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National Advocates for Asian American, Native Hawaiian & Pacific Islander Health

October 31, 2011

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

Re: **REG-131491-10 (Health Insurance Premium Tax Credit)**

To Whom It May Concern:

The Asian & Pacific Islander American Health Forum (APIAHF) thanks the Department of Treasury, Internal Revenue Service (IRS), and HHS for the opportunity to comment on the premium tax credits under the Affordable Care Act (ACA). For 25 years, APIAHF has dedicated itself to improving the health and well-being of Asian American, Native Hawaiian and Pacific Islander communities living in the United States and its jurisdictions. The Proposed Rule for the premium tax credit has the potential to help make coverage more affordable for many low and moderate-income Asian Americans, Native Hawaiians, and Pacific Islanders (AA and NHPI).

AAs and NHPIs stand to benefit significantly from coverage and subsidies offered through the Exchanges. Our analysis of the 2009 American Community Survey reveals that an estimated 11.3 percent of Asian American adults and 12.4 percent of Native Hawaiian and Pacific Islander adults are likely to receive a premium tax credit to purchase plans in the Exchanges.[1] In addition, Asian American and Pacific Islander communities are overwhelmingly immigrant; almost 60 percent of Asian Americans and 14 percent of Pacific Islanders living in the U.S. are foreign-born, representing the full spectrum of immigration status categories.[2]

Linguistic and cultural barriers add complexities to the eligibility and enrollment process, preventing many in these populations from attaining quality health care. We urge IRS to ensure the processes involved in enrollment in the premium tax credits adequately meet the needs of diverse communities, including those that are immigrant and limited English proficient. It is critical to ensure that newly available health insurance plans purchased through the exchanges are affordable and accessible for eligible individuals, including low-income and working immigrant families.

Premium Tax Credits for Residents of the U.S. Territories

The U.S. Territories of Guam, American Samoa and the Commonwealth of the Northern Mariana Islands have much to gain from the establishment of the Health Insurance Exchanges. Over 331,000 people live in these jurisdictions. Located in the Pacific and about 8,000 miles from the continental United States at its farthest,

[1] APIAHF analysis of 2009 ACS Public Use Microdata Sample (PUMS) data.
[2] 2007-2009 American Community Survey 3-year Estimates.

residents of these jurisdictions face serious health disparities such as high rates of cervical, lung, and stomach cancer, breast cancer mortality, and suicide[3]. Under the new law the governments of these territories can elect to establish the Health Insurance Exchanges, through communicating with the Secretary of Health and Human Services by October 1, 2013. The health insurance infrastructure of the territories is less developed in comparison to the states, with only small and local insurance companies insuring a large segment of the population. Tax rules also differ in the territories. Guam, American Samoa and the Commonwealth of the Northern Mariana Islands do not pay federal income taxes but do pay taxes on social security and Medicare. As such, we ask that IRS consider the unique structure of the tax code in the U.S. Territories in its final rule.

We also urge IRS to work closely with HHS and consult with territorial governments to advise them on coordinating the distribution of premium subsidies. We understand that under the ACA, there is only a finite amount of money set aside for the territories. Pursuant to Sec 1323(c) of the ACA, Treasury will provide a total of $1 billion between 2014-2019 to Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands and the U.S. Virgin Islands to provide its residents with premium and cost-sharing assistance. Thus, we ask that Treasury also consider population changes and projections when allocating these dollars between the five territories.

§1.36B-1 Premium tax credit definitions

Family and family size

We support the NPRM's current definition of family and family size. We agree that family and family size should include individuals who are exempt from the requirement to maintain coverage under Section 1501 of the ACA.

However, we recommend that the definition of family and family size should include individuals who are ***excluded*** as well as exempted from the requirement under Section 1501. This includes individuals who are not lawfully present but who may be the sole income earner and tax filer in the family. Although individuals who are not lawfully present are ineligible to purchase health insurance through the exchange, other family members may be eligible for insurance and premium tax credits. Their family size should be based on the actual number of individuals in the family.

