Low-Income Taxpayers and the Affordable Care Act

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By Christine Speidel

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Introduction

What is the connection between taxes and health insurance? Why do advocates for low-income taxpayers need to know about the Affordable Care Act?

The Affordable Care Act (ACA, also called "Obamacare")[1] contains dozens of tax provisions.[2] The ACA introduces a major new tax credit and a major new tax penalty for 2014. It also imports tax concepts into Medicaid. All told, the ACA will have a major impact on low-income taxpayers.

Health care advocates are already in the thick of helping people get and maintain health insurance coverage. Tax advocates at Low-Income Taxpayer Clinics[3] (LITCs) may not see ACA-related examinations and collection controversies until 2015, but now is the time many of our clients are making decisions that will seriously impact their lives and shape future tax controversies. Education, issue-spotting, and early guidance could make a positive difference. All advocates working with low-income taxpayers should educate their clients, particularly those in English as a second language (ESL) communities, about their new rights and responsibilities.

This article serves as an introduction and reference on the ACA for legal advocates and policymakers, with a focus on tax provisions affecting lower-income individuals. The article summarizes the major health care reform developments affecting low-income taxpayers from October 2013 through mid-2015, and introduces key ACA concepts. It then focuses in detail on the two ACA tax provisions that most concern low-income individuals: the Premium Tax Credit and the individual shared responsibility payment. This article also flags issues of concern for advocates and identifies areas to monitor for further development and advocacy. As the Internal Revenue Service (IRS) develops publications, forms, and schedules, there will be opportunities for systemic advocacy on behalf of low-income taxpayers.

A comprehensive discussion of the ACA is beyond the scope of this article. Instead, this article focuses on the choices, deadlines, and difficulties likely to arise for low-income taxpayers in the relatively near future.

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[1] The *Affordable Care Act* or *ACA* refers to the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)), as amended by the Medicare and Medicaid Extenders Act of 2010, Public Law 111-309 (124 Stat. 3285 (2010)), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Public Law 112-9 (125 Stat. 36 (2011)), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (125 Stat. 38 (2011)), and the 3% Withholding Repeal and Job Creation Act, Public Law 112-56 (125 Stat. 711 (2011)).

[2] *See*, Affordable Care Act Tax Provisions, *at* http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions?portlet=6.

[3] Low Income Taxpayer Clinics are funded by the Taxpayer Advocate Service of the IRS pursuant to I.R.C. § 7526. A nationwide list of clinics is available in IRS Publication 4134, online at http://www.irs.gov/uac/Low-Income-Taxpayer-Clinics.

Background

The ACA makes major changes to health insurance in the United States. The law affects almost all aspects of the health insurance industry. ACA implementation requires participation from many different federal agencies, including the Department of Health and Human Services (HHS), the Department of Labor (DOL), and the Department of the Treasury.

On January 1, 2014, many of the pillars of the ACA came into effect. Those particularly relevant to low-income taxpayers are outlined in this section.

In addition to the provisions described below, the ACA mandates broad changes to the content and availability of private health insurance plans, particularly in the "individual market."[4] As of January 1, 2014, insurance companies may not exclude coverage of pre-existing conditions, and furthermore may not refuse to issue an insurance policy because of pre-existing conditions.[5] Annual and lifetime limits on most covered benefits are banned.[6] Also, certain preventative services must be covered without any out-of-pocket cost.[7] These are only a few examples of the many ACA provisions impacting insurance plans. Additional ACA provisions have already gone into effect.[8]

Changes to Medicaid

The ACA makes two main changes to Medicaid.[9] First, it creates a new eligibility category for childless adults. This is the "Medicaid expansion." Second, it changes the eligibility rules for some (but not all) existing Medicaid beneficiaries.[10]

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[4] The individual health insurance market is contrasted with group markets, in which employers (for example) purchase insurance for their employees. Under the ACA, large employer plans do not have to change their content as dramatically as plans in the individual market.

[5] ACA § 1201 (amending the Public Health Service Act, 42 U.S.C. §§ 300gg *et seq.*); *see*, discussion in preamble to interim final rule, Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 FR 37,188, 37,190 (June 28, 2010).

[6] ACA § 1001 (amending 42 U.S.C. § 300gg–11); *see also* http://www.hhs.gov/healthcare/rights/limits/index.html.

[7] ACA § 1001, Coverage of Preventive Health Services (amending 42 U.S.C. § 300gg–13); *see also* http://www.hhs.gov/healthcare/facts/factsheets/2010/07/preventive-services-list.html.

[8] E.g., the requirement that insurance companies permit young adults under 26 to remain on their parents' plans. ACA § 1001 (amending 42 U.S.C. § 300gg–14).

[9] Medicaid is a public health insurance program for low-income people who fit into certain categories (e.g. children, the disabled). *See*, http://www.ssa.gov/disabilityresearch/wi/medicaid.htm. In contrast, Medicare is an insurance program for elderly and disabled beneficiaries. It covers people who have made payments into the system. *See*, http://www.socialsecurity.gov/pgm/medicare.htm.

[10] A full discussion of the Medicaid rules is beyond the scope of this article. A detailed explanation of the changes to Medicaid can be found in *The Advocate's Guide to MAGI* by the National Health Law Program (October 2013), available online at http://nhelp.nonprofitsoapbox.com/publications/browse-all-publications.

The ACA expansion covers almost everyone up to 133% of the federal poverty line (FPL) who is not eligible for Medicare.[11] There is a 5 percentage point disregard, so the practical limit is 138% FPL.[12] This is currently about $15,800 for a single individual.

Confusingly, 133% FPL will not be the official income limit for the expanded Medicaid population, and income limits will not be uniform across states. Actual income limits will vary because of "hold-harmless" requirements for the conversion from current Medicaid income rules.[13] These are intended to prevent beneficiaries (in the aggregate) from losing Medicaid as a result of the conversion to ACA income rules.

In June 2012, the U.S. Supreme Court ruled that states may opt out of the Medicaid expansion.[14] HHS's Centers for Medicare & Medicaid Services (CMS) will permit states to join the expansion at any time; there is no deadline.[15] As of November 22, 2013, twenty-six states are currently moving forward with the expansion.[16]

On the other hand, states cannot opt out of the general changes made to Medicaid eligibility rules.[17] The new ACA eligibility rules apply to Medicaid for children, pregnant women, and parents/caretakers of dependent children, plus the new adult eligibility group created by the ACA.[18] The new rules do not apply to individuals who qualify for Medicaid based on old age or disability.[19]

The new ACA Medicaid rules prohibit states from considering an applicant's assets in the eligibility determination.[20] The ACA also imports several tax concepts into Medicaid, including "tax dependent,"[21] the tax household, and "adjusted gross income" (AGI) under

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[11] ACA § 2001 (codified at 42 U.S.C. § 1396a).
[12] 42 U.S.C. § 1396a(e)(14)(I); 42 C.F.R. §§ 435.603(d)(1), 435.603(d)(4). *See* discussion in the Preambles to the Proposed Rule at 78 Fed. Reg.4594, 4625-26 (Jan. 22, 2013) and to the Final Rule at 78 Fed. Reg. 42160, 42186-88 (July 15, 2013).
[13] 42 U.S.C. § 1396a(e)(14)(A). See also discussion of conversion requirements in Centers for Medicare & Medicaid Services' solicitation of public input, *available at* http://www.medicaid.gov/state-resource-center/Events-and-announcements/downloads/MAGI-income-conversion.pdf (2012).
[14] *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 567 U.S. __ (2012).
[15] *See*, correspondence from Marilyn Tavenner to Republican Governors Assn., July 13, 2013, available at http://www.healthreformgps.org/resources/obama-administration-no-deadline-for-states-to-decide-whether-to-participate-in-medicaid-expansion/.
[16] Kaiser Family Foundation, *Status of State Action on the Medicaid Expansion Decision*, http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/.
[17] *See*, Center for Medicaid and CHIP Services, *MAGI: Medicaid and CHIP's New Eligibility Standards* (Sept. 30, 2013), available at http://www.medicaid.gov/AffordableCareAct/Medicaid-Moving-Forward-2014/Downloads/Modified-Adjusted-Gross-Income-and-Medicaid-CHIP.pdf.
[18] ACA § 2002, codified at 42 U.S.C. § 1396a(e)(14).
[19] *Id.*
[20] *See,* 42 C.F.R. § 435.603(g).
[21] Unfortunately, ACA Medicaid's definition of "tax dependent" does not quite align with the definition in section 152. Instead, it includes spouses whose personal exemptions are claimed under section 151.

section 62.[22] Suddenly, Medicaid applicants need to know their AGI, their tax filing status (dependent, nonfiler, or tax filer), and which people will be included on their tax return at the end of the year.[23] These are major changes to the Medicaid eligibility rules.

Exchanges and Qualified Health Plans

The ACA creates "American Health Benefit Exchanges" in which consumers can purchase private insurance plans and apply for federal subsidies.[24] If a state chooses not to set up an exchange, HHS must do it for them.[25]

M.I.T. economist Jonathan Gruber estimates that 80% of Americans will be relatively unaffected by the exchanges.[26] People enrolled in Medicare are unaffected.[27] People with employer-sponsored insurance are mostly unaffected.[28]

Who is affected by the exchanges? Mainly, it is Medicaid beneficiaries, the uninsured, and people who buy insurance for themselves on the individual market.[29] Some people currently covered by employer-sponsored insurance could be affected if their employers stop offering coverage. Small businesses with less than 50 full-time employees can also purchase health insurance though ACA exchanges.[30]

Insurance plans offered through an exchange are called Qualified Health Plans (QHPs).[31] QHPs are organized in metal tiers, from platinum down to bronze.[32] Generally, platinum plans have the most expensive premiums and lower cost-sharing, while bronze plans have

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However, the section 152 definition is used by the new Exchange subsidies discussed below. *Compare* 42 C.F.R. § 435.4 *with* 45 C.F.R. § 155.300; *see also* I.R.C. §§ 151-52.

