons with disabilities. The final rule should not require children and adults who do not work and who cannot easily afford the fee (\$380 today) to apply for and obtain a work permit which they do not otherwise need.

We also recommend the addition of three other lawfully present immigration categories to the definition: individuals granted a stay of removal, asylum applicants, and certain victims of trafficking. Grants of prosecutorial discretion under new Department of Homeland Security (DHS) guidelines include stays of removal. Individuals granted such discretionary relief, including some teenagers and young adults who have grown up in the U.S., should be recognized as lawfully present. Several states provide health coverage to individuals with these lawful statuses, and to promote consistency and maximize enrollment, it is appropriate to include them among the lawfully present categories for purposes of implementing the Exchange.

Victims of human trafficking can be granted continued presence in the U.S. by DHS in order to aid in the prosecution of traffickers in person. This category of non-citizens was already eligible for Medicaid and CHIP under 22 USC § 7105(b), and therefore did not appear in the CHIPRA definition listing newly covered immigrants, upon which the PCIP regulations at 45 CFR § 152.2, were based.

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, which can and often does 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.ⁱⁱ

Due to the complexity and constant evolution of immigration law, immigration statuses and terminology are often misaligned. The definition should also explicitly acknowledge the future possibility that new statuses of immigrants may be established and other statuses may be recognized as lawfully present. Flexibility around this definition will ensure that immigrants who are required by law to purchase health coverage are able to do so in practice.

§ 1.36B-1(k) Exchange

Finally, CCF recommends clarification of the definition of “Exchange” at § 1.36B-1(k), and will recommend corresponding clarification by HHS in its final rules. HHS proposed rules blur important distinctions between SHOP exchange and the individual market Exchange, such as when Exchange is defined as *including* both the individual market and the SHOP. The distinction is critical to immigrant families because the ACA’s immigrant restrictions are

confined to the individual market. We recommend that all ACA regulations clearly and consistently distinguish between SHOP Exchange and Individual Market Exchange. Otherwise, the rules threaten to discourage participation of employers and immigrant families alike.

- **Recommendation:** Support § 1.36B-1(d) “Family and family size,” including in the definition “an individual who is exempt from the requirement to maintain minimum essential coverage under section 5000A.”
- **Recommendation:** Amend § 1.36B-1(g) “Lawfully present,” 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 § 208(a) of the Immigration and Nationality Act (INA) or for withholding of removal under § 241(b)(3) of the INA or under the Convention Against Torture, whose application has been accepted as complete.
- **Recommendation:** Amend § 1.36B-1(g) “Lawfully present,” by adding that states may continue using existing administrative mechanisms for determining eligibility, provided that the rules are no more restrictive than federal law.
- **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.” See related recommendation for § 1.36B-2(b)(4), below.

ELIGIBILITY FOR PREMIUM TAX CREDIT (1.36B-2)

§ 1.36B-2(b) Applicable taxpayer

In § 1.36B-2(b)(4), CCF supports including taxpaying individuals not lawfully present in the category of “applicable taxpayers.” Under this rule, these taxpayers may apply for a tax credit for their lawfully present dependent family members who are eligible for coverage by a QHP through an individual market Exchange. This is a crucial recognition of the realities of “mixed status” immigrant families. These families have taxpaying members who are restricted from purchasing health insurance through the Exchange, yet also have family members who are Exchange-eligible citizens and/or lawfully present immigrants. As in the above comment on § 1.36B-1(k), it is important that the use of the word “Exchange” in this rule clarify that what is meant is the Individual Market Exchange, not the SHOP.

CCF fully supports the clarification in § 1.36B-2(b)(5) that lawfully present immigrants with income under 100 percent of the federal poverty line (FPL) for the taxpayer's family size, are eligible for the premium tax credit if not eligible for Medicaid. This proposed rule recognizes that all lawfully present immigrants have access to the Exchange even if they are subject to the five-year bar in the Medicaid program that was enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

Further, CCF supports the provision in § 1.36B-2(b)(7) that requires the tax credit amount for a household with income below 100 percent of FPL to be computed based on the household's actual income. This special rule is needed for families, like those described in the above paragraph, who will not be covered in the Medicaid program and for whom it would be unfair and unaffordable to calculate a tax credit based on 100 percent FPL when their household income is in fact lower than that.