This recommendation would help ensure alignment with the definition of applicable taxpayer in the NPRM at Section 1.36B-2(b)(4) which correctly clarifies that individuals who are not lawfully present (and thus excluded from the individual mandate) may be considered an applicable taxpayer for purposes of applying for and obtaining premium tax credits for eligible family members. The definition of

[3] Asian & Pacific Islander American Health Forum. "Opportunities and Challenges: Implementation of the Patient Protection and Affordable Care Act in the U.S. Pacific Territories." April 2011

family and family size should recognize that some individuals in a family may not be subject to the individual mandate.

Congress created a rule specifying how the IRS should calculate the income of families that include lawfully present and not lawfully present individuals, for purposes of determining eligibility for the premium tax credit.[4] To the extent that the income of every individual in a family is counted, individuals who are not lawfully present should also be included in the definition of family and family size. Their inclusion in the definition of family and family size does not bestow any eligibility upon those who are not lawfully present.

Lawfully present

The proposed regulations adopt a definition of "lawfully present" used in the Pre-Existing Condition Insurance Plan (PCIP), at 45 CFR §152.2. Although the PCIP definition provides a helpful starting point, we urge IRS to use a slightly expanded definition that more accurately encapsulates all lawfully present individuals. First, the definition should include two categories that are currently listed in the definition CMS developed to implement Section 214 of the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009. Specifically, categories eight and nine from the CHIPRA guidance[5] are not included in the PCIP definition: individuals who are lawfully present in the Commonwealth of the Mariana Islanders and American Samoa. These categories were omitted from the PCIP definition because residents of the U.S. territories are not eligible to participate in the PCIP program. By contrast, territorial residents are eligible to participate in the Exchanges, if the territories elect to create one.

Second, we recommend the inclusion of a three additional categories of individuals that should be considered lawfully present:

- Victims of human trafficking who have been granted "continued presence;"
- Individuals whose status makes them eligible to apply for work authorization under 8 CFR §274a.12; and
- Individuals granted a stay of removal/deportation by administrative or court order, statute or regulations.[6]

In addition, we ask that the final rule include a revision to the current category pertaining to asylum applicants to include pending applicants 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 Convention Against Torture, whose application has been accepted as complete. These individuals should be considered lawfully present without regard to whether they are eligible for employment authorization,

[4] Section 1401(e) of the ACA; Section 1.36B-3(l)(2) of the NPRM.
[5] Centers for Medicare & Medicaid Services, *Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women*
[6] For more information about these categories, see the National Immigration Law Center's comments on the Interim Final Rule for the Pre-Existing Condition Insurance Program – File Code OCIIO-9995-IFC, available at http://www.nilc.org/immspbs/health/Comments-PCIP-regs-2010-09-24.pdf.

since they have a right to remain in the U.S. pending the adjudication of their asylum application. This process can take years.

Finally, we recommend that the definition of lawfully present acknowledge the possibility of new categories of immigrants who may be determined lawfully present in the future. Immigration law frequently changes, producing new statuses and document requirements, therefore the regulation should recognize that the list is not exhaustive.

<u>Recommendation:</u>
Amend the definition of "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;
Revise the current category pertaining to asylum applicants as follows:
(6) A pending applicant for asylum under section 208(a) of the Immigration and Nationality Act (INA) or for withholding of removal under section 241(b)(3) of the INA or under the Convention Against Torture, whose application has been accepted as complete.

<u>§1.36B-2 Eligibility for premium tax credit</u>

Individuals not lawfully present or incarcerated

We thank IRS for considering the unique needs of diverse family units, including mixed-immigration status families, in the Proposed Rule. Specifically, we commend IRS for addressing the possibility that an individual who is not lawfully present may be an applicable taxpayer and obtain a tax credit on behalf of a dependent family member if that family member is eligible to enroll in a qualified health plan. We strongly support and encourage IRS to continue to specifically address the diverse needs of mixed-immigration status families to ensure all eligible persons are able to receive the premium tax credit.

