

VIA ELECTRONIC SUBMISSION AT REGULATIONS.GOV (1jx-88ml-6cqf)

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:

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 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 §1502 of the Patient Protection and Affordable Care Act (ACA). These comments support proposed methods of collecting data about dependents of insured individuals and recommend changes to protect the privacy of personally identifiable information and to more effectively encourage access of families, including those with immigrants, to health insurance under the ACA.

**§1.6055-1. Information reporting for minimum essential coverage.**

As IRS states in the preamble at 54990, “[t]he proposed regulations adopt TIN (tax identification number) reporting, consistent with the statute” at ACA §1502. Because TIN requests are more likely to pose challenges to immigrants than to citizens, it is helpful that the preamble acknowledges that responsible entities such as issuers and self-insured employers may have difficulty obtaining TINs for some covered individuals, may not always collect TINs from dependents, and may seek to enroll individuals who decline to provide TINs. Unacknowledged in the preamble, however, is the circumstance that TINs may be unavailable for some individuals. We recommend that this be added to help prevent undue concern on the part of entities encountering this circumstance, and the drawing of erroneous inferences of fault on the part of consumers.

As noted above, eligible non-citizens are more likely than citizens to lack a TIN in the form of a Social Security number (SSN) or individual tax identification number (ITIN). HHS rules account for this by allowing states to issue unique identifier numbers for health insurance enrollment. For example, non-citizens who have newly arrived in the U.S. (along with some citizens and other immigrants who have never previously needed to file a tax return) would not have a TIN until at least the next tax-filing year.

In addition, some lawfully present immigrants do not have an immigration status that confers work-authorized eligibility for a regular SSN. For these consumers, the process of obtaining a non-work SSN can be difficult if not impossible without expert help from an advocate or other assister. Further, for individuals ineligible for a SSN to obtain a ITIN, they must submit two certified documents from a list of thirteen options,[[1]](#footnote-1) which may not be readily available or easily obtainable. To promote simplified enrollment as well as equity and fairness, it is important that policies not deter and disadvantage ACA-eligible immigrants from enrolling in coverage that is more easily available to other employees’ dependents because they are citizens.

We thus strongly support proposed §1.6055-1(d)(1)(iii) of the NPRM, providing that the insurer or other responsible entity may submit the date of birth (DOB) of a covered individual if a TIN is not available.

We note, however, that the lack of a TIN may create challenges for IRS in assessing appropriate individual responsibility payments. When one person serves as the responsible individual for an insured child but a different person claims the child as a tax dependent (for instance separated parents where the noncustodial parent purchases a child’s health insurance), IRS will need to match the report of coverage to the tax return where the child is named as a dependent. We urge IRS to take appropriate measures to avoid assessing an individual responsibility payment when there is no TIN to facilitate making the appropriate match. IRS can use dependents’ names, DOB, and other information to make the appropriate match and assure that insured children do not erroneously trigger individual responsibility payments.

The preamble at 54990 notes that penalties for reporting failures are waived for entities that make reasonable efforts to collect TINs but do not receive them. Waiver of these penalties is an essential component if entities are to comply with the requirement to submit the DOB when the TIN is unavailable. As such, we believe the waiver should be explicitly provided in the final rule.

The preamble describes “reasonable efforts” as three requests for the TIN: at time of enrollment followed by “two consecutive annual TIN solicitations.” We see the rationale in repeating a solicitation for a TIN, as the interval between the two solicitations provides opportunity to obtain a TIN if one is available. But a third solicitation may have a chilling effect on participation in health reform. The repeated solicitation will become known in immigrant communities and could be interpreted as threatening. Requests for SSNs or other TINs have been shown to deter participation of immigrants in government programs and activities. SSNs have been erroneously used by government agencies as a proxy for immigration status, and inferences of unlawful status have been drawn for immigration enforcement purposes. Three requests could be perceived by immigrant families as onerous or harassing.