[22] Unless otherwise indicated, section references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.).

[23] *See generally, The Advocate's Guide to MAGI*, *supra* n. 10.

[24] ACA § 1311; 45 CFR §155.20. This article uses the term "exchange" since that is the term practitioners will encounter in federal statutes and regulations. In communications with the general public, HHS uses the term "marketplace." See, www.healthcare.gov. The terms are synonymous. Individual exchanges go by various names, e.g. Covered California, https://www.coveredca.com/.

[25] ACA § 1321(c), codified at 42 U.S.C. § 18041. This is called a federally-facilitated exchange.

[26] Ryan Lizza, *Obamacare's Three Percent*, The New Yorker News Desk blog, (Oct. 30, 2013) http://www.newyorker.com/online/blogs/newsdesk/2013/10/obamacares-three-per-cent.html.

[27] Centers for Medicare and Medicaid Services (CMS), Fact Sheet, *People with Medicare and the Health Insurance Marketplace*, Aug. 2013, available at http://www.cms.gov/Center/Special-Topic/Open-Enrollment/Downloads/Medicare-Marketplace-FAQs.pdf.

[28] Lizza, *supra* n. 26.

[29] *Id.*

[30] *See, generally*, 45 C.F.R. Part 155, Subpart H; https://www.healthcare.gov/small-businesses/. Exchanges will open up to larger employers in 2016. *See*, 45 C.F.R. § 155.20 (defining terms *qualified employer* and *small employer*).

[31] ACA § 1301 (codified at 42 U.S.C. § 18021).

[32] ACA § 1302(d)(1) (codified at 42 U.S.C. § 18022).

the least expensive premiums, but higher cost-sharing.[33] Subsidies available for QHPs are discussed below.

Insurance companies' criteria for which individuals can be covered by a single QHP are completely separate from QHP subsidy criteria. Unlike the subsidies, QHP family enrollment is not aligned with tax dependent rules.

Exchanges must offer a single application that consumers can use to apply for both QHP subsidies and Medicaid.[34] Applicants who request financial help are screened for Medicaid first, then QHP subsidies.[35] A federal "data services hub" controlled by HHS will attempt to electronically verify application information.[36] The hub will draw from multiple sources, including the Department of Homeland Security (DHS), the Social Security Administration (SSA), and the Department of Treasury. The Internal Revenue Service (IRS) can provide strictly limited information, and only for taxpayers identified by Social Security Number on an exchange application.[37] Tax return data released to an exchange continues to be protected from disclosure by section 6103.[38]

Operational details will vary significantly from state to state. For example, states can decide how far to integrate Medicaid eligibility determinations with the exchange.[39]

There are three enrollment criteria for an unsubsidized QHP.[40] To access a QHP, an individual must: (1) be a U.S. citizen or national, or be "lawfully present" in the U.S. for the period for which coverage is sought;[41] (2) reside in the geographic area served by the exchange to which they are applying; and (3) not be incarcerated, except for incarceration pending disposition of charges.

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[33] For a primer on insurance terms, including premiums and cost-sharing, readers may wish to consult the health reform glossary at http://kff.org/glossary/health-reform-glossary/.
[34] ACA § 1413. HHS model applications released on October 9, 2013 are available at http://www.cms.gov/CCIIO/resources/Forms-Reports-and-Other-Resources/index.html.
[35] Individuals cannot receive QHP subsidies if they are eligible for Medicaid. I.R.C. § 36B(c)(2)(B).
[36] ACA §§ 1411, 1413. Medicaid agencies must also use the data hub to verify information. ACA § 2201. *See*, preamble to HHS notice, 78 FR 8538, 8539-40 (Feb. 6, 2013). *See also*, description of Health Insurance Exchanges Program in HHS Notice, 78 FR 8538-42 (Feb. 6, 2013).
[37] I.R.C. § 6103(l)(21); Treas. Reg. § 301.6103(l)(21)-1; *see also*, discussion in preamble to IRS rule at 78 FR 49367-69 (Aug. 14, 2013); IRS FAQ available at http://www.irs.gov/uac/Newsroom/IRC-Section-6103%28l%29%2821%29-Questions-and-Answers.
[38] *See*, preamble to final rule, 78 FR at 49,368 ("By operation of law, the safeguards established by section 6103(p)(4) apply to those entities described in section 6103(l)(21), namely HHS, the Exchanges established under the Affordable Care Act, and the State agencies administering a State program described under section 6103(l)(21), as well as their contractors.")
[39] *See*, 45 C.F.R. § 155.302, *Options for conducting eligibility determinations*.
[40] 45 C.F.R. § 155.305.
[41] Lawful presence is discussed in more detail below.

The exchanges have set enrollment windows. QHPs operate on a calendar year basis. Each fall there is a window of time in which individuals can sign up for a different plan, or renew their current coverage for the next calendar year.[42] Individuals who miss the open enrollment period cannot sign up for a QHP until the next open enrollment, unless they qualify for a special enrollment period.[43]

The exchanges got off to a rocky start. As late as early December 2013, most exchanges were not functioning smoothly.[44] It remains to be seen whether all the glitches can be worked out in time for people to enroll by March 31. If not, commentators have suggested that the administration could extend open enrollment or postpone the ACA penalty, among other options.[45]

QHP Subsidies

Qualified Health Plans are subsidized by the federal government for taxpayers with income up to 400% of the federal poverty line.[46] Currently, that is $45,960 for a single individual and $94,200 for a family of four. Subsidies take the form of premium tax credits and cost-sharing reductions.[47] Premium tax credits can be taken in advance to reduce monthly premium bills.[48] QHP enrollees with income under 250% FPL may also receive cost-sharing subsidies.[49] These reduce out-of-pocket costs like co-pays. In order to receive cost-sharing reductions, taxpayers must enroll in a QHP at the silver level.[50]

At least one state offers additional subsidies beyond the federal subsidy level.[51] All exchanges offer at least the federal subsidies.

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[42] 45 C.F.R. § 155.410. Medicaid does not have enrollment periods; applicants can be enrolled at any time during the year.
[43] Special enrollment periods are available when individuals experience certain qualifying events, such as the birth of a child, or marriage. *See*, 45 C.F.R. § 155.420.
[44] *See*, Amy Goldstein and Juliet Eilperin, *Health-care enrollment on Web plagued by bugs*, The Washington Post, Dec. 2, 2013.
[45] *See*, e.g., Health Reform GPS, *Editor's Comment: What Policy Options Exist if the Healthcare.gov Website Remains Non-Functional?* (Oct. 23, 2013), available at http://healthreformgps.org/resources/editors-comment-what-policy-options-exist-if-the-healthcare-gov-website-remains-non-functional/.
[46] ACA § 1401. The ACA refers to the "poverty line", but HHS prefers the term "poverty guidelines." http://aspe.hhs.gov/poverty/faq.cfm. The poverty line/guidelines are available at http://aspe.hhs.gov/poverty/index.cfm.
[47] ACA §§ 1401, 1402. Eligibility for the Premium Tax Credit is discussed below.
[48] ACA § 1412, codified at 42 U.S.C. § 18082.
[49] ACA § 1402, codified at 42 U.S.C. § 18071. HHS's implementing regulations are located in 45 C.F.R. Part 155. For more details on cost-sharing under the ACA, *see* Health Consumer Alliance, *Issue Brief #5, Reduced Cost-Sharing under the Health Insurance Exchanges* (August 2011), available at http://healthconsumer.org/New_Health_Law_CA_IssueBrief_5_Final.pdf.
[50] *Id.*
[51] *See,* Vermont Fiscal Year 2014 Appropriations Act, § E.309.1 (to be codified at 33 V.S.A. § 1812).

Both advance premium tax credits and cost-sharing reductions are implemented behind the scenes, between the insurance company, the exchange, and HHS.[52] An individual with subsidies should receive a reduced monthly premium bill from their insurance company, and they should be charged lower amounts for medical services used.

The ACA Penalty

Because sick people can no longer be excluded from the individual insurance market, or charged more than healthy people, the viability of the market depends on healthy individuals buying insurance. The ACA imposes a penalty on all non-exempt individuals who do not maintain a minimum level of health insurance coverage. This is the so-called individual mandate, officially named the Individual Shared Responsibility Payment.[53]

The ACA also created an Employer Shared Responsibility Payment.[54] The employer shared responsibility requirement applies to employers with at least 50 full-time-equivalent employees. A large employer may owe a shared responsibility payment for a year in which at least one full-time employee qualifies for a Premium Tax Credit.[55] Implementation of this penalty has been postponed until 2015.[56]

Timeline[57]

Oct. 1, 2013 – Mar. 31, 2014[58]	Initial open enrollment period on exchanges. Individuals and small employers can apply for QHP coverage for 2014.
Dec. 23, 2013	Last day to enroll in a QHP for guaranteed coverage starting Jan. 1, 2014.[59]
Dec. 31, 2013	Last day to pay first month's premium for guaranteed coverage starting Jan. 1.[60]

[52] *See*, 45 C.F.R. § 155.340.
[53] I.R.C. § 5000A.
[54] I.R.C. § 4980H.
[55] For an overview of employer shared responsibility, see http://kff.org/infographic/employer-responsibility-under-the-affordable-care-act/.
[56] IRS Notice 2013-45, announced July 11, 2013.
[57] For comprehensive health reform implementation timelines, *see* http://kff.org/interactive/implementation-timeline/ and http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html.
[58] See, https://www.healthcare.gov/glossary/open-enrollment-period/ ("For coverage starting in 2014, the Open Enrollment Period is October 1, 2013–March 31, 2014.").
[59] Individual insurance companies may accept later enrollments. *See*, CMS Interim Final Rule, 78 FR 76,212 (Dec. 17, 2013); https://www.healthcare.gov/what-key-dates-do-i-need-to-know/#part=3.
[60] State exchanges and individual insurance companies may extend this deadline. *See*, discussion in preamble to Interim Final Rule, 78 FR 76,212, 76,214 (Dec. 17, 2013). Some have done so. E.g., America's Health Insurance Plans (AHIP) will accept payment through January 10, 2014. Press release available at http://ahip.org/Press-Room/Extend-Deadline-Premium-Payment/ (Dec. 18, 2013).