Individuals lawfully present

To further clarify eligibility for lawfully present individuals, we support the recommendations of the National Immigration Law Center for consideration in the final rule:

Recommendation 1:
To ensure that consistent terminology is used in the NPRM, we recommend that the language in this section be revised as follows:

(5) Individuals lawfully present. If a taxpayer's household income is less than 100 percent of the federal poverty line for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an alien ***individual who is*** lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—

Recommendation 2:
As Medicaid income eligibility after 2014 will be set at 133% FPL or below under the ACA, many lawfully present immigrants with incomes below 133% FPL must also seek premium tax credits and cost-sharing reductions because they will be ineligible for Medicaid solely due to their immigration status. As a result, we recommend that the IRS clarify in this section that not only are individuals with incomes below 100% FPL eligible for premium tax credits, but that lawfully present individuals with incomes between 0% FPL and 133% FPL are eligible for premium tax credits if they are ineligible for Medicaid. This could help streamline enrollment for coverage in the exchange and affordability credits for many lawfully present immigrants who are determined ineligible for Medicaid by the state solely due to their immigration status.

As such we recommend that the language in this section be revised as follows:

(5) Individuals lawfully present. If a taxpayer's household income is less than 100 percent of the federal poverty line ***or between 100 and 133 percent of the federal poverty line*** for the taxpayer's family size and the taxpayer or a member of the taxpayer's family is an alien ***individual who is*** lawfully present in the United States, the taxpayer is treated as an applicable taxpayer if—

Special rule for taxpayers with household income below 100 percent of the federal poverty line for the taxable year

We are pleased the Proposed Rule specifically addresses eligibility and computation for premium assistance for taxpayers with incomes below 100% FPL for the taxable year. The proposed computation method, relying on the taxpayer's actual household income and not a deemed household income that equals 100% FPL, aligns with the ACA's legislative history and intent. Similarly, we strongly support the proposed computation method for taxpayers who are lawfully present with incomes under 100% FPL based on actual household income. This will ensure low-income persons are able to qualify for and receive the maximum assistance for which they are eligible.

Government-sponsored minimum essential coverage

We support codification of the proposed time frame for determining when a person is eligible for government-sponsored coverage as the first day of the first

full month in which the individual may receive benefits. This time frame will allow individuals who become newly eligible for government-sponsored coverage to transition and enroll in new coverage, while maintaining the credit. With respect to the requirement that an individual obtain coverage "reasonably promptly," we recommend IRS require notice be given to an individual who qualifies for coverage. In addition, the final rule should provide a minimum standard definition for reasonable promptness to which states must adhere. This minimum standard should be of adequate length as to allow applicants to obtain necessary documentation, such as a reissued official copy of a birth certificate. States should be given the flexibility to expand this standard's duration and make exemptions for individuals who can demonstrate good faith towards completing enrollment requirements. Exemptions should be required for any delay due to action or inaction by a government agency or official, such as a delay in the reissuing of an official copy of a birth certificate. In addition, the notice should specify the time frame for enrollment in coverage, including the date the determination becomes effective, and the contact information where individuals can obtain additional information or assistance.

In addition, we urge IRS to include flexibility in the rule to accommodate the needs of persons who may have challenges transitioning from coverage in a QHP to a government-sponsored program. Flexibility will be especially important in the first few years after 2014 as persons learn of, select and enroll in coverage in the Exchanges and insurance affordability programs.

