Low-Income Taxpayers
and the
Affordable Care Act

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Vermont Legal Aid
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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 Patient Protection and Affordable Care Act[1] (ACA) contains dozens of tax provisions.[2] The ACA introduced a major new tax credit and a major new tax penalty for 2014. It also imported 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.[4] 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

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[1] The Affordable Care Act or ACA refers to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (hereinafter PPACA) 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, Pub. L. No. 112-9, 125 Stat. 36 (2011), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011), and the 3% Withholding Repeal and Job Creation Act, Pub. L. No. 112-56, 125 Stat. 711 (2011). Textual references to the "ACA" refer to the original act, as amended.

[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, and online at *http://www.irs.gov/Advocate/Low-Income-Taxpayer-Clinics/Low-Income-Taxpayer-Clinic-Map*.

[4] For a more comprehensive reference and practice guide, see Chapter 29 in the forthcoming 6th edition of *Effectively Representing Your Client Before the IRS*, published by the American Bar Association.

concern for advocates and identifies areas to monitor for further development and advocacy.

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.

Background

The ACA made 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."[5] 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.[6] Annual and lifetime limits on most covered benefits are banned.[7] Also, certain preventative services must be covered without any out-of-pocket cost.[8] These are only a few examples of the many ACA provisions impacting insurance plans. Additional ACA provisions went into effect before 2014.[9]

[5] 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.

[6] PPACA § 1201, 124 Stat. at 154-55, codified at 42 U.S.C. §§ 300gg *et seq.*; *see also*, 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 Fed. Reg. 37,188, 37,190 (June 28, 2010).

[7] PPACA § 1001, § 2711, 124 Stat. at 131 (codified at 42 U.S.C. § 300gg–11); *see also* HHS, *Lifetime and Annual Limits*, http://www.hhs.gov/healthcare/rights/limits/index.html.

[8] PPACA § 1001, § 2713, 124 Stat. at 131 (codified at 42 U.S.C. § 300gg–13); *see also* HHS, *Preventative Services Covered Under the Affordable Care Act*, http://www.hhs.gov/healthcare/facts/factsheets/2010/07/preventive-services-list.html.

[9] E.g., the requirement that insurance companies permit young adults under 26 to remain on their parents' plans. PPACA § 1001, § 2714, 124 Stat. at 132 (codified at 42 U.S.C. § 300gg–14).

Changes to Medicaid

The ACA makes two main changes to Medicaid.[10] 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.[11]

The ACA expansion covers almost everyone up to 133% of the federal poverty line (FPL) who is not eligible for Medicare.[12] There is a 5 percentage point disregard, so the practical limit is 138% FPL.[13] For 2014, that is $16,105 for a single individual.

Confusingly, 138% FPL may 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.[14] 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.[15] HHS's Centers for Medicare & Medicaid Services (CMS) will permit states to join the expansion at any time; there is no deadline.[16] As of August 28, 2014, twenty-eight states are implementing the Medicaid expansion.[17]

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[10] 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*.

[11] 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 (February 2014), available online at *http://www.healthlaw.org/publications/agmagi*.

[12] PPACA § 2001, 124 Stat. at 271-79 (codified at 42 U.S.C. § 1396a).

[13] 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).

[14] 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).

[15] *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 567 U.S. __ (2012).

[16] *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/*.

[17] 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/*.

On the other hand, states cannot opt out of the general changes made to Medicaid eligibility rules.[18] 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.[19] The new rules do not apply to individuals who qualify for Medicaid based on old age or disability.[20]

The new ACA Medicaid rules prohibit states from considering an applicant's assets in the eligibility determination.[21] The ACA also imports several tax concepts into Medicaid, including "tax dependent,"[22] the tax household, and "adjusted gross income" (AGI) under section 62.[23] 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.[24] 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.[25] If a state chooses not to set up an exchange, HHS must do it for them.[26]

M.I.T. economist Jonathan Gruber estimates that 80% of Americans will be relatively unaffected by the exchanges.[27] People enrolled in Medicare are unaffected.[28] People with employer-sponsored insurance are mostly unaffected.[29]