Jan. 1, 2014	Medicaid eligibility is expanded; some Medicaid eligibility categories shift to a tax-based methodology.
	QHPs begin to provide coverage.
	QHP subsidies begin, including advance premium tax credits.
	The obligation to have health coverage or pay a penalty goes into effect.
Mar. 31, 2014	QHP open enrollment ends.
	Deadline to apply for a hardship exemption from the 2014 ACA penalty, based on a projected lack of affordable coverage.[61]
	Individuals who enroll in a QHP by March 31 will not owe an ACA penalty for the months before their QHP coverage begins.[62]
Nov. 15, 2014 – Jan. 15, 2015	QHP open enrollment period for coverage beginning Jan. 1, 2015.[63]
Tax filing season, Jan. – Apr. 2015	Reporting and self-assessment of the Individual Shared Responsibility Payment occurs on 2014 tax returns.
	The Premium Tax Credit may be claimed on 2014 individual income tax returns. Taxpayers who received an advance credit in 2014 must reconcile it with the actual credit due.
Summer 2015	ACA-related IRS audits, automated assessments, and collection disputes begin.

[61] *See*, 45 C.F.R. § 155.605(g)(2)(v). Penalty exemptions are discussed further below.
[62] *See*, Centers for Medicare & Medicaid Services (CMS) Center for Consumer Information & Insurance Oversight (CCIIO), *Enrollment Period FAQ* (Oct. 28, 2013), available at http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf; see also https://www.healthcare.gov/what-key-dates-do-i-need-to-know/#part=4.
[63] See, https://www.healthcare.gov/glossary/open-enrollment-period/ ("For coverage starting in 2015, the Open Enrollment Period is November 15, 2014–January 15, 2015.").

Key ACA Concepts

Determining Household Income: MAGI

The ACA created a new method for determining financial eligibility, called Modified Adjusted Gross Income (MAGI). Under this method, income eligibility analysis starts with an individual's adjusted gross income (AGI) as defined in section 62.[64] Various additions and subtractions are applied to produce *modified* adjusted gross income, or MAGI. "MAGI" is used to determine eligibility for both QHP subsidies and the Medicaid categories affected by the ACA.[65] MAGI is also a factor in the individual shared responsibility payment computation.

MAGI is always based on AGI, but the specific modifications to AGI vary. Confusingly, the term "MAGI" is defined differently for each program.[66]

The Premium Tax Credit, the individual shared responsibility payment, and the ACA Medicaid rules all require computation of "household income." For most people, the household (or family) is composed of the tax filer(s) and all individuals whose personal exemptions are included on the tax return.[67] This is the concept of the tax household.

Under the ACA, household income includes the Modified Adjusted Gross Income (MAGI) of all members of the household, with one exception. The income of tax dependents is not counted if the dependent is not "required to file a return of tax imposed by section 1."[68]

This specificity leads to potentially confusing situations. Section 1 of the Internal Revenue Code imposes the individual income tax. The income tax filing thresholds for individuals are set out in section 6012(a)(1).[69] It is possible that an individual could have a filing requirement under another code section, but not under section 6012(a)(1). For example, if

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[64] AGI is found at the bottom of the first page of Form 1040. On the 2013 Form 1040, AGI is on line 37. *See*, http://www.irs.gov/pub/irs-pdf/f1040.pdf.

[65] A helpful summary of MAGI calculations for Medicaid and the Premium Tax Credit is available from the U.C. Berkeley Labor Center at http://laborcenter.berkeley.edu/healthcare/MAGI_summary13.pdf (last accessed Dec. 3, 2013). Note that this summary does not include MAGI calculations for the individual shared responsibility payment.

[66] The three definitions of "MAGI" are set out for the Premium Tax Credit at Treas. Reg. § 1.36B-1(e)(2), for the individual shared responsibility payment at Treas. Reg. § 1.5000A-1(d)(10)(ii), and for Medicaid at 42 C.F.R. 435.603(e).

[67] Exemptions are claimed on line 6 of the 2013 Form 1040. Exemption amounts are deducted from income on line 42. See, http://www.irs.gov/pub/irs-pdf/f1040.pdf.

[68] I.R.C. §§ 36B(d)(2)(A); 5000A(c)(4)(B); 42 C.F.R. § 435.603(d)(2).

[69] For most single adults, the income tax filing threshold is equal to the exemption amount plus the basic standard deduction. I.R.C. § 6012(a)(1). The 2014 exemption and standard deduction amounts were announced in Rev. Proc. 2013-35.

a dependent must file solely because of self-employment tax or to report an early distribution penalty, their MAGI is not included in "household income."[70]

Both MAGI and the tax household concept are major changes to Medicaid eligibility rules. The ACA makes tax calculations and tax return information newly important for Medicaid applicants. Additionally, health care workers and advocates suddenly need to understand tax concepts that are (frequently) foreign to them. Tax advocates are in a unique position to partner with and educate health care advocates for low-income taxpayers.

Immigration Status: "Lawfully Present"

As noted above, only people who are "lawfully present" in the U.S. can enroll in a QHP. "Lawfully present" is a term of art that is also used in the Premium Tax Credit and individual shared responsibility payment statutes. Just as individuals must be "lawfully present" to purchase a QHP, only "lawfully present" individuals may receive a PTC. Conversely, individuals not considered "lawfully present" are exempt from the ACA penalty.

Thankfully, the agencies implementing the ACA have adopted a single definition of "lawfully present" for QHPs, the PTC, and the ACA penalty. The regulations under both IRS programs refer to the definition located in the exchange regulations at 45 C.F.R. § 155.20.[71] In turn, that section refers to §152.2.

The definition of "lawfully present" includes a long list of statuses.[72] It includes not only immigrants and refugees, but non-immigrants present in the U.S. under valid work or student visas. Individuals in the process of applying for certain statuses are also considered lawfully present.

Surprisingly, given the breadth of the definition, individuals granted deferred action under the "Deferred Action for Childhood Arrivals" (DACA) policy are excluded.[73] Exclusion from the definition of "lawfully present" means that those individuals cannot participate in the exchanges, but neither are they subject to a penalty if they go uninsured.

Lawful presence is determined on an individual basis. For example, a parent's undocumented status does not affect her "lawfully present" children's eligibility for a PTC, nor does it affect the children's exposure to a shared responsibility payment. An

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[70] *See,* discussion in preamble to IRS rule, Health Insurance Premium Tax Credit, 77 F.R. 30,377, at 30,377-78 (May 23, 2012).
[71] Treas. Reg. §§ 1.36B-1(g); 1.5000A-3(c)(2)(ii)(B).
[72] *See*, 45 C.F.R. § 152.2; *see also*, https://www.healthcare.gov/immigration-status-and-the-marketplace/; National Immigration Law Center, *Issue Brief:"Lawfully Present" Individuals Eligible under the Affordable Care Act* (Sept. 2012), *available at* http://www.nilc.org/ACAfacts.html.
[73] *Id.*; Centers for Medicare and Medicaid Services (CMS) interim final rule, 77 FR 52614 (Aug. 30, 2012).

undocumented parent will need to file a tax return using an Individual Taxpayer Identification Number (ITIN) in order to claim a PTC for her children.[74]

Individual Shared Responsibility Payment

Section 5000A generally provides that individuals and their tax dependents must have "minimum essential coverage," obtain an exemption, or pay a penalty.[75] The penalty is reported on individual income tax returns. It goes into effect on January 1, 2014, but it won't be reported or assessed until 2014 tax returns are filed in 2015. The penalty is computed monthly, so it is worth applying for insurance mid-year.[76]

Most health insurance qualifies as minimum essential coverage (MEC).[77] The term includes (among other types of coverage) Medicare Part A, Medicare Advantage, TRICARE, employer-sponsored coverage (including COBRA and retiree coverage), coverage purchased in the individual market, and most types of Medicaid.[78] MEC does not include insurance that only covers a specific type of service, e.g., dental coverage.[79]

Who is potentially subject to a penalty?

U.S. citizens and nationals, and people who are considered "residents" for U.S. tax purposes, are potentially subject to a shared responsibility payment. There are exceptions for residents of U.S. territories, and for U.S. citizens residing abroad.[80]

People who are considered residents for U.S. tax purposes may owe a penalty if they do not have U.S. health insurance *while "lawfully present" in the U.S.*[81]

Individuals who are not "lawfully present" in the U.S. are not subject to a penalty.[82] This makes sense, since they are barred from purchasing even an unsubsidized QHP.[83]

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[74] Individuals who are not eligible for a Social Security Number (SSN) may apply to the IRS for an ITIN in order to file a U.S. tax return. For more information regarding ITINs, see the IRS.gov website at http://www.irs.gov/Individuals/General-ITIN-Information, and IRS Publication 1915, available at http://www.irs.gov/pub/irs-pdf/p1915.pdf.
[75] I.R.C. § 5000A; Treas. Reg. § 1.5000A-1(a).
[76] Treas. Reg. § 1.5000A-4(a).
[77] *See*, I.R.C. § 5000A(f); Treas. Reg. § 1.5000A-2; 45 C.F.R. §156.602 (coverage recognized by HHS under I.R.C. § 5000A(f)(1)(E)); *see also*, Kaiser Health News, *Why Health Law's 'Essential' Coverage Might Mean 'Bare Bones'* (Aug. 25, 2013), *available at* http://www.kaiserhealthnews.org/Stories/2013/August/26/essential-benefits-bare-bones-health-insurance.aspx.
[78] *Id.*
[79] I.R.C. § 5000A(f)(3). These insurance plans are known as "excepted benefits." For background and details on excepted benefits, *see* discussion in preamble to proposed rule, *Amendments to Excepted Benefits*, 78 FR 77632, 77633 - 37 (Dec. 24, 2013).
[80] Treas. Reg. § 1.5000A-1(b)(2).
[81] Treas. Reg. § 1.5000A-3(c)(2). For more information on when a non-citizen is a U.S. resident for tax purposes, *see* IRS Publication 519, U.S. Tax Guide for Aliens (2012), available at http://www.irs.gov/publications/p519/.
[82] I.R.C. § 5000A(d)(3).