Employer-sponsored minimum essential coverage

We are concerned that Treasury's proposed definition of "minimum essential coverage," as set forth at 1.36B-2(c)(3)(v) effectively results in a penalty to families, especially those at the lower end of premium credit eligibility. This is because the proposed rule uses an affordability test based on the cost of self-only coverage, which provides coverage to the employee only and not to the dependents including children in the household. In many employer-sponsored coverage plans, premiums for family coverage are considerably higher than premiums for self-only coverage. While an employer may offer family coverage, many families with dependents will be treated as having access to affordable minimum essential coverage even though the insurance offered will be too expensive for the family to reasonably afford. This is particularly important for Asian American, Native Hawaiian and Pacific Islander families, whose employer coverage rates range from 77 percent among Asian Indians to 49 percent among Koreans.[7]

While we understand the ACA provides a statutory scheme for determining if employer-sponsored coverage is considered affordable, we want to highlight the potential negative effect that the proposed metric basing affordability on the cost of individual coverage can have for families. Under the Proposed Rule, coverage

[7] Kaiser Family Foundation and Asian & Pacific Islander American Health Forum, "Race Ethnicity and Health Care" (2008), available at http://www.kff.org/minorityhealth/upload/7745.pdf.

may be unaffordable for a family offered employer-sponsored coverage *even if* coverage for an individual adult is less than 9.5% of the family MAGI. This may result in millions of families having to pay extraordinarily high premiums and being ineligible for subsidized coverage in the Exchanges. As a result, many families may continue to go without health coverage, undermining the goals of the ACA.

We acknowledge that in the future, proposed regulations may base the affordability test on the cost of employer-sponsored family coverage. We urge Treasury to adopt the alternative immediately so that employees will not encourage their current employers to cease offering coverage as a means of qualifying. To the extent that employers respond to the desires of these employees and cease to offer coverage, the purpose of the affordability test, and the ACA's goal of increasing market competition for health insurance, will be undermined.

Employee safe harbor

We strongly support the "employee safe harbor" in 1.36(B)-2(c)(3)(v)(2) of the proposed rule, which treats an employer-sponsored plan as unaffordable for the entire plan year once a determination of unaffordability is made. Without a safe harbor, individuals and families would be at risk of repaying large sums if the cost of employer coverage went below 9.5 percent of their household income for any months 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 end up being 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 after all. A family in this situation would have a large repayment obligation even though the Exchange correctly determined that the family was eligible for premium credits at the time the family applied. The policy in the proposed rule will avoid this result, and it should be retained in the final rule. Employees are not actually eligible to enroll in employer-sponsored coverage when there is a change in income in the middle of the plan year. The proposed rule will avoid situations where individuals and families are left without access to affordable coverage because they could not foresee an income increase.

§1.36B-3 Computing the premium assistance amount

In General

The proposed rules will leave many families facing a "double premium" or even a "triple premium" if they have one or more children eligible for CHIP or one parent eligible for employer-sponsored coverage. The issue, sometimes known as the "premium stacking issue," arises because each family is expected to contribute a specific dollar amount, depending on their household income and family size, for coverage through a qualified health plan offered on an Exchange. Under the proposed rules, a family could end up paying premiums for a qualified health plan

for adult coverage in addition to CHIP premiums if the children are enrolled in CHIP.

Unfortunately, the number of families subject to this type of "double premium" is likely to be significant. Estimates from the Urban Institute indicate that three out of four (75%) parents who are eligible for the Exchange will have one or more children who are eligible for CHIP or Medicaid and must enroll in these programs. It is unknown how many of these families must pay premiums to enroll their children in public coverage, but 30 states charge a premium or annual enrollment fee to children in CHIP, so this is a serious concern. While the fundamental issue arises from the statute, the proposed rules do not acknowledge the problem, nor do they provide states with any options or advice for addressing it.

We urge IRS to look into potential solutions to this problem to ensure the intent of the law, to provide affordable access to health coverage, is fulfilled. Treasury should also urge HHS to modify the CHIP rules in some way to not penalize families with children in CHIP.

