

Affordable Care Act 2014 Tax Returns and Beyond

**A Presentation for
Vermont Tax Professionals Association**

by

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Vermont Legal Aid
Working for Justice

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Warning



All forms and instructions discussed are drafts. Some regulations have not yet been finalized. New guidance may be issued. Information may change.



Today's Presentation



- Premium Tax Credit allocation issues
 - ✦ Draft Forms 1095-A & 8962, draft instructions
 - ✦ Final and temporary regulations
- ACA penalty assessment & collection issues
- Premium Tax Credit assessment & collection issues
- Looking forward – potential pitfalls
 - ✦ Forms 1095-A
 - ✦ Estranged parents/spouses
 - ✦ VHC renewals and 2015 open enrollment
 - ✦ APTC reconciliation



Premium Tax Credit: Mechanics Review



- Exchange sends Form 1095-A by January 31, 2014
 - At this point VHC plans to send paper forms, not electronic
 - Everyone who had an individual market plan through VHC or another exchange should receive one
- Taxpayer completes Form 8962 and attaches to Form 1040 or 1040A
 - In some situations amounts will need to be allocated between taxpayers



Premium Tax Credit Allocation



Three allocation situations discussed in temporary regulations

1. Shifting enrollees
 2. Former spouses
 3. Taxpayers filing as married filing separately or head of household
- Comments due October 27, 2014. 79 Fed. Reg. 43693.



Premium Tax Credit Allocation



1. Shifting enrollees

- A dependent enrolled by one taxpayer but claimed by another. Treas. Reg. § 1.36B-4T(a)(1)(ii)(B).
- Should be mostly allocation of PTC between parents
- Parent enrolls child in health plan expecting to claim as dependent and receives APTC, but other parent ultimately properly claims child as dependent



Premium Tax Credit Allocation



1. Shifting enrollees

- Premiums paid must be allocated between the parents
- If APTC was paid, APTC and benchmark premiums are also allocated
- One percentage is applied to all 3 allocated items
 - The parents can pick any allocation percentage
- If the parents don't agree, allocation percentage is $\frac{\# \text{ of shifting enrollees claimed by claiming parent}}{\# \text{ of individuals enrolled in health plan with the shifting enrollees}}$



Premium Tax Credit Allocation



1. Shifting enrollees: allocation percentage
 - Example: Jane enrolls in a QHP with her 3 children and receives APTC. But at tax time, 1 of the children is properly claimed by his father John.
 - Perhaps the family court ordered Jane to sign form 8332
 - If Jane and John can't agree on an allocation percentage, it will be 25%.
 - One shifting enrollee divided by 4 people on that enrollee's health plan



Premium Tax Credit Allocation



1. Shifting enrollees

- It doesn't matter who actually paid the premiums. If John is entitled to claim one child, John is allocated 25% of the premiums that Jane paid.
- John must reconcile 25% of the advance premium tax credit payments paid towards Jane's plan.
- The benchmark is only allocated if APTC was paid.
 - Draft Form 8962 is not good on this point



Premium Tax Credit Allocation



1. Shifting enrollees

- The 1095-A will come to Jane; she will need to give a copy to John
- John and Jane could both claim a PTC on their separate returns, if they are unmarried
- Both would fill out Form 8962, Part 4, Shared Policy Allocation
- If John had his own QHP during 2014, he would add his 1095-A amounts to the allocated amounts for his child. See Form 8962, line 34.
 - Form 8962 instructions have not been released



Premium Tax Credit Allocation



Three allocation situations discussed in temporary regulations

1. Shifting enrollees
2. Former spouses
3. Taxpayers filing as married filing separately or head of household



Premium Tax Credit Allocation



2. Former spouses

- Taxpayers who are married during the year, legally divorce or separate by the end of the year, and who were enrolled in the same QHP at any time during the year
- Or, taxpayer has a dependent enrolled in the same plan as their former spouse
- Or, taxpayer has a dependent enrolled in the same plan as a dependent of their former spouse
- Treas. Reg. § 1.36B-4T(b)(3)



Premium Tax Credit Allocation



2. Former spouses

- Must allocate premiums paid, APTC paid, and benchmark premiums
- One percentage is applied to all 3 allocated items
- Can agree on a percentage, or it's 50% by default
- If the plan covers a time period during which only one taxpayer or his or her dependents was enrolled in the plan, then 100% is allocated to that taxpayer.