Exemptions from the penalty

Penalty exemptions are described in both IRS and HHS regulations. There are nine categories of exemption from the shared responsibility payment.[84] They are:

1. Religious conscience[85]
2. Health care sharing ministry[86]
3. Indian tribes[87]
4. No income tax filing requirement[88]
5. Short coverage gap[89]
6. Hardship[90]
7. Unaffordable coverage options[91]
8. Incarceration after disposition of charges[92]
9. Not lawfully present[93]

Some exemptions must be claimed through an exchange, some need to be claimed on a tax return, and one does not need to be formally claimed at all. In addition, sometimes the taxpayer can choose whether to go through HHS or claim an exemption on his or her tax return.

How are exemptions claimed?[94]

- Individuals who are not required to file a federal income tax return do not need to take any action.[95]
- General hardship exemptions and the religious conscience exemption can only be granted by an exchange.[96]

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[83] 45 C.F.R. § 155.305.
[84] *See,* IRS Q&A at http://www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision.
[85] Treas. Reg. § 1.5000A-3(a); 45 C.F.R. § 155.605(c).
[86] Treas. Reg. § 1.5000A-3(b); 45 C.F.R. § 155.605(d). Health care sharing ministries are defined at I.R.C. § 5000A(d)(2)(B)(ii).
[87] Treas. Reg. § 1.5000A-3(g); 45 C.F.R. § 155.605(f).
[88] Treas. Reg. § 1.5000A-3(f); 45 C.F.R. § 155.605(g)(3).
[89] Treas. Reg. § 1.5000A-3(j).
[90] Treas. Reg. § 1.5000A-3(h) 45 C.F.R. § 155.605(g).
[91] Treas. Reg. § 1.5000A-3(e); 45 C.F.R. §§ 155.605(g)(2) & (5).
[92] Treas. Reg. § 1.5000A-3(d); 45 C.F.R. § 155.605(e). The ACA makes a distinction between incarceration prior to disposition of charges, and after disposition of charges. This distinction is made in QHP criteria, in ACA penalty exemptions, and in PTC criteria.
[93] Treas. Reg. § 1.5000A-3(c).
[94] *See,* Question 21, *Questions and Answers on the Individual Shared Responsibility Provision*, at http://www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision.
[95] Treas. Reg. § 1.5000A-3(f)(3). This exemption is based on "household income," which is discussed above. If the income of a dependent causes a tax filer's household income to exceed the income tax filing threshold, a specific hardship exemption applies. This exemption may be claimed on the filer's tax return. *See*, Treas. Reg. § 1.5000A-3(h)(3); 45 C.F.R. § 155.605(g)(3).

- Members of federally recognized Indian tribes, members of health care sharing ministries, and individuals who are incarcerated may choose whether to apply for an exemption certificate from an exchange, or claim the exemption on their tax return.[97]
- The exemptions for short coverage gaps and individuals who are not lawfully present in the United States can be claimed only as part of filing a federal income tax return.[98]
- There are two ways to claim an exemption for lack of affordable coverage.[99] It can be claimed on the tax return, based on the income reported on the return.[100] Or, it can be granted by the exchange during the QHP open enrollment period, based on projected income.
- There are two "hardship" exemptions that may be claimed on a tax return.[101] These are variations on the filing threshold and affordability exemptions.

Note that the short coverage gap covers periods of *less than* three months; a full three calendar months without coverage does not qualify as a short coverage gap.[102]

HHS has set various timeframes for claiming exemptions through an exchange.

- The religious conscience and Indian tribe exemptions may be claimed prospectively or retrospectively.[103] The regulations do not provide any deadline for applying.[104] The exchange may grant these exemptions prospectively for multiple years.
- The exemptions for health sharing ministries and incarceration may only be claimed retrospectively.[105] However, if the exemptions are claimed through an exchange, an application must be submitted by December 31 of the year for which the exemption is needed.[106]

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[96] *See*, Treas. Reg. §§ 1.5000A-3(a) & (h)(2).
[97] For these three categories, 45 C.F.R. § 155.605 allows the exchange to issue an exemption certificate, but Treas. Reg. § 5000A-3 does not restrict the exemption to individuals who have obtained a certificate through the exchange.
[98] These exemptions do not appear in HHS regulations; they are only detailed in IRS regulations.
[99] Technically these are separate exemptions. The exemption available through HHS based on projected affordability is technically a hardship exemption.
[100] *See*, Treas. Reg. § 1.5000A-3(e). A slight variation of this exemption is described not in the IRS regulations but in 45 C.F.R. § 155.605(g)(5). It is also claimed on the tax return. Treas. Reg. § 1.5000A-3(h)(3).
[101] *See*, Treas. Reg. § 1.5000A-3(h)(3).
[102] Treas. Reg. § 1.5000A-3(j).
[103] 45 C.F.R. §§ 155.605(c)(3) & (f)(3).
[104] 45 C.F.R. § 155.610(h).
[105] 45 C.F.R. §§ 155.605(d)(2) & (e)(2).
[106] 45 C.F.R. §§ 155.605(b) & (h).

- Timeframes for hardship exemptions vary. The general hardship exemption may be claimed for up to three years following the month of hardship.[107] The hardship exemption for projected lack of affordable coverage must be applied for prospectively, during open enrollment.[108]

When an exemption is claimed through an exchange, the taxpayer is generally required to report any changes that affect eligibility for the exemption.[109] When new information is reported, the exchange is required to redetermine the taxpayer's eligibility for the exemption.[110] The one exception to this rule is the projected unaffordability exemption.[111] Once an exchange has determined that premiums will be unaffordable to an individual, based on projected income, that determination will not be revised. An individual with that exemption does not need to report changes.

Hardship and affordability exemptions are of particular importance to low-income taxpayers. In the context of the individual shared responsibility payment, insurance is unaffordable if the premiums to cover all uninsured family members would exceed 8% of household income.[112] The exchange is permitted to issue an exemption prospectively, based on projected income, if an application is filed during open enrollment.[113]

Hardship exemptions are defined by HHS in regulations and guidance.[114] HHS has significant flexibility to create and change hardship exemption criteria. For example, after the exchanges got off to a bumpy start this fall, HHS announced a new hardship exemption for individuals who enroll in a QHP by the end of 2014's open enrollment

[107] 45 C.F.R. § 155.610(h)(2).
[108] 45 C.F.R. § 155.605(g)(2)(v).
[109] 45 C.F.R. § 155.620(b).
[110] 45 C.F.R. § 155.620(a).
[111] 45 C.F.R. §§ 155.620(a) & (b).
[112] Treas. Reg. §1.5000A-3(e); 45 CFR § 155.605(g)(2) & (5). If total family premiums would be over 8% of household income, but self-only coverage is "affordable" for the employees in the family, the exemption must be claimed on a tax return. 45 C.F.R. § 155.605(g)(5); Treas. Reg. § 1.5000A-3(h)(3). The affordability exemption claimed through HHS uses the self-only premium to evaluate affordability for an employee, and the family premium for related individuals. 45 C.F.R. § 155
605(g)(2)(iii).
[113] 45 CFR 155.605(g)(2).
[114] See, I.R.C. § 5000A(e)(5); ACA § 1311(d)(4)(H).The HHS exemption regulations are located at 45 CFR part 155 subpart G (155.600 - 155.635). *See also* discussion and responses to comments in the preamble to the final rule, beginning at 78 FR 39,493 (July 1, 2013).

period.[115] Most recently, HHS declared that consumers whose individual market plans were "cancelled" will be granted a hardship exemption for 2014.[116]

The general hardship exemption set out in 45 C.F.R. § 155.605(g)(1) is quite broad. The exchange must consider any substantial, unexpected expenses faced by the applicant, and whether the expense of purchasing a QHP would have caused the applicant a "serious deprivation of food, shelter, clothing, or other necessities." The regulation also includes a catch-all category allowing a hardship exemption for "other circumstances that prevented [the applicant] from obtaining coverage..." Unfortunately, guidance issued in June 2013 restricts the circumstances that federally-facilitated exchanges may consider.[117]

Although it appears to remove any flexible "catchall" category, HHS's June 2013 guidance does provide significant protections for many taxpayers. The guidance states that exchanges may grant a general hardship exemption under 45 C.F.R. § 155.605(g)(1) if the applicant:

- "becomes homeless;
- "has been evicted in the past six months, or is facing eviction or foreclosure;
- "has received a shut-off notice from a utility company;
- "recently experienced domestic violence;
- "recently experienced the death of a close family member;
- "recently experienced a fire, flood, or other natural or human-caused disaster that resulted in substantial damage to the individual's property;
- "filed for bankruptcy in the last 6 months;
- "incurred unreimbursed medical expenses in the last 24 months that resulted in substantial debt;
- "experienced unexpected increases in essential expenses due to caring for an ill, disabled, or aging family member;
- "is a child who has been determined ineligible for Medicaid and CHIP, and for whom a party other than the party who expects to claim him or her as a tax dependent is required by court order to provide medical support. We note that this exemption should only be provided for the months during which the medical support order is in effect; or

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[115] *See*, CCIIO, *Enrollment Period FAQ* (Oct. 28, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf; *see also* https://www.healthcare.gov/what-key-dates-do-i-need-to-know/#part=4.

[116] *See*, CCIIO, *Options Available for Consumers with Cancelled Policies* (Dec. 19, 2013), available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf.