Applicable benchmark plan, family coverage

Under 1.36B-3(f)(2), for Exchanges that offer multiple family categories, a family's benchmark plan is the category that best fits their family's composition. We understand that this proposed rule reflects the HHS's proposed rule 156.255(c) of 45 CFR, which requires qualified health plan issuers to offer coverage to four rating categories (individual; two adults; one adult with children; and family), but gives issuers the discretion to decide whether to offer coverage to each of the four family categories or to combine coverage categories. For example, an issuer could choose to offer only two categories of coverage—single and family—rather than offering coverage to each of the four categories discreetly. In addition, while required by the ACA, the proposed 156.255(c) does not contemplate the availability of child-only plans. We have strong concerns about the implications of such a rule when calculating families' premium tax credits using the method the IRS proposes under 1.36B-3(f)(2). The best solution to these concerns is for HHS to make changes to the proposed 156.255(c) of 45 CFR.

Allowing issuers in an Exchange to choose different rating categories makes the calculation of the benchmark premium as proposed by the IRS impractical and unnecessarily complicated. As currently proposed, it would be possible for many carriers in an Exchange to offer only individual and family coverage while just a few carry coverage in the one-adult with children or two adult rating categories. It would even be possible for only one qualified health plan in an Exchange to offer a certain category of coverage. If an Exchange only has one qualified health plan that offers a certain category of coverage, there would be no second lowest cost silver plan available in that category. The proposed rules are unclear on how a taxpayer's premium tax credit would be calculated if the taxpayer's family enrolled in a category that only one plan covered. In addition, it is unclear what category of coverage would be used to calculate the benchmark premium for a family that purchases a child- or children-only qualified health plan.

Further, in Exchanges with a limited market offering in certain coverage categories, the premiums for benchmark plans could vary in a way that do not seem to coincide with value. For example, if a limited number of carriers participated in the one adult with children market, premiums for such plans could be substantially more expensive than premiums for family coverage, without offering any added value through more robust benefits. Due to a lack of competition, benefits offered in such a one adult with children plan could actually be somewhat less robust than those offered in the more competitive family coverage plan market.
To facilitate the identification of the benchmark plan (and assure meaningful competition among qualified health plans), each exchange must establish a set of rating categories that all participating issuers make use of.

We strongly recommend that the IRS urge HHS to adopt in final rules 45 CFR, subsection 156.255(c) a requirement that: 1) qualified health plan issuers must cover all four rating categories (or another limited number of categories established by the Exchange, not by each issuer); and 2) a rating category be added for children, since QHP issuers are explicitly required to offer child-only plans within Exchanges.

Only if HHS does not adopt the above recommendations do we recommend that Treasury adopt the following additions to the final rule under 1.236B-3(f)(2) to mitigate the potential negative consequences of HHS rule 156.255(c) when calculating premium tax credits:

1. In Exchanges where there are two or fewer one adult with children plans, an applicable family's benchmark premium should be based on the second lowest cost family plan if it is higher than the premiums for the one adult with children plans;
2. In Exchanges where there are two or fewer plans offered to two-adult households, an applicable couple's benchmark premium should be based on the sum premium of two single benchmark plans if the sum is higher than the premiums for plans in the two adult categories;
3. In Exchanges where the premium for the second lowest cost silver plan in the one adult with children category is more than a set percent lower in cost than the benchmark plan premium for family coverage, the benchmark plan premium for families purchasing a QHP for one-adult and a child or children should be the benchmark plan premium for family coverage;
4. In Exchanges where the premium for the second lowest cost silver plan in the two adult household category is more than a set percent lower in cost than the benchmark plan premium for two individual plans, the benchmark premium for two-adult households should be the sum of the benchmark premium for two individual plans.

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, we support 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. Although the language of the formula may appear to require a new methodology for counting the income of mixed-status immigrant households, the ACA at § 1401(e)(1)(B)(ii) allows for the use of another methodology that would accomplish the same result. The NPRM acknowledges this ACA provision by reserving for later rulemaking, §1.36B-3(l)(2)(B)(ii), "Comparable method."