Premium Tax Credit Allocation



2. Former spouses

- Once again, it doesn't matter who actually made the premium payments.
- Form 1095-A will be sent to the person identified in exchange records as the tax filer
- The benchmark premiums are allocated whether or not APTC was paid.
 - Why is this different than for shifting enrollees? The regulations don't explain.
 - Makes it simpler to complete Form 8962.



Premium Tax Credit Allocation



Three allocation situations discussed in temporary regulations

1. Shifting enrollees
2. Former spouses
3. Taxpayers filing as married filing separately or head of household



Premium Tax Credit Allocation



3. Taxpayers filing as married filing separately or head of household

- Treas. Reg. § 1.36B-4T(b)(4).
- Must allocate advance credit payments received as married
- If claiming PTC, must allocate premiums
- Benchmark plan premiums are not allocated
 - This is getting confusing!



Premium Tax Credit Allocation



3. Taxpayers filing as married filing separately or head of household

- Allocation percentage is 50%
 - Taxpayers not allowed to choose a different figure
- If the plan covers a time period during which only one taxpayer or his or her dependents was enrolled in the plan, then 100% is allocated to that taxpayer.



Premium Tax Credit Allocation



3. Taxpayers filing as married filing separately or head of household

- Form 1095-A will be sent to the person identified in exchange records as the tax filer
- Both taxpayers will complete form 8962 to reconcile APTC
 - Complete Part 4, shared policy allocation, except that the benchmark is not allocated
 - Note: draft form 8962 does not say anything about the joint filing requirement or the exceptions to it



Premium Tax Credit Allocation



Three allocation situations discussed in temporary regulations

1. Shifting enrollees
 2. Former spouses
 3. Taxpayers filing as married filing separately or head of household
- AND a fourth allocation scenario, from the final regulations: Health plan covers more than one tax household



Premium Tax Credit Allocation



4. Health plan covers more than one tax household (from the get-go)

- Treas. Reg. sec 1.36B-3(h)
- Example: 25-year-old nondependent on a parent's plan
- APTC should have been calculated separately by the exchange; should not need allocating
- Benchmark premiums are not allocated
- Premiums paid are allocated



Premium Tax Credit Allocation



4. Health plan covers more than one tax household

- Premiums paid are allocated in proportion to the premiums for each taxpayer's benchmark plan
 - Mom, Dad, and their 25-year-old son Jeff are on a health plan with premiums of \$15,000. Mom & Dad's benchmark premium is \$12,000. Jeff's benchmark premium is \$6,000.
 - The premium allocated to Mom and Dad is \$10,000 ($\$15,000 \times \$12,000 / \$18,000$)



Premium Tax Credit Allocation



4. Health plan covers more than one tax household

- Notice again, it doesn't matter who actually pays the premiums. Jeff can claim his own PTC because he's not a tax dependent.
- Two forms 1095-A will be sent, to:
 - Mom or Dad, depending on who the exchange listed first on the account; and
 - Jeff



Premium Tax Credit Allocation



4. Health plan covers more than one tax household

- What will the forms 1095-A look like?
 - It depends on whether advance PTC payments were made. See draft instructions, page 2.
 - If advance payments were made, the forms 1095-A should be totally separate. The taxpayers should not need to do any allocating themselves.
 - If advance payments were not made, the forms 1095-A could be identical, and the taxpayers will need to allocate the premiums paid and figure out their correct benchmark premium



Premium Tax Credit Allocation



- Recap
 - There are slightly different rules for each of the 4 allocation situations described above
 - ✦ If this does not make sense to you, there's still time to submit comments on the temporary regulations
 - Form 8962 instructions will be crucial
- Form 8962 is not final
 - <http://www.irs.gov/uac/Comment-on-Tax-Forms-and-Publications>
- Any questions or discussion about PTC allocation issues?