[117] *See*, CCIIO, *Guidance on Hardship Exemption Criteria and Special Enrollment Periods* (June 26, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/exemptions-guidance-6-26-2013.pdf.

- "as a result of an eligibility appeals decision, is determined eligible for enrollment in a QHP through the Marketplace, advance payments of the premium tax credit, or cost-sharing reductions for a period of time during which he or she was not enrolled in a QHP through the Marketplace, noting that this exemption should only be provided for the period of time affected by the appeals decision."

Under the guidance, state-run exchanges may develop their own criteria within the requirements of the regulation, or they may use the federal criteria.

If a hardship exemption is granted, it must cover at least the month before the hardship occurred, the months of hardship, and the month after the hardship ended.[118]

How much is the penalty for not having insurance?

The annual penalty for failure to have insurance is the GREATER of:			
	Flat dollar amount	OR	**Percent of income amount**
2014	$95 per adult and $47.50 per child, up to $285 max		1% of applicable income
2015	$325 per adult and $162.50 per child, up to $975 max		2% of applicable income
2016	$695 per adult and $347.50 per child, up to $2,085 max		3% of applicable income
Applicable Income = Household income above the income tax filing threshold Source: http://www.cbpp.org/files/QA-on-Premium-Credits.pdf			

The above amounts are divided by 12 to arrive at the monthly penalty.

For many people, the penalty will not be the flat dollar amount. A single taxpayer's penalty rises above $95 as soon as his or her AGI passes $19,650.[119]

Note that the percent of income amount does not vary depending on how many household members owe a penalty. This is counter-intuitive, as the purpose of the penalty is to encourage taxpayers to obtain coverage. The flat dollar amount, on the other hand, is

[118] 45 C.F.R. § 155.605(g)(1).
[119] *See*, Ajay Gupta, ACA PENALTY: TOOTHLESS? HARDLY! CORPORATE RAIDERS FARE BETTER, 141 Tax Notes 877 (Nov. 25, 2013) ("…as long as an individual taxpayer has an AGI exceeding $19,650, his penalty amount will always be higher than $95.")

calculated by the number of people in the household without MEC or an exemption, up to the family cap.

When filing a tax return, the filer must report on any individual whose personal exemption the filer is entitled to claim. This includes anyone whose exemption could be claimed on line 6 of the filer's Form 1040. It includes "qualifying relatives" as well as "qualifying children."[120] If an individual who qualifies as the taxpayer's dependent did not have MEC, a shared responsibility payment may be owed even if the taxpayer chooses not to claim a dependent exemption for that person.[121]

The ACA penalty is firmly attached to the dependent exemption. If a noncustodial parent is entitled to claim his child in alternate years (e.g. under a divorce order), the noncustodial parent will have to report on the child's insurance status in those alternate years, and pay a penalty if the child did not have insurance or an exemption.

As the chart above notes, the "percent of income" penalty amount is based on household income minus the applicable filing threshold.[122] Household income is the MAGI of all the individuals whose personal exemptions are properly claimed on the tax return, except for dependents without a section 1 filing requirement.[123] There is no adjustment to household income for exempt household members. This means that ITIN filers' income is counted to determine the penalty owed for their U.S. citizen children.[124] Additionally, there is no adjustment to household income for individuals who qualify as the tax filer's dependents but whose dependent exemptions are not claimed on the tax return.[125]

For section 5000A purposes, "MAGI" is AGI increased by tax-exempt interest and any foreign income excluded under section 911.[126]

In the preamble to its final rule, the IRS stated that the section 6662 accuracy-related penalty does not apply to a shared responsibility payment.[127]

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[120] For more information on exemptions and dependents, see IRS Publication 501, *Exemptions, Standard Deduction, and Filing Information*, *available at* http://www.irs.gov/publications/p501/. Advocates should be aware that "dependent" is defined differently in different contexts. This article uses the tax definition.
[121] *See,* discussion in preamble to IRS rule, Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 F.R. 53,646, 53,647 (Aug. 30, 2013).
[122] I.R.C. § 5000A(c)(2)(B).
[123] I.R.C. § 5000A(c)(4)(B).
[124] In contrast, as discussed below, the Premium Tax Credit adjusts household income to account for individuals who are not lawfully present, but not for other non-eligible family members.
[125] Compare the definitions of "family," "household income," and "shared responsibility family" set out in Treas. Reg. § 1.5000A-1(d).
[126] I.R.C. § 5000A(c)(4)(C).
[127] *See*, 78 FR 53,655 (Aug. 30, 2013).

Collection of the ACA penalty

As has been widely publicized, the IRS is not permitted to use its lien or levy procedures to collect the individual shared responsibility payment.[128] Collection is expected to occur through voluntary payments and refund offsets.

In a recent article, *Tax Notes International* editor Ajay Gupta argues that the penalty should not be disregarded as meaningless, and nor should the IRS's powers be underestimated.[129] Gupta argues that the statute of limitations on collection is effectively unlimited for refund offsets. Additionally, he posits that the assessment statute expiration date[130] could be extended in many cases under section 6501(c)(2). He further points out that the ACA failed to give taxpayers any pre-assessment rights or the right to judicial review.

It remains to be seen whether the IRS will propose regulations or guidance providing due process protections. Gupta argues that the best solution is a legislative fix to bring the penalty under deficiency procedures. Deficiency procedures allow taxpayers to appeal to the U.S. Tax Court before the IRS can assess (or start collecting) additional tax and penalties.

Example

Consider the following example of Rob, a hypothetical taxpayer. Rob is a skilled Jamaican farm worker. For the last 5 years he has worked in the U.S. from May through October under the H-2A agricultural guest worker program. Rob is not married. He has no children in the United States.[131]

In 2014, Rob works in the U.S. under his H-2A visa for just over 6 months. He arrives on April 25 and leaves on November 10. He has no health insurance during that time. Rob's employer pays him $12,150 total during the year. He has no other worldwide income and no adjustments, so his AGI is $12,150.

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[128] I.R.C. § 5000A(g)(2)(B).

[129] Ajay Gupta, ACA PENALTY: TOOTHLESS? HARDLY! CORPORATE RAIDERS FARE BETTER, 141 Tax Notes 877 (Nov. 25, 2013)

[130] The assessment statute expiration date (ASED) is the date beyond which the IRS may not assess additional tax. The ASED is generally three years from the date the tax return is filed. I.R.C. § 6501(a). This means that the IRS generally has three years to audit a tax return and assess additional tax. There are various exceptions to the three-year rule.

[131] Only children who are U.S. citizens or residents of the U.S., Canada, or Mexico may be claimed on U.S. tax returns. *See*, IRS Publication 501, *supra* note 120. *See also* IRS Publication 519, *supra* note 81.

Rob will owe a penalty on his 2014 U.S. tax return. Why is that?

- Rob is considered a resident for U.S. tax purposes, under the substantial presence test.[132]
- Rob was "lawfully present" in the U.S., under his visa.
- His income is more than the filing threshold for a single person ($10,150)
- He was without health insurance for more than 2 months, while lawfully present in the U.S.

What is Rob's ACA penalty?

- The flat dollar amount is $7.92 per month ($95 divided by 12)
- The percent of income amount is 1% of $2,000 (12,150 – 10,150), divided by 12, which equals $1.67 per month
- The flat dollar amount is used because it's larger. Rob's penalty is $7.92 x 6 months = $47.52. Rob does not owe a penalty for April or November, because he was not "lawfully present" for those entire months.[133]
- The penalty amount of $47.52 is then compared with the monthly national average bronze plan premiums for six months, for a single person. The premiums will almost certainly be higher.[134] Therefore, Rob's likely penalty is $47.53.

Unfortunately, Rob may not be able to do these calculations in advance. He may not know how many months his employer will need him this year, or what his total wages will be. He may have sporadic or unreliable Jamaican income.

Another consideration is that Rob will be arriving in the U.S. outside of the QHP open enrollment period.[135] If Rob wants to purchase a QHP for coverage while he's in the US, he needs to apply within 60 days of arriving in the country.[136]

Because Rob is considered a U.S. resident for 2014 income tax purposes, and because he was "lawfully present" in 2014, he is entitled to the same QHP subsidies as a U.S. citizen, for those 6 months.

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[132] *See*, IRS Publication 519, *supra* note 81.
[133] Treas. Reg. § 5000A-3(c)(2)(ii)(B).
[134] *See*, HHS Office of the Assistant Secretary for Planning and Evaluation, *ASPE Issue Brief: Health Insurance Marketplace Premiums for 2014* (Sept. 2013), *available at* http://aspe.hhs.gov/health/reports/2013/marketplacepremiums/ib_marketplace_premiums.cfm ("The weighted average lowest monthly premiums for a 27-year-old in 36 states will be … $163 for a bronze plan…"). The report is based on data available to HHS as of September 18, 2013, and is subject to change.
[135] This article does not discuss special enrollment periods in detail. One good training on this topic is a webinar by the Center on Budget and Policy Priorities, *Beyond the Basics of Transitions in Coverage*, available at http://www.healthreformbeyondthebasics.org/cbpp-webinar-beyond-the-basics-of-transitions-in-coverage/.
[136] *See*, special enrollment period regulations generally at 45 C.F.R. § 155.420, and for Rob specifically at §§ 155.420(c) and 155.420(d)(3).

Implications for low-income taxpayers and advocates

The scope of the penalty is not fully appreciated by the general public or even by advocates. Many people believe that the 2014 penalty will be $95, while in fact most taxpayers will pay more. In addition, non-immigrants may not know that they are potentially subject to the ACA penalty. Outreach is needed to target specific populations, including guestworkers present under H-2A and H-2B visas. These taxpayers will need to use the Substantial Presence Test to determine whether they have a potential liability under section 5000A.