We recommend use of the existing income counting and family size determination procedures used by most states in the Medicaid program as the comparable method that does accomplish this same result. The existing Medicaid formula provides that an entire household's income and size is taken into account to compute FPL and thus determine eligibility. It results in the same determination of FPL and could be easily adjusted to compute modified gross adjusted income (MAGI). State and federal agencies are already familiar with the Medicaid methodology of counting actual numbers of family members, and actual income supporting those family members when determining income eligibility. Applying consistent income counting rules for eligibility for Medicaid and for subsidies in the Individual Market Exchange would reduce confusion and administrative costs and burdens. Thus, for efficiency and practicality of determining eligibility for a premium tax credit and of reconciliation of the credit with advance credit payments, final regulations implementing ACA § 1401(e)(1)(B) should incorporate commonly-practiced Medicaid income counting methodology for mixed-status households.

APIAHF 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. Asian American and Pacific Islander communities are overwhelmingly immigrant; almost 60 percent of Asian Americans and 14 percent of Pacific Islanders living in the U.S. are foreign-born, representing the full spectrum of immigration status categories.[8] Such a requirement would violate the standards of the HHS-USDA "Tri-Agency Guidance" issued in 2000[9] 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 confidentiality and non-discrimination protections in §§ 1411(g) and 1557, as does

[8] 2007-2009 American Community Survey 3-year Estimates.

[9] 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

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 commonly practiced Medicaid income counting methods for mixed-status families.

Finally, it is unclear how the calculations made by applying the formula in ACA § 1401(e)(1)(B) would be reconciled during the tax process. If done incorrectly, it could create a situation where a family who receives the benefit of this reduction would then appear to have a premium tax credit that is disproportionate to their income and their family size, thus putting them at risk for an unwarranted tax penalty or create additional administrative burdens to establish eligibility for appropriately-sized credit.

As such, we urge IRS to incorporate the following:

1. 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.
2. Amend (l)(2)(ii) by proposing and recommending that states use the Medicaid income counting 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.
3. Amend § 1.36B-3(1) by requiring states to implement this provision consistent with rules protecting collection, use, and disclosure of information in ACA §§ 1411(g) and 1557, 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.

<u>§1.36B-4 Reconciling the premium tax credit with advance credit payments</u>

We are concerned about the hardship that many low-income Asian American, Native Hawaiian, Pacific Islander and other families will face due to reconciliation when their incomes or family compositions change during the course of the year. Asian Americans, Native Hawaiians and Pacific Islanders have lower per capita incomes than non-Hispanic whites.[10] Disaggregating the Asian American category further reveals that Bangladeshi, Hmong, Cambodian and Laotian Americans have lower per capita incomes than Latinos and African Americans, and Hmong Americans have the lowest per capita income among any racial group nationwide at $10,949.[11]

[10] U.S. Census Bureau, 2007-2009 American Community Survey, 3 Year estimates
[11] U.S. Census Bureau, 2007-2009 American Community Survey, 3 Year estimates

During a period of unemployment or reduced income, a family may apply for assistance with premiums through the exchange and receive advance premium credits. If the family regains income during the course of the year, however, they may have to repay some or all of the assistance they received, even if they requested that their credits be adjusted accordingly and received the correct amount of assistance for the coverage month. After a period of unemployment, most families struggle to get out of debt and catch up on their expenses. It is not practical to expect them to pay a new back bill for premiums. Moreover, if this reconciliation amount is part of their general tax liability, families who cannot immediately repay at the end of a tax year may face interest and penalties. The Affordable Care Act is designed to help families afford premiums so that they will be able to obtain care. While paying monthly premiums will be new to some households, the coverage will help them avoid medical debt and is designed to be affordable given their household incomes. We urge you to keep these goals in mind as you work to ensure that families will receive appropriate assistance during periods of financial hardship.