- **Recommendation:** Support in part and amend in part § 1.36B-2(b)(4) pertaining to the definition of an “applicable taxpayer.” Support the proposal to include as an applicable taxpayer an individual who is not lawfully present or incarcerated but whose family member is eligible to apply for a premium tax credit and enroll in a QHP. Amend the language of the proposed rule to include the words, “Individual Market” before the word, “Exchange,” pursuant to § 1312(f)(3) of the ACA that restricts individuals not lawfully present from the Individual Market Exchange.
- **Recommendation:** Support § 1.36B-2(b)(5) clarifying that lawfully present immigrants or their family members who are not eligible for Medicaid and who have household income under 100 percent FPL, are “applicable taxpayers” eligible to apply for a premium tax credit.
- **Recommendation:** Support § 1.36B-2(b)(5) clarifying that the amount of premium tax credits provided to lawfully present immigrants or their family members who are not eligible for Medicaid and who have household incomes under 100 percent FPL, will be calculated based on the actual household income.

COMPUTING THE PREMIUM ASSISTANCE CREDIT AMOUNT (1.36B-3)

The Treasury NPRM does not address explicitly the computation of a premium tax credit for child-only coverage as required by ACA § 1201(4).ⁱⁱⁱ CCF supports the ACA requirement that QHPs offer child-only coverage. This provision will help uninsured children in complex family situations connect to coverage and care. These children should be protected and actively considered as the NPRM and Proposed Rules move toward finalization, and the perspective of consumer advocates representing children and families should be actively sought in this process.

1.36B-3(f)(3) Second lowest cost silver plan not covering the taxpayer's family

CCF supports the flexibility in the NPRM § 1.36B-3(f)(3) that allows families who live in different geographic areas to combine benchmark plan premiums for use in computing the

amount of a premium assistance credit for which they may qualify. The NPRM's Example 8 in § 1.36B-3(f)(5) demonstrates how the proposed rule is conducive to making affordable quality insurance available to, for example, farmworker families who may consist of parents separated by work into different Exchange rating areas. In Example 8, one parent lives with their child and one does not, and they must buy multiple plans to obtain family coverage. Currently, lack of access to health insurance for farmworker populations results in significant lack of access to care for such families.^{iv} Under Example 8, the proposed rule allows the applicable benchmark plan premium used for computing the family's tax credit to be the sum of the premium for a benchmark plan covering parent and child, and the premium for a self-only benchmark plan. This interpretation permits affordability for a geographically-separated family to be the same as that of a family living together.

1.36B-3(l) Families including individuals not lawfully present

The NPRM at § 1.36B-3(l)(2)(i) reiterates the ACA's specific formula at § 1401(e)(1)(B)(i) for counting the income of a household that includes one or more members who are eligible for the Exchange, along with one or more members who are ineligible due to immigration status. The income-counting formula will be used when determining premium tax credits and cost-sharing reductions. In general, CCF supports the formula's 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 the health coverage they purchase is as affordable as it would be if all family members were eligible for coverage. However, the ACA at § 1401(e)(1)(B)(ii) allows for the use of another methodology that would accomplish the same result. CCF supports this latter approach to prevent unnecessary collection of information that would deter eligible family members from claiming the premium tax credit. The NPRM acknowledges this ACA provision by reserving for later rulemaking, § 1.36B-3(l)(2)(B)(ii), "Comparable method."

To accomplish the same result with another methodology, CCF suggests HHS use the existing income-counting and family size determination procedures used by most States in the Medicaid program. We recommend that the entire household income and family size as defined in ACA § 1401(d) be taken into account to compute FPL when determining subsidy eligibility. State and federal agencies are already familiar with the methodology of counting actual numbers of family members, and actual income supporting those family members when determining income eligibility. This formula results in the same determination of FPL as the formula found in § 1401(e)(1)(B)(i). Applying consistent income counting rules for eligibility would reduce confusion and administrative costs and burdens.