Taxpayers who may need an affordability exemption should be encouraged to apply through an exchange prior to the close of open enrollment. This is the one exemption for which there is no requirement to report changes in circumstance. Once the exemption certificate is issued by the exchange, the determination is final. However, the deadline to apply is quite early in the year. The last day of open enrollment is March 31 for 2014, and January 15 for 2015.[137]

The lack of a flexible catch-all hardship category will be problematic for our clients.[138] It is not difficult to think of people who might not be able to navigate the new system and get health insurance next year, but who don't fit any category on HHS's list of hardship circumstances. For example, taxpayers who are illiterate, isolated, mentally ill, incapacitated, or who are incarcerated prior to disposition of charges may all have difficulty meeting the exemption criteria. This problem could be lessened if state-based exchanges can be convinced to adopt their own hardship criteria.

Premium Tax Credit

Premium Tax Credits are available to middle and low-income taxpayers to offset the cost of QHP premiums. The Premium Tax Credit (PTC) is refundable.[139] This means that it can generate a cash refund for taxpayers who owe little or no tax.[140] The credit may be taken wholly or partially in advance through an exchange.[141] Advance payments are made

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[137] These dates could be changed by HHS.

[138] There is some indication that HHS guidance on this point may change. After commenters protested the lack of a catch-all on the draft hardship application, HHS added an "other" category. *See*, Application for Exemption from the Shared Responsibility Payment for Individuals who Experience Hardships, OMB Form No. 0938-1190, *available at* http://marketplace.cms.gov/getofficialresources/publications-and-articles/publications-and-articles.html. As of this writing, however, the June 26, 2013 guidance remains in effect.

[139] ACA § 1401.

[140] As with any refundable credit, the Premium Tax Credit is subject to offset if claimed on a tax return. Tax refunds can be offset for certain debts, including tax debts, child support, and federally-guaranteed student loans. For more information on offsets, see the Treasury Offset Program website, at http://www.fms.treas.gov/debt/top.html.

[141] ACA § 1412, codified at 42 U.S.C. § 18082.

directly to QHP issuers (private insurance companies).[142] This is a seamless process for the consumer.

Advance PTC is based on the applicant's projected annual household income. For example, most taxpayers will apply for 2015 advance PTC during the 2015 open enrollment period. Currently, this is November 15, 2014 through January 15, 2015.[143] At that time, the applicant will need to estimate his or her 2015 household income. This figure will not be definitively known until 2015 tax returns are filed in 2016.

Who is eligible for a Premium Tax Credit?

A Premium Tax Credit is only available for individuals who were enrolled in a QHP during the tax year. As we saw above, there are three QHP criteria: A person must be (1) a U.S. citizen or "lawfully present," (2) a resident of the exchange's service area, and (3) not incarcerated after disposition of charges.[144]

Once QHP enrollment criteria are met, there are four additional requirements for the Premium Tax Credit.[145] The criteria involve income, filing status, dependent status, and eligibility for health insurance. The last requirement can be complex, so it is discussed in a separate section, below.

PTC eligibility is determined individually for each person in a tax household. A non-eligible taxpayer may claim PTC for his or her eligible dependents.

The dependent exemption dictates who can claim a Premium Tax Credit for a child.[146] Only the person who claims an individual's personal exemption can receive a Premium Tax Credit for that individual. It does not matter who paid the premiums or which parent has the legal obligation to provide coverage.[147]

PTC Income Criteria

To qualify for PTC, an individual must generally have household income between 100% and 400% of the federal poverty line (FPL).[148] Currently, 400% of the poverty line is $45,960 for a single individual and $94,200 for a family of four. Lawfully present non-citizens may have income under 100% of the FPL, if they are found ineligible for

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[142] *See*, 45 C.F.R. § 155.340. Advance payments are not subject to offset.
[143] *See*, https://www.healthcare.gov/glossary/open-enrollment-period/ ("For coverage starting in 2015, the Open Enrollment Period is November 15, 2014–January 15, 2015."). These dates could be changed by HHS.
[144] 45 C.F.R. § 155.305.
[145] *See generally*, I.R.C. § 36B.
[146] When a filer claims a personal exemption for a dependent, it is called a dependent exemption.
[147] *See* discussion in preamble to final rule, Health Insurance Premium Tax Credit, 77 F.R. 30,377, 30,377 (May 23, 2012).
[148] I.R.C. § 36B(c)(1)(A).

Medicaid.[149] Also, individuals who receive advance credits are not penalized if their annual income comes in under 100% FPL.[150]

As mentioned above, "household income" is generally defined as the MAGI of the return filer(s) plus the MAGI of all individuals properly claimed on the return who are required to file a federal income tax return.[151] However, for the PTC, household income is adjusted when the family includes individuals who are not "lawfully present" in the U.S.[152] Household income is not adjusted for family members who are not otherwise eligible for PTC, or for family members who are exempt from the ACA penalty.[153]

For the PTC, MAGI is defined in section 36B as AGI plus *three* additions: foreign income excluded under section 911, tax-exempt interest, and nontaxable Social Security.[154,155]

PTC Filing Status Criteria

Taxpayers who are considered married under section 7703 must file a joint tax return in order to receive a Premium Tax Credit.[156] This means that married individuals who are considered unmarried under section 7703 (filing as Head of Household) are entitled to claim a PTC.[157] Changes in filing status during the year are addressed in the regulation at § 1.36B-4(b), in terms of allocating advance credits between taxpayers. Unfortunately the regulation does nothing to mitigate the harsh result for a taxpayer who must file with the Married Filing Separately status.[158]

PTC Dependent Status Criteria

An individual who qualifies as the dependent of another taxpayer cannot claim a Premium Tax Credit. This is true even if the individual's dependent exemption is not actually

[149] I.R.C. § 36B(c)(1)(B).
[150] Treas. Reg. § 1.36B-2(b)(6).
[151] Treas. Reg. § 1.36B-1(e).
[152] Treas. Reg. § 1.36B-3(l)(2). This is discussed further below.
[153] *See*, Treas. Reg. § 1.36B-1(d).
[154] I.R.C. § 36B(d)(2)(B); Treas. Reg. § 1.36B-1(e)(2). Note that this is slightly different from the definition of MAGI in the individual shared responsibility section of the code, discussed above.
[155] Social Security disability and retirement benefits can be partially taxable. For more information on when Social Security benefits are taxable, see IRS Publication 17, *Your Federal Income Tax* (2013), Chapter 11, available at http://www.irs.gov/publications/p17/.
[156] I.R.C. § 36B(c)(1)(C); Treas. Reg. § 1.36B-2(b)(2). In some circumstances, a married taxpayer is considered unmarried under section 7703. Those individuals will use Head of Household filing status.
[157] For more information on when a married taxpayer is considered unmarried, see IRS Publication 501, *supra* note 120.
[158] Individuals who are legally married as of December 31 of a tax year have three possible filing statuses for that year: Married Filing Jointly, Married Filing Separately, and (if criteria are met) Head of Household. They cannot file as Single. *See generally*, IRS Publication 501, *supra* note 120.

claimed by the other taxpayer.[159]

Access to other insurance

Normally, to be eligible for PTC an individual cannot have access to "minimum essential coverage" (MEC) except through the individual insurance market.[160] This means that people who could get employer-sponsored or government-sponsored insurance generally do not qualify for a Premium Tax Credit.[161]

In certain circumstances, a taxpayer who has an offer of insurance is permitted to decline that insurance and not be disqualified from the Premium Tax Credit.[162] This is true even if the declined insurance qualifies as MEC under section 5000A. If the criteria described below are met, the taxpayer is treated as though he were not eligible for that other insurance.[163]

To date, the following types of insurance may be declined, if an individual wishes to instead enroll in a QHP and receive a PTC:

- Self-funded student health plans[164]
- TRICARE[165]
- Medicare coverage requiring a Part A premium[166]
- State high risk pools[167]
- Employer-sponsored insurance that is not affordable or adequate[168]
- Coverage offered to a related individual who is not claimed as a tax dependent by the filer (e.g. a 25-year-old nondependent who could get coverage under a parent's plan)[169]

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[159] *See* discussion in preamble to IRS rule, Health Insurance Premium Tax Credit, 77 F.R. 30,377, 30,377-78 (May 23, 2012); Treas. Reg. § 1.36B-2(b)(3).
[160] I.R.C. § 36B(c)(2)(B).
[161] If Medicaid eligibility determinations are not integrated with the exchange (as is the case in all federally-facilitated exchanges), consumers will experience a delay in their application for QHP subsidies while a Medicaid determination is being made by their state Medicaid agency.
[162] If a taxpayer actually *enrolls* in the plan, these exceptions do not apply and the individual will not be eligible for PTC.
[163] *See*, Treas. Reg. § 1.36B-2(c).
[164] IRS Notice 2013-41.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] Treas. Reg. § §1.36B-2(c)(3). For a detailed examination of this exception, see CBPP webinar, *How Offers of Employer coverage Affect Premium Tax Credit Eligibility*, *available at* http://www.healthreformbeyondthebasics.org/cbpp-webinar-how-offers-of-employer-coverage-affect-premium-tax-credit-eligibility/.
[169] Treas. Reg. § §1.36B-2(c)(4).

Student health plans that are not self-funded are considered individual market plans, so they are not disqualifying.[170]

"Affordable" coverage is defined very differently for the Premium Tax Credit than for the individual shared responsibility payment. In the context of Premium Tax Credit eligibility, an employer's offer of coverage is considered "affordable" to the employee's entire family if premiums for self-only coverage do not exceed 9.5% of household income.[171] The affordability determination does not consider the cost of family or dependent coverage.

Again, the fact that a certain offer of insurance may be disregarded for Premium Tax Credit eligibility does not mean that the insurance would not qualify as MEC under section 5000A.

How much is the credit?

The Premium Tax Credit is calculated as: the cost of "benchmark" QHP premiums for all PTC-eligible household members, minus the family's expected premium contribution. The benchmark premiums used in the calculation are specifically adjusted for the individuals in the family who are eligible for a PTC.[172] The credit is capped by the premium amounts actually paid by the family.[173]

The PTC is much more generous to lower-income taxpayers. The expected contribution is a percent of household income that varies with the household's income as a percentage of the FPL.[174] It ranges from 2% to 9.5% of household income.