The preamble discussion of the reasonable effort standard can also be perceived by insurers as de-emphasizing consumer protections and as supporting or permitting requests for information that is neither necessary nor appropriate to solicit. Other programs under the ACA place robust limitations on collection of information from individuals applying for coverage to only that which is “strictly necessary” to determine eligibility.[[2]](#footnote-2) The ACA and regulations further protect consumers through privacy protections for personally identifiable information (PII) collected as part of an eligibility determination.[[3]](#footnote-3) Before enactment of the ACA, HHS recognized that requests for information that are not carefully designed to avoid unnecessary requests and to provide assurances of confidentiality may discourage individuals from accessing coverage because of fear of immigration enforcement consequences for them or their family members.[[4]](#footnote-4)

CCF is concerned about the omission in the NPRM of confidentiality protections around the reporting of PII of applicants and enrollees and their dependents. Treasury rules include strong confidentiality protections in IRC §6103, yet the NPRM does not reference these protections in the context of employee and dependent data collection. Such a reference would help to educate and incentivize reporting entities to avoid overreaching in collection of dependents’ PII, and we recommend that these protections be included.

In some cases the entity collecting the information will be the employer, not the insurer. In these circumstances, immigrant concerns about confidentiality are heightened. It is important to protect employees and their mixed-status families from employers who would draw inferences about immigration status from the unavailability of a TIN for a covered individual. It is important for employers to know clearly that the absence of a TIN for a covered individual does not constitute constructive knowledge of an immigration violation, and does not incur any immigration enforcement duty. [[5]](#footnote-5) Thus, it would help to facilitate the intended purposes of §6055 reporting if the final rules include specific language concerning confidentiality and protections for both employers and employees against the use of any information for purposes of constructive notice of immigration status as it pertains to possible unlawful employment.

* **We support alternative reporting by entities of the covered individual’s DOB if a TIN is not available.**
* **Recommendation: Develop sub-regulatory guidance clarifying for reporting entities that TINs are not available to all covered individuals, and that the alternative use of a DOB for reporting is both necessary and acceptable when a TIN is not available.**
* **Recommendation: Develop sub-regulatory guidance to clarify the standard for making a reasonable effort to obtain a TIN, establishing that the reporting entity acts responsibly in attempting to solicit a TIN and makes a reasonable effort to obtain the TIN when, after an initial, unsuccessful request for a TIN (for example, at the time of enrollment), the entity makes another solicitation for the TIN before the end of the following calendar year.**
* **Recommendation: Amend §1.6055-1 to add language from the preamble at 54990 providing for a waiver of penalties under 26 U.S.C. §§6721-6722 for reporting entities that make reasonable efforts to collect TINs but do not receive them.**
* **Recommendation: Amend §1.6055.1 to add that the collection, use, and disclosure of information collected under ACA §1502 is: (1) subject to the confidentiality protections of IRC §6103, (2) subject to privacy protections consistent with 45 C.F.R. §155.260.**
* **Recommendation: Add a safe harbor protection that prohibits employers from using information obtained for constructive knowledge of unlawful status or unauthorized employment.**
* **Recommendation: Amend §1.6055.1 to include language consistent with 45 C.F.R. §155.715(c)(4) (pertaining to verification of information by SHOP exchanges) to prohibit information collected from employees or employers from being used to verify, or draw inferences about, immigration status.**

Thank you for your consideration of these comments and recommendations. For additional information, please contact Dinah Wiley at [dw688@georgetown.edu](mailto:dw688@georgetown.edu).

Sincerely,

Georgetown University Center for Children and Families

1. *Revised Application Standards*, IRS, March 19, 2013, http://www.irs.gov/Individuals/Revised-Application-Standards-for-ITINs. [↑](#footnote-ref-1)
2. 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.” [↑](#footnote-ref-2)
3. *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.”) [↑](#footnote-ref-3)
4. Dept. Health and Human Services and Department of Agriculture, Policy Guidelines Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits. [↑](#footnote-ref-4)
5. *See* 8 U.S.C. §1324(a)(1)–(2) (stating it is unlawful for an employer to hire or continue to employ an individual “knowing” the individual is unauthorized); 8 C.F.R. §274a.1(l)(1) (defining “knowing” as including “constructive knowledge” that is inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition . . .”). [↑](#footnote-ref-5)