ACA Penalty: Assessment and Collection



What assessment and collection procedures apply to the ACA penalty?

- There's a lot we don't know yet
- What do we know?
 - IRS cannot use the NFTL, levies, or criminal penalties to collect the penalty. IRC 5000A(g)(2)
 - ✦ Includes the State Income Tax Levy Program and the Federal Payment Levy Program
 - But... other protections are missing
 - ✦ No right to pre-assessment review
 - ✦ No right to a Collection Due Process hearing



ACA Penalty: Liens



The Service cannot file a NFTL regarding the ACA penalty. Still,

- The “secret” statutory lien will arise and attach to all property of the taxpayer under Section 6321
- The secret lien could potentially be foreclosed in federal district court pursuant to Section 7403
 - But... the Service will not have the benefit of any priority status that would have been conferred by a NFTL



ACA Penalty: Levies



The Service cannot use its levy powers to collect the ACA penalty. But:

- A refund offset is not technically a levy. See *Perry v. Comm’r*, T.C. Memo. 2010-219, and cases cited.
- Refund offsets could be applied first to §5000A amounts, and then to other taxes owed
 - Not in the IRM yet, but would be logical
 - Same with IA payments



ACA Penalty: Assessment



- ACA puts no limits on IRS assessment of the penalty
- Taxpayers have no right to Tax Court deficiency procedures prior to assessment
 - See Section 6211(a), definition of a deficiency.
 - Only Congress can expand the Tax Court's jurisdiction
 - An oversight? The ACA penalty will be affected by Tax Court decisions on income and dependents
- We don't know yet what pre-assessment administrative review IRS will offer, if any



ACA Penalty: ASED



- IRS has not taken a position on the applicable ASED
- The ACA penalty is an excise tax
 - Section 5000A can be understood as imposing an indirect tax on the condition of not having health insurance. Nat'l Fed. Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2599-2600 (2012).
 - Section 5000A is located in chapter 48, subtitle D of the Internal Revenue Code. Subtitle D is titled Miscellaneous Excise Taxes.
- Assuming it's an excise tax...
 - ASED is generally 3 years, § 6501(a).
 - If underreported by more than 25 percent, 6 years, § 6501(e)(3).
 - Unlimited for fraud, willful attempt to defeat or evade the penalty, or failure to file a return. § 6501(c)(1)(2) & (3).

ACA Penalty: Post-assessment Review



- No right to a Collection Due Process hearing
 - The Service is not legally obligated to provide the rights conferred by sections 6330 and 6331 when employing its offset authority. *Boyd v. Comm’r*, 451 F.3d 8 (1st Cir. 2006).
- Audit Reconsideration / 1040X
- OIC Doubt as to Liability
- Federal District Court refund suit
 - Must pay the tax first
- Stay tuned!



ACA Penalty: CSED



- IRS has not taken a position on the CSED applicable to the penalty
- The general collection statute expiration date under Section 6502 should apply
 - It has been suggested that refund offsets could continue forever, because § 6502(a) only explicitly limits levies and proceedings in court.
 - The Service's longstanding position is that an enforceable tax liability is a prerequisite for making an offset. [Program Management Technical Advice 2011-035](#)
 - Once again, stay tuned!



ACA Penalty: Accuracy penalties



- The accuracy-related penalty in §6662 does not apply to the shared responsibility payment.
 - “The section 5000A shared responsibility payment is not taken into consideration in determining whether there is an underpayment of tax under section 6664. Therefore, the shared responsibility payment is not taken into account under section 6662.” [78 FR at 53655](#) (Aug. 30, 2013).
 - ✦ If that is the case, the §6663 fraud penalty would not apply to the ACA penalty, either.



ACA Penalty: Accuracy penalties



- Even if the Service changes its interpretation of section 6664, any accuracy-related penalty would have to be based on negligence or disregard of the rules.
 - The “substantial understatement” penalty under section 6662(b)(2) only applies to income tax.