Confusingly, the PTC uses the federal poverty levels in effect on the first day of QHP open enrollment.[175] For 2014, open enrollment began on October 1, 2013. The 2014 federal poverty levels will be released by HHS in early 2014, but the 2014 Premium Tax Credit will continue to be calculated based on 2013 poverty levels.

> Example:[176] Debbie and Joe are a married couple with one son. Debbie has net self-employment income of $34,000. She has no health insurance. Joe has Social Security Disability income of $11,500, and he has Medicare. The only adjustment to income is

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[170] *See*, HHS final rule, *Student Health Insurance Coverage*, 77 FR 16,453-70. (March 21, 2012).
[171] Treas. Reg. § 1.36B-2(c)(3)(v).
[172] Treas. Reg. §§ 1.36B-3(f) & (h).
[173] Treas. Reg. § 1.36B-3(d). For a thorough understanding of how the Premium Tax Credit is calculated, it may be helpful to review the Premium Tax Credit webinar presented May 22, 2013 by the Center on Budget and Policy Priorities, available online at http://www.healthreformbeyondthebasics.org/category/issues/premium-tax-credits/.
[174] Treas. Reg. § 1.36B-3(g).
[175] *See*, Treas. Reg. § 1.36B-1(h) (defining *federal poverty line* for purposes of the Premium Tax Credit).
[176] This scenario is adapted from a training by Tamara Borland of Iowa Legal Aid. The figures are from the Kaiser Family Foundation subsidy calculator, online at http://kff.org/interactive/subsidy-calculator/.

$2,400 in self-employment tax.[177] Debbie and Joe have a son who is 16 years old. He has $3,000 in income from a summer job. He is uninsured. Debbie wants to know if she and her son can get a subsidized QHP.

- For PTC purposes, the family's household income is $43,100.[178] This is 221% of the 2013 FPL.[179]
- Based on their FPL, the family's expected premium contribution is 7.02% of household income. 7.02% of $43,100 is $3,027, or $252.25 per month.
- Assume that the benchmark plan covering Debbie and Joe requires premiums of $7,063 per year.
- The family's PTC is the benchmark amount minus their required contribution, or $7,063 minus $3,027. Their PTC is $4,036, or $336 per month.

The PTC may be taken in advance when Debbie applies for her QHP, or Debbie can wait and claim the credit on her and Joe's tax return, or Debbie can request a partial advance credit from the exchange. Debbie can use her credit to purchase any QHP offered by her exchange. If she chooses a silver plan, Debbie and her son will qualify for reduced cost-sharing.

Immigration status and the Premium Tax Credit

Immigration status brings complications both legal and practical. Special eligibility rules apply to non-U.S. citizens and mixed-status families. The application and verification process will be more complicated and potentially problematic. Finally, many families will worry about the immigration consequences that may result from using an exchange.

Immigration status affects Premium Tax Credit calculations in two ways. First, individuals who are not US citizens may have household income under 100% of the FPL.[180] This provision is aimed at individuals who would be eligible for Medicaid but for their immigration status, but it is not limited to that population. Second, the FPL percentage used in the calculations is adjusted in mixed status families.[181]

Individuals not considered "lawfully present" do not qualify for a Premium Tax Credit, but they may receive a Premium Tax Credit on behalf of an eligible family member.[182] In mixed status families, family size for PTC calculations does not include individuals who

[177] Adjustments are claimed on lines 23 – 26 of the Form 1040 (2013). Gross taxable income ("total income," line 22) minus adjustments is Adjusted Gross Income. *See*, IRS Form 1040, *supra* note 64.
[178] Joe's non-taxable Social Security Disability is included. The son's income is not included because he is a dependent with no filing requirement.
[179] In some states, Medicaid eligibility extends beyond this income level; in other states it does not. Assume Debbie and Joe live in a state with low Medicaid eligibility levels.
[180] Treas. Reg. § 1.36B-2(b)(5).
[181] Treas. Reg. § 1.36B-3(l).
[182] Treas. Reg. § 1.36B-2(b)(4).

are not lawfully present. Household income is also reduced, proportionate to the percentage of eligible family members. These two changes result in an adjusted FPL.

> Example: an undocumented married couple have two young citizen children. The parents' AGI is $50,000. If all family members were "lawfully present," they would have a family size of four, and household income of $50,000. Their FPL would be 212%.
>
> Because of the parents' undocumented status, the children's family size is reduced to two. Household income is reduced to $25,000 ($50,000 * 2/4). Based on those figures, the children's FPL for PTC calculations is 161%.

The QHP application process is also more complicated for non-citizens, and especially for people without social security numbers (SSNs). Exchanges will request SSNs from all applicants and family members whose income is relevant to the application. However, applicants and family members do not have to provide an SSN if they do not have one.[183] Individuals without a valid SSN should leave that space on the application blank; they should not provide an ITIN.[184]

After an application is filed, the exchange will try to verify as much information as possible through electronic data sources.[185] This system may not work as well for individuals without an SSN. The IRS will not verify tax information for ITIN filers.[186] Other data sources in the hub may likewise fail to match the information on the taxpayer's application. The result is that many applicants will need to provide proof of their income and identity to the exchange.[187]

Even if the daunting application process can be overcome, mixed status families may be reluctant to apply for their eligible members, for fear of immigration consequences. Advocates and HHS are trying hard to reassure people.[188] In fact, there are significant

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[183] 45 C.F.R §§ 155.310(a)(3); 155.305(f)(6); *see also* 45 C.F.R. § 155.315(i).
[184] See, National Immigration Law Center, *Frequently Asked Questions: The Affordable Care Act & Mixed-Status Families* (Oct. 2013), at 4 (Question 7), available at http://nilc.org/aca_mixedstatusfams.html.
[185] *See*, discussion of Health Insurance Exchanges Program in HHS Notice, 78 FR 8538-42 (Feb. 6, 2013).
[186] *See*, Treas. Reg. § 301.6103(l)(21)-1(b) (defining "relevant taxpayer" for whom return information will be disclosed); *see also* preamble to final rule, 73 FR 49,367, 49,369 (Aug. 13, 2013) (noting that HHS will only request return information for individuals whose SSNs have been verified by the Social Security Administration).
[187] *See*, verification procedures in 45 C.F.R. § 155.315.
[188] *See*, HHS FAQ, *What do immigrant families need to know about the Marketplace?*, available at https://www.healthcare.gov/what-do-immigrant-families-need-to-know/; Southeast Asia Resource Action Center, *How the Affordable Care Act Helps Undocumented Immigrants*, *available at* http://www.searac.org/sites/default/files/How%20ACA%20helps%20undocumented%20immigrants.pdf; The Shriver Brief, *How the Affordable Care Act Helps Immigrants* (Oct. 18, 2013), http://www.theshriverbrief.org/2013/10/articles/health-care-justice/how-the-affordable-care-act-helps-

protections in place. ACA regulations block the use of personally-identifiable information (including immigration status) for purposes other than an eligibility determination.[189] Exchanges cannot ask about the immigration status of family members who are not applying for coverage for themselves.[190] Similar protections have been codified in guidance for Medicaid and the Children's Health Insurance Program (CHIP).[191]

This fall, U.S. Immigration and Customs Enforcement (ICE) clarified that "ICE does not use information … that is obtained for purposes of determining eligibility for [health] coverage as the basis for pursuing a civil immigration enforcement action against [applicants] or members of their household…"[192] The memo does not limit criminal actions. It also ends with a disclaimer, that ICE does not intend the document to create any enforceable rights. Nevertheless, the policy statement supports the ACA's protections against immigration enforcement.

Reconciliation of advance Premium Tax Credit payments

Anyone who receives advance PTC payments must file a tax return to reconcile the advance payments with the PTC actually due to the taxpayer.[193] Excess advance payments are treated as additional income tax liability.[194] The ACA does not impose any limits on the IRS's collection powers with respect to excess PTC.

Reconciliation of advance PTC could be more complicated for ITIN filers, because the IRS won't be able to match data from the exchange.[195] Reporting will take place under SSNs only.

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immigrants/; National Immigration Law Center Fact Sheet, *The Affordable Care Act & Mixed-Status Families*, available at http://nilc.org/aca_mixedstatusfams.html.

[189] ACA § 1411(g); 45 C.F.R. §§ 155.260, 155.270. *See also*, National Immigration Law Center Fact Sheet, *The Affordable Care Act & Mixed-Status Families*, available at http://nilc.org/aca_mixedstatusfams.html; HHS FAQ, *What do immigrant families need to know about the Marketplace?*, available at https://www.healthcare.gov/what-do-immigrant-families-need-to-know/.

[190] 45 C.F.R § 155.310(a)(2).

[191] 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, www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html. *See also* discussion in preamble to ACA Medicaid rule at 77 FR 17,144, 17,164 (Mar. 23, 2012).

[192] ICE, Clarification of Existing Practices Related to Certain Health Care Information (Oct. 25, 2013) available at http://www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf.

[193] Treas. Reg. § 1.36B-4.

[194] I.R.C. § 36B(f)(2); Treas. Reg. § 1.36B-4(a)(1)(i).

[195] *See* proposed regulations on information reporting for exchanges at 78 FR 39,644 (July 2, 2013). Information reporting rules have also been proposed for large employers at 78 FR 54,996 (Sept. 9, 2013) and for other providers of MEC at 78 FR 54,986 (Sept. 9, 2013).

Obviously, estimating income for APTC will be very difficult for taxpayers with unreliable or varying sources of income. In order to minimize tax liability, changes affecting the correct PTC amount should be reported promptly to the exchange.

However, there are limits on the amount of excess credit that must be repaid.[196] The limits are shown on the following chart.