CCF is very concerned about the burden of implementing this provision in a way that does not require family members who are not seeking coverage for themselves to declare their immigration status. Such a requirement would violate the standards of the HHS-USDA "Tri-Agency Guidance" issued in 2000^v and now codified in new Medicaid rules at § 435.907(e)(1). Immigrant families have heightened concerns about the collection, use, and disclosure by government agents of personally identifiable information (PII). Breaches of confidentiality and privacy laws can lead to forcible separation of families. The ACA provides strong protections in §§ 1411(g) (confidentiality) and 1557 (nondiscrimination), as does the Internal Revenue Code at 26 USC § 6103. Final rules should emphasize these

authorities, and their protections should be implemented robustly by the Treasury regulations and in the development of any forms developed pursuant to the ACA. Confidentiality concerns are another reason why final rules should reference and direct states to the alternative and comparable income counting and family-size determination method recommended for mixed-status families, described above.

- **Recommendation:** That future Treasury rulemaking address methodology for claiming a premium tax credit for child-only coverage and that final rules explicitly address and protect the needs of children in complex family situations.
- **Recommendation:** Support § 1.36B-3(f)(3), as illustrated by Example 8 in § 1.36B-3(f)(5), which allows family members who reside in different rating areas, such as a farmworker and a spouse and children, to aggregate premiums for the applicable benchmark plans in determining the coverage family's premium assistance credit amount.
- **Recommendation:** Support and Amend § 1.36B-3(l). Support the fairness of (l)(1) and (l)(2)(i) as a formula for counting income and family size accurately for purposes of computing the premium tax credit of mixed-status immigrant households who have one or more members who are not eligible for the Exchange. Amend (l)(2)(ii) by proposing and recommending that states use the income counting for mixed-eligibility families currently in use by most states, as a comparable method that counts the actual income and actual family size when determining income eligibility based on comparing a household's income to FPL.
- **Recommendation:** Amend § 1.36B-3(1) to require states to implement this provision consistent with rules protecting collection, use, and disclosure of information in ACA §§ 1411(g) (confidentiality) and 1557 (nondiscrimination), the confidentiality protections of the Medicaid program at § 1902(a)(7) of the Social Security Act, and the policies of the HHS-USDA "Tri-Agency Guidance" issued in 2000 and now codified in new Medicaid rules at § 435.907(e)(1), as well as the protections of the Internal Revenue Code at 26 USC § 6103.

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, as such information is irrelevant to the duty to pay taxes. CCF supports this policy and notes that it is undisturbed by the ACA. The NPRM should specifically prohibit the transfer of immigration status information from the Exchange to the IRS. To promote maximum compliance with tax laws, it is essential that exchange of information between the Exchange and IRS for verification of eligibility or other purposes be strictly limited and clearly defined. In addition, the NPRM should be strengthened by codifying and citing §§ 1411(g)(2) and (h) of the ACA which prohibit using information provided to the IRS from the Exchange for any purpose other than "ensuring efficient operation of the Exchange." Accordingly, even if reconciliation is required to verify whether or not § 1401(e)(1)(B)(i) was correctly applied, any immigration information gleaned during reconciliation is expressly prohibited from leaving IRS, pursuant to § 1411(g)(2)(B) of the ACA. In fact, this prohibition on the disclosure of information appears to be stronger than the Internal Revenue Code's confidentiality protection at § 6103.

Therefore, the proposed rule should guarantee that the provision of enrollee information to the IRS by the Exchange is compliant with statutory protections for the privacy and confidentiality of personally identifiable information (PII). Distinct rules outlining the use of PII are particularly necessary for individuals with complex family situations, such as taxpayers and other members of mixed-status immigrant families eligible for premium assistance under ACA § 1401(e)(1)(B). Fully 25 percent of the citizen children in mixed-status families are uninsured. If IRS reconciliation processes are perceived to be, or are in fact, unsecure or violate § 1411(g)(2) and (h) or § 6103 of the Code, reconciliation may deter eligible immigrant families from participating in the new Exchanges.

- **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.

We hope you find these comments to be helpful. For more information, please contact Dinah Wiley at dinahwiley@gmail.com, 703-402-2665.

ⁱ 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>

ⁱⁱ USCIS Ombudsman, “Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication (August 26, 2011) available at <http://www.dhs.gov/xlibrary/assets/cisombemployment-authorization-for-asylum-08262011.pdf>

ⁱⁱⁱ ACA § 1201(4) adds § 2707(c) to the Public Health Service Act (42 U.S.C. 300gg et seq.)

^{iv} See, e.g. Kaiser Family Foundation, “Migrant and Seasonal Farmworkers: Health Insurance Coverage and Access to Care,” available at <http://www.kff.org/uninsured/7314.cfm>

^v 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), found at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html>