Taxpayers will also need considerable help and counseling with reconciliation. The federal government should furnish tools on Exchange websites and on the IRS website to easily calculate credit amounts that will enable families to adjust their credits and avoid reconciliation. The Taxpayer Advocate Service must be equipped to answer questions, and its availability must be widely publicized. We also urge IRS to specify in the final rule the requirement to provide assistance in a manner that is culturally and linguistically appropriate and accessible. Further, the rules should require training of exchange staff and navigators in this area.

Finally, IRS should furnish households with all assistance possible to prevent reconciliation obligations from mounting and to exempt them from interest or penalty payments. One possible way of providing relief would be to develop a hardship waiver. Exchanges could certify that a household had carried out its obligations to report changes but nonetheless had an overpayment amount that would be difficult for the family to handle. Taxpayers filing this hardship waiver form with their tax returns could be exempt from reconciliation. IRS should also automatically offer payment plans for any reconciliation amounts, and should not charge interest or penalties on these amounts. Families for whom repayment would pose hardship, as certified by an exchange, should be exempt from reconciliation. IRS, in coordination with exchanges, should furnish tools for calculating and adjusting premium credits when income changes; provide outreach and counseling, including through the Taxpayer Advocate Service; provide training to exchanges and navigators; and require through regulation that each state exchange have adequately trained staff to assist consumers in this area.

§1.36B-4(b)(1) Changes in Filing Status (Marriage)

Changes in filing status occur when couples marry, divorce or separate, when a spouse dies, or when new dependents are added or other dependents are removed

from a tax return. Marital status is judged by the taxpayer's status on the last day of the year.

Taxpayers who marry during the year face special challenges in that their credits may have been appropriately calculated every month but the couple may still owe additional tax. This discriminates against couples that choose to get married and creates a substantial unanticipated expense for couples that have diligently reported changes in income and circumstance.

Taxpayers will rely on the calculations made by the Exchanges and will make complex decisions in choosing which level of coverage, cost sharing amount and plan to purchase. To have consumers make those decisions and faithfully report changes to income and circumstance, only to have the math change at the end of the year, would certainly cause a lack of consumer confidence in the Exchanges and in the tax system. The Exchange (and tax filers) will already be doing monthly calculations in the case of individuals who lose eligibility for the credit by gaining access to other minimum essential coverage.

As such, we recommend IRS prorate the credit by adding the Exchange-calculated advance credit for the months prior to marriage and the Exchange-calculated advance credit for months of the year in which the filers were married. If this policy cannot be adopted, the IRS should consider having a one-year waiver of reconciliation that applies to newly-married couples (a "marriage safe harbor").
§1.36B-4(b)(2) Taxpayers not married to each other at the end of the taxable year.

Permanent separation and divorce create particular complications in determining the premium tax credit. The proposed rule would require the advanced payments and benchmark plan premiums of the taxpayers to be allocated between the taxpayers for the months in which they were married. The regulation allows the divorced taxpayers to agree to an allocation or, failing agreement, requires each taxpayer to use an allocation of 50 percent.

We urge IRS to consider requiring advance credits to be allocated by income. Women, who typically earn less than their spouses and disproportionately get primary physical custody of their children in a divorce, may be particularly disadvantaged if their former spouse rushes to file with a 50 percent allocation before an alternative allocation can be decided. In that case, a lower-income mother may owe additional tax based on the credits received prior to divorce. Even among well-intentioned tax filers, the additional complexity of figuring out the credit based on household income allocation, versus simply splitting credits in half, may deter filers from using the income-allocation method. On the whole, this is likely to discriminate against lower-income taxpayers.

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

The tax code disadvantages married couples filing separately by disqualifying filers from the Earned Income Tax Credit, education credits and other benefits. However,

premium tax credits will be different from those credits because they will be used directly to comply with the individual mandate. Therefore, it is important for IRS to carve out some common sense exceptions to the statutory requirement that married taxpayers must file jointly.