ACA Penalty: Interest and penalties



- Late payment penalties may be imposed under Section 6651(a)(3)
- Interest may be imposed under Section 6601
 - But! Interest will not begin to run until assessment. Section 6601(e)(2)(A).
 - ✦ Congress specified that the ACA penalty is to be collected in the same manner as an assessable penalty under subchapter B of chapter 68 of the Code. 5000A(g)(1)
 - ✦ Interest on assessable penalties does not run until assessment.



Premium Tax Credit: Assessment and Collection



Much easier to prepare for than the ACA penalty!

- PTC is treated for assessment and collection purposes like existing refundable credits
 - Anyone who receives advance PTC payments (APTC) must file a tax return to reconcile the advance payments with the PTC actually due to the taxpayer. Treas. Reg. § 1.36B-4.
 - Excess advance payments are treated as additional income tax liability. IRC 36B(f)(2); Treas. Reg. § 1.36B-4(a)(1)(i).



Premium Tax Credit: Assessment and Collection



- Deficiency procedures apply under Section 6211(b)(4)
- Penalties and interest may be assessed as with any other overpaid refundable credit
- The ACA does not impose any limits on the Service's collection powers for excess PTC. Therefore, collection may take the form of liens, levies and refund offsets.
- The same collection options should apply as for other income tax liabilities
 - ✦ Including CDP rights



Premium Tax Credit: Accuracy penalties



- The IRC 6662 and 6663 accuracy and fraud penalties should not be imposed based on the disallowance of refundable credits. Rand v. Comm’r, 141 T.C. No. 12 (2013)
 - IRS directed Chief Counsel attorneys to follow Rand in [Notice CC-2014-007](#) (July 31, 2014).
 - ✦ The notice only binds Chief Counsel attorneys litigating in Tax Court.
 - ✦ The notice leaves open the possibility that the Service could change its mind



Premium Tax Credit: Accuracy penalties



- The 20% penalty under section 6676 could potentially be asserted instead of the 6662 penalty
 - Erroneous claim for refund or credit with respect to income tax
 - Without a reasonable basis
- Since Rand, much speculation



ACA Assessment and Collection Issues



- This is an area of uncertainty
- Any questions or discussion?



Looking Ahead: Potential Pitfalls



- **Forms 1095-A**
 - Exchanges experienced massive technical difficulties this year.
 - ✦ E.g. some accounts have the child listed as subscriber and parent listed as the dependent. Will errors like this be straightened out by January 31?
 - What should taxpayers do if Form 1095-A is wrong? We don't know yet.
 - ✦ Call VHC? 855-899-9600/TDD 888-834-7898
 - ✦ Call the Office of the Health Care Advocate? 800-917-7787
 - ✦ VLA will advocate for a dedicated help line or special review process



Looking Ahead: Potential Pitfalls



- **Forms 1095-A**
 - Taxpayers should NOT file a return that they believe is incorrect
 - ✦ Deficiency procedures apply to the Premium Tax Credit. Don't give them up.
 - ✦ A Tax Court appeal is a stronger position to be in than waiting on a 1040X or Audit Reconsideration.



Looking Ahead: Potential Pitfalls



- Estranged parents and spouses
 - The PTC and § 5000A add complexity to dependent exemption disputes and decisions
 - ✦ People need to plan ahead if they are going to claim APTC
 - The number of dependents claimed affects a parent's eligibility for subsidies on the exchange, even if the child has Dr. Dynasaur
 - ✦ The child's individual shared responsibility payment could be an unpleasant surprise
 - Remember, the percent of income amount does not vary depending on how many tax household members owe a penalty



Looking Ahead: Potential Pitfalls



- Estranged parents and spouses
 - “Non-custodial” parents need to get form 8332 if they want to claim the children
 - Form 8332 is technically necessary for most people if they get audited
 - Many clients don’t believe it. A lot of returns go through. IRS correspondence examiners sometimes accept a divorce order when it’s not technically sufficient.
 - If clients don’t believe it, send them the [Armstrong/Hanson case?](#)