Cap on APTC Repayment				
Income as percentage of poverty line	**Annual income for an individual (2013 $)**	**Single taxpayers**	**Annual income for a family of four (2013 $)**	**Married taxpayers filing jointly**
Under 200%	Under $22,980	**$300**	Under $47,100	**$600**
At least 200% but less than 300%	$22,980 - $34,470	**$750**	$47,100 - $70,650	**$1,500**
At least 300% but less than 400%	$34,470 - $45,960	**$1,250**	$70,650 - $94,200	**$2,500**
400% and above	$45,960 and higher	**Full amount**	$94,200 and higher	**Full amount**
Source: http://www.cbpp.org/files/QA-on-Premium-Credits.pdf.				

Because of the limit on tax liability, some taxpayers may be tempted to keep changes in circumstance to themselves, rather than reporting to the exchange. However, taxpayers have a duty to report changes within 30 days.[197] Also, the exchanges will periodically check data sources for new information.[198]

Implications and issues for advocates and low-income taxpayers

The complexity of the ACA raises many issues for advocates and low-income taxpayers. This article will only scratch the surface.

Access to advance PTC is particularly crucial for low-income individuals residing in states with relatively limited Medicaid programs. The Supreme Court's decision allowing states to opt out of the Medicaid expansion created a coverage gap in non-expansion states.[199] In states that have not expanded Medicaid, it may be beneficial for very low-income

[196] I.R.C. § 36B(f)(2)(B);Treas. Reg. § 1.36B-4(a)(3).
[197] 45 C.F.R. § 155.330(b).
[198] 45 C.F.R. § 155.330(d). The frequency and breadth of these data checks may vary by exchange.
[199] PTC eligibility begins at 100% of the FPL, because lower-income individuals were supposed to enroll in Medicaid.

individuals to refrain from claiming a dependent, in order to increase their FPL to 100%.[200] This strategy appears lawful and consistent with PTC regulations.

A second major issue is the joint return requirement. This will cause significant hardship to low-income taxpayers who cannot meet the requirement because of circumstances such as domestic abuse, pending divorce, or incarceration. Filing status will be a serious problem for those taxpayers, unless they qualify to file as Head of Household.[201] In 2012, the IRS solicited input on options to address this problem, and indicated that the issue was under consideration.[202] However, no proposed regulations have been released to date.

As we saw with the ACA penalty, the dependent exemption is of paramount importance for the Premium Tax Credit. Advocates should reach out to clients and family law practitioners to emphasize the increased significance of IRS Form 8332.[203] Family court orders may need to be modified to take the new health insurance landscape into account. Although the IRS views family court orders with indifference, our clients cannot. Existing family court orders may not align entitlement to the dependent exemption with the duty to provide medical support.

There are also significant practical questions whose resolution is currently unknown. They are most numerous and significant for non-traditional households and families whose members reside in multiple states.

Theoretically, members of one tax household do not have to be enrolled in the same QHP for all eligible members to receive advance PTC. In principle, advance PTC could be granted for a taxpayer whose dependents are enrolled in different QHPs issued by different exchanges.[204] In actuality, CMS has not released guidance for exchanges to follow, and there is no guarantee that procedures will be put in place.

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[200] The taxpayer could still owe a shared responsibility payment for the dependent. *See, supra*.

[201] Even spouses who do qualify for Head of Household will have problems. They may not know at the beginning of the year whether the requirements will be met. Exchanges may not understand the Head of Household criteria, or even be aware of section 7703.

[202] *See*, preamble to final rule, 77 FR at 30,384-85 (May 23, 2012).

[203] IRS form 8332 must be signed by a custodial parent in order for the non-custodial parent to claim a child's dependent exemption. I.R.C. § 152(e)(2)(A). If it comes to the IRS's attention, the IRS will disallow a dependent exemption for a non-custodial parent without this form. *See, e.g.*, *Armstrong v. Comm'r*, 139 T.C. No. 18 (2012). For tax years after 2008, a family court order is not sufficient. Treas. Reg. § 1.152-4(e)(1)(ii). It remains to be seen whether form 8332 will be revised to include the additional implications of giving up a dependent exemption.

[204] For example, a father residing in Massachusetts enrolls through his state exchange. He claims a dependent exemption for his son, who resides with the taxpayer's ex-wife in Vermont. The father theoretically could apply to Vermont's exchange for his son, and receive advance PTC, if eligible. Note that in this scenario, only the father can apply for advance PTC for the son. The mother cannot apply because she does not expect to claim the son's dependent exemption.

The implementing agencies have not fully determined how taxpayers will get the information they need to determine their proper credits and liabilities. The proposed regulations on QHP information returns do not address non-custodial parents, or the possibility that the person who enrolls a dependent in coverage may not be the only person who needs information.[205] Conversely, privacy issues implicated by QHP information returns have not been fully addressed. In cases of domestic violence, a non-custodial parent entitled to claim his child should not be able to get the custodial parent's address from the QHP information return. In response to proposed IRS regulations on QHP information returns, advocates raised concerns about medical identity theft as well as stalking and domestic violence. Continued advocacy will be needed on this front as regulations are finalized and forms and publications are developed.

Conclusion

Under the ACA, suddenly, health care workers and advocates need to know about taxable versus nontaxable income, tax dependents, Head of Household criteria, and when a person has an income tax filing requirement. Tax advocates at Low-Income Taxpayer Clinics can be a resource for health care health care advocates and others who may be unfamiliar with these topics.

LITCs, legal aid programs, and other advocates work directly with many taxpayers who are impacted by the ACA. We have an excellent opportunity to help our clients access the health insurance subsidies they deserve and avoid shared responsibility penalties and future tax controversies. LITCs should advise existing clients on their ACA-related tax questions. Tax advocates can spot health care issues and refer clients to health advocates.[206] Health advocates can do the same with tax issues. We should all be mindful of ACA deadlines that may affect our clients.

The ACA also increases the importance of several tax issues that LITCs already handle. As of January 1, 2014, there are significant new consequences attached to the dependency exemption. ITIN disputes will be even more important as individuals look to joint filing status to avoid or lower their shared responsibility payment, and mixed status families require and ITIN to reconcile advance payments of the Premium Tax Credit. Controversies involving cancelled debt, stock basis, settlements, and retirement

[205] IRS Reg-140789-12, 78 FR 39,644 (July 2, 2013). The IRS website explains, "[a]n information return is a tax document businesses are required to file to report certain business transactions to the IRS." http://www.irs.gov/uac/Information-Returns-by-Form.

[206] At this time, the LITC program office has not clarified whether LITCs may represent low-income taxpayers in exchange appeals related to exemptions or Premium Tax Credit.

distributions have weightier consequences now that increased AGI could mean going without affordable health insurance, *and* paying a stiffer penalty for being uninsured.[207]

Systemic advocacy is a crucial piece of the LITC program's mission, and the mission of many other advocacy groups. As forms are developed, publications are written, and additional guidance is issued, advocates should seize any opportunity to be involved. By working together and pooling our knowledge, we will be able to spot problematic issues and prevent systemic problems before they arise.

[207] MAGI includes taxable lump sum income for the Premium Tax Credit and the individual shared responsibility payment, but not for Medicaid.

Resources and References

New resources should be available shortly as the IRS steps up its outreach and taxpayer education efforts. Additional guidance is likely to be issued by IRS, HHS, CMS, and other federal agencies.

Government Resources

Centers for Medicare and Medicaid Services guidance: http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/index.html

HHS regulations and guidance categorized by topic: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html

IRS Affordable Care Act Pages - http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions-Home (general, more readable for taxpayers) and http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions?portlet=6 (additional information for tax practitioners)

IRS PTC Page http://www.irs.gov/uac/The-Premium-Tax-Credit

IRS Publication 5093, Health Care Law Online Resources (Jul. 2013), is a one-page flyer available at http://www.irs.gov/pub/irs-pdf/p5120.pdf.

IRS Publication 5120, Facts About the Premium Tax Credit (Sept. 2013), is a one-page flyer available at http://www.irs.gov/pub/irs-pdf/p5120.pdf.

U.S. Department of Labor health reform page: http://www.dol.gov/ebsa/healthreform/

Read the ACA - http://www.hhs.gov/healthcare/rights/law/index.html

Non-government Resources

Center on Budget and Policy Priorities, *Premium Tax Credits: Answers to Frequently Asked Questions*, (July 2013) http://www.cbpp.org/files/QA-on-Premium-Credits.pdf. An excellent overview, with examples, and the source of the charts used in this article.

Consumers Union, Helping Consumers Understand the New Premium Tax Credit, May 15, 2013, available at http://consumersunion.org/wp-content/uploads/2013/05/Understanding_The_Premium_Tax_Credit.pdf. Suggested talking points and accessible explanation of the Premium Tax Credit.

Health Affairs blog: http://healthaffairs.org/blog/. Good source of ACA news and policy discussions.

Kaiser Family Foundation health reform page: http://kff.org/health-reform/. Kaiser's site includes a subsidy calculator, FAQs, and a comprehensive health reform timeline.

National Health Law Program, *The Advocate's Guide to MAGI*, October 2013, available online at http://nhelp.nonprofitsoapbox.com/publications/browse-all-publications.

National Health Law Program page on health care reform: http://www.healthlaw.org/issues/health-care-reform

National Immigration Law Center page on health reform: http://www.nilc.org/ACAfacts.html. An excellent resource for advocates working with individuals who are not U.S. citizens.

Health Reform: Beyond the Basics, http://www.healthreformbeyondthebasics.org/, a project of the Center on Budget and Policy Priorities, this site's library includes excellent webinars and FAQ on several ACA topics.

Health Reform GPS, a joint project of the George Washington University's Hirsh Health Law and Policy Program and the Robert Wood Johnson Foundation: http://www.healthreformgps.org/. Helpful source for ACA news and resources.

Robert Wood Johnson Foundation & George Washington University's Hirsh Health Law and Policy Program, Navigator Resource Guide: http://www.healthreformgps.org/resources/rwjf-publishes-navigator-resource-guide/.

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