There are several legitimate reasons where it may be inadvisable or even impossible for married taxpayers to file jointly. One prominent reason is in cases of domestic violence, when a woman may be living separately from her spouse and keeping her whereabouts a secret. APIAHF is particularly concerned about these situations; an estimated 41 to 61 percent of Asian Americans report experiencing domestic violence during their lifetime.[12] In these cases, it would be inappropriate to require a woman to file a joint return. In fact, domestic violence was a condition discussed extensively during the health care debate when it was discovered that women with a history of domestic violence were often considered uninsurable by health plans. As a result, 42 U.S.C. 300gg was amended by Section 1201 of the Affordable Care Act to prohibit discrimination by insurers against conditions arising out of acts of domestic violence. It is appropriate that the IRS make a similar distinction for this class of individuals.

Abandoned spouses may also warrant special protection, in cases where a person (with no dependents) cannot locate their spouse and is forced to file separately. In addition, a family could be financially crippled if an angry spouse uses the threat of filing separately as retaliation during divorce proceedings. Incarceration is another possible barrier to joint filing, particularly if a tax filer has not obtained power of attorney for the incarcerated spouse. In addition, there should be exceptions in the case of a spouse living out of the country.

Taxpayers could be asked to certify on the schedule used to calculate the premium tax credit whether one of these conditions applies. This could utilize "exception codes" in a manner similar to those used to identify exceptions to the early distribution tax on qualified retirement plans. The exception codes should capture general categories (domestic abuse, abandoned spouse, separation, incarceration, spouse out-of-the-country). If these exceptions prove to be too broad, a narrower exception might rely on verifiable information. For instance, in the case of domestic violence, an exception might be granted if the person currently has or during the tax year had an order of protection or sought criminal prosecution in a domestic abuse case. Incarceration is also easily verifiable.

When such exceptional circumstances are identified, the individual should be permitted to file separately and still receive a premium tax credit. In cases where both spouses, at some point in the year, were enrolled in the same insurance plan, the IRS could allocate the advance credit and the benchmark premium according to

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[12] This range is based on studies of women's experiences of domestic violence conducted among different Asian ethnic groups in the U.S. The low end of the range is from a study by A. Raj and J. Silverman, Domestic violence against South-Asian women in Greater Boston *Journal of the American Medical Women's Association.* 2002; 57(2): 111-114. The high end of the range is from a study by M. Yoshihama, Domestic violence against women of Japanese descent in Los Angeles: Two methods of estimating prevalence. *Violence Against Women.* 1999; 5(8):869-897.

household income (with the absent spouse's income being determined by their tax filing). This would help protect the lower-income spouse. If the absent spouse did not file a tax return or if the filing spouse does not know their spouse's social security number, a reasonable allocation is 50 percent. In these cases, the repayment limits for single individuals should apply, according to income.

The Preamble requests comment on whether the regulation should take into account whether a couple filing together in the previous year and whether they attested their expectation to file jointly in order to obtain tax credits. It's important that the regulation bear in mind that family changes that can occur during the year. For example, a couple may indicate that they intend to file together when applying for credits in November 2013, but face a completely different scenario 17 or 18 months later when it's time to reconcile the premium tax credit on their tax return. It is reasonable, though, to expect that these exceptions would have limitations. Restricting the exception for one year may be too restrictive. A complicated divorce involving custody or criminal charges may take a long time to resolve. Limiting the exception to three consecutive years would be helpful to accommodate these types of situations.

Conclusion

In summary, we appreciate the opportunity to comment on the eligibility and computation of the premium tax credits under the ACA. Please contact APIAHF Policy Director, Priscilla Huang, at phuang@apiahf.org with any questions. We welcome future opportunities to work together on this important aspect of health reform implementation.

Respectfully,

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Asian & Pacific Islander American Health Forum