Looking Ahead: Potential Pitfalls



- Estranged parents and spouses
 - What if my ex won't sign form 8332 even though the judge said I can claim the kids?
 - The family court can order parents to sign documents necessary to implement a court order
 - Refusal = contempt of court
 - Punishable by fines or even jail time
 - But, the aggrieved parent will have to file a "motion to enforce" or a "motion for contempt", pay filing fees, and go to court with their ex again
 - Mediation could be required first, under the existing court order
 - Court forms and information packets can be downloaded at www.vermontjudiciary.org



Looking Ahead: Potential Pitfalls



- Estranged parents and spouses
 - What about modifying the family court order?
 - ✦ The court order may not seem fair now that the dependent exemption has additional consequences.
 - ✦ In most states, the family court's allocation of a dependent exemption can be modified if circumstances change.
 - ✦ In Vermont, this may be an area for future litigation.
 - Most recent Vt case denied modification where exemption was placed in property division section of divorce agreement. *Adamson v. Dodge*, 816 A.2d 455 (Vt. 2002).
 - ✦ Best scenario for modification: the allocation is in the "child support" section of the court order



Looking Ahead: Potential Pitfalls



- Estranged parents and spouses
 - Getting access to information needed to file taxes could be a problem
 - ✦ 1095-A will be sent to the tax filer or enrolling individual
 - ✦ 1095-B will be sent to the policy holder
 - ✦ 1095-C will be sent to the employee
 - For the Premium Tax Credit, taxpayer could file what they believe to be correct, then appeal all the way to Tax Court if the return is challenged.
 - For the ACA penalty, it is not clear what a taxpayer should do. We don't know if any pre-assessment procedures will be available.



Looking Ahead: Potential Pitfalls



- 2015 open enrollment
 - Vermont Health Connect's 2015 open enrollment is November 15, 2014 through February 15, 2015
 - During open enrollment, individuals can apply for 2015 health plans and APTC. Enrollees can change plans.
 - The overlap with tax season could confuse people
 - ✦ 1095-A forms will be sent by 1/31
 - The overlap could generate a high volume of calls for VHC
 - For coverage effective January 1, 2015, a plan must be selected by December 15, 2014



Looking Ahead: Potential Pitfalls



- **Vermont Health Connect Renewals**
 - People enrolled in a 2014 plan who did NOT authorize VHC to check their tax data for renewal purposes should be getting letters now (375-400 people)
 - General letters about renewing coverage will go out in October
 - ✦ People should call VHC to update their information or give their income projections for 2015
 - On November 15, VHC will have access to updated (2013) tax data from the IRS. VHC will use available data and any information people have provided to calculate 2015 eligibility.
 - ✦ Individuals need to pick a plan by December 15 to have coverage on January 1. It will be tight.



Looking Ahead: Potential Pitfalls



- Vermont Health Connect Renewals
 - Vermont's renewal plan is better for consumers than the federal marketplace plan.
 - Vermont Health Connect will try to give people a correct eligibility determination for 2015, even if they do not respond to letters.
 - In contrast, the federal marketplace will give people the same dollar amount of ATPC as they received in 2014, unless the consumer updates their information.
 - Any clients with insurance through New Hampshire's federal partnership exchange should update their information.
 - ✦ Log onto healthcare.gov or call the federal Health Care Marketplace Hotline at 1-800-318-2596 (TTY: 1-855-889-4325).



Looking Ahead: Potential Pitfalls



- **APTC Reconciliation**

- There is no exception to reconciliation
 - ✦ Errors made by exchanges, navigators, etc. must all be paid for by the taxpayer.
 - ✦ People will not be happy about this
- The caps on repayment should help

2014 Repayment Limits for Advance Premium Tax Credits				
Household Income as Percentage of Federal Poverty Line (FPL)	Annual Income for an Individual	Maximum Repayment for a Single Person	Annual Income for a Family of Four	Maximum Repayment for Married Taxpayers Filing Jointly
<200%	< \$22,980	\$300	< \$47,100	\$600
200 - 299%	\$22,980 - \$34,470	\$750	\$47,100 - \$70,650	\$1,500
300 - 399%	\$34,470 - \$45,960	\$1,250	\$70,650 - \$94,200	\$2,500
400%+	\$45,960+	Full Amount	\$94,200+	Full Amount

Looking Ahead: Potential Pitfalls



- APTC Reconciliation – grace period issues
 - People whose plans were terminated for nonpayment will owe back any APTC paid for their first grace period month, assuming the premium for that month was never paid
 - ✦ If the premium is never paid, it does not count as a coverage month for purposes of the PTC.
 - The good news: APTC does not need to be repaid by the taxpayer beyond the first grace period month. The issuer must refund any payments to the federal government for months in which the taxpayer had no health insurance coverage



Vermont Low Income Taxpayer Project



- Free Federal Tax Help for Individuals
 - ✦ Advice or representation for IRS disputes
 - Exams, U.S. Tax Court, Innocent Spouse
 - Collection alternatives, collection appeals
 - ✦ Educate
- A Voice for Low Income Taxpayers
 - ✦ Submit issues to the TAS Systemic Advocacy System
 - ✦ Comment on IRS forms and regulations
 - ✦ Part of a national network of LITC advocates
- 1-800-889-2047



HCA | What We Do



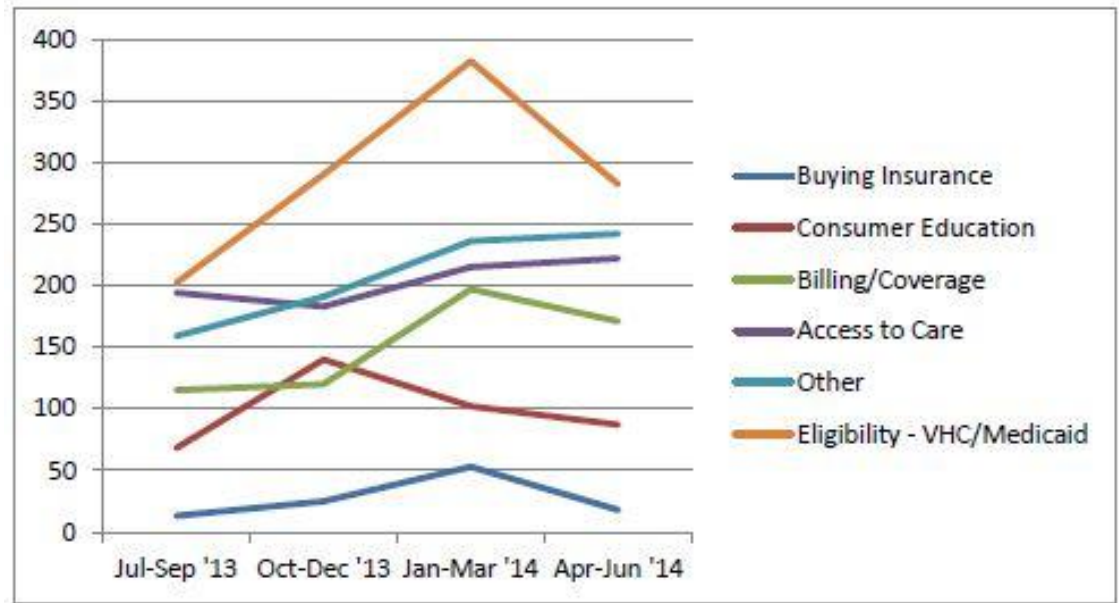
- Free Health Care/Insurance Help for Vermonters
 - ✦ Answer questions
 - ✦ Resolve thorny problems
 - ✦ Work to get coverage
 - ✦ Educate
- A Voice for Consumers
 - ✦ Green Mountain Care Board
 - ✦ State agencies
 - ✦ State legislature
- 1-800-917-7787



HCA Most Frequent Calls

HCA | Total Calls

- 3,907 calls from 7/1/13 to 6/30/14
- 1,208 calls about Vermont Health Connect from 10/1/13 to 6/30/14
- 42% more calls in SFY Q3 2014 than in SFY Q3 2013



Questions?



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