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[18] *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*.
[19] PPACA § 2002, 124 Stat. at 279-83 (codified at 42 U.S.C. § 1396a(e)(14)).
[20] *Id.*
[21] *See,* 42 C.F.R. § 435.603(g).
[22] Unfortunately, ACA Medicaid's definition of "tax dependent" does not quite align with the definition in Internal Revenue Code section 152. Instead, it includes spouses whose personal exemptions are claimed under section 151. However, the section 152 definition is used when determining eligibility for the 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.
[23] Unless otherwise indicated, section references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.). Regulations under the I.R.C. are referred to as Treasury Regulations. The Treasury Regulations can be found in Title 26 C.F.R.
[24] *See generally, The Advocate's Guide to MAGI*, *supra* n. 11.
[25] PPACA § 1311, 124 Stat. 173-181 (codified at 42 U.S.C. § 18031); 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. State-established exchanges go by various names; *see, e.g.*, Covered California, *https://www.coveredca.com/*.
[26] PPACA § 1321(c), 124 Stat. 186 (codified at 42 U.S.C. § 18041). This is called a federally-facilitated exchange.

Who is affected by the exchanges? Mainly, it is Medicaid beneficiaries, the uninsured, and people who buy insurance for themselves on the individual market.[30] 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 a separate marketplace called the Small Business Health Care Options Program, or SHOP.[31].

Insurance plans offered through an exchange are called Qualified Health Plans (QHPs).[32] QHPs are organized in metal tiers, from platinum down to bronze.[33] Generally, platinum plans have the most expensive premiums and lower cost-sharing, while bronze plans have the least expensive premiums, but higher cost-sharing.[34] 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.[35] Applicants who request financial help are screened for Medicaid first, then QHP subsidies.[36] A federal "data services hub" controlled by HHS will attempt to electronically verify application information.[37] The hub will draw from multiple sources, including the Department of Homeland Security (DHS), the Social Security Administration (SSA), and the Department of Treasury.

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[27] 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*.

[28] 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*.

[29] Lizza, *supra* n. 27.

[30] *Id.*

[31] *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*). SHOP exchanges are beyond the scope of this article, and the subsidies discussed in this article are not available to individuals with SHOP insurance plans.

[32] PPACA § 1301, 124 Stat. at 162-63 (codified at 42 U.S.C. § 18021).

[33] PPACA § 1302(d)(1), 124 Stat. at 167 (codified at 42 U.S.C. § 18022(d)(1)).

[34] 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/*.

[35] PPACA § 1413, 124 Stat. at 233 (codified at 42 U.S.C. § 18083). FFM application forms are available at *https://marketplace.cms.gov/applications-and-forms/individuals-and-families-forms.html*.

[36] Individuals cannot receive QHP subsidies if they are eligible for Medicaid. I.R.C. § 36B(c)(2)(B).

[37] PPACA §§ 1411, 1413, 124 Stat. at 224, 233 (codified at 42 U.S.C. §§ 18081, 18083). Medicaid agencies must also use the data hub to verify information. PPACA § 2201, § 1943, 124 Stat. at 289-91 (codified at 42 U.S.C. § 1396w-3). *See*, preamble to HHS Privacy Act notice, 78 Fed. Reg. 8538, 8539-40 (Feb. 6, 2013) (describing the "Health Insurance Exchanges Program").

The Internal Revenue Service (IRS) can provide strictly limited information, and only for taxpayers identified by Social Security Number on an exchange application.[38] Tax return data released to an exchange continues to be protected from disclosure by section 6103.[39]

Operational details will vary significantly from state to state. For example, states can decide how far to integrate Medicaid eligibility determinations with the exchange.[40]

There are three enrollment criteria for an unsubsidized QHP.[41] 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;[42] (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.

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.[43] 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.[44]

The exchanges got off to a rocky start in October 2013. As of early December 2013, most exchanges were not functioning smoothly.[45] As a result, exchanges were permitted to effect coverage retroactively to January 1, something that is normally not permitted.[46] State exchanges and individual insurance companies were also permitted to extend the payment deadline for January 1 coverage.[47] Some did so.[48]

[38] I.R.C. § 6103(l)(21); Treas. Reg. § 301.6103(l)(21)-1; *see also*, discussion in preamble to IRS rule at 78 Fed. Reg. 49,367-69 (Aug. 14, 2013); IRS FAQ available at *http://www.irs.gov/uac/Newsroom/IRC-Section-6103%28l%29%2821%29-Questions-and-Answers*.

[39] *See*, preamble to final rule, 78 Fed. Reg. 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.")

[40] *See*, 45 C.F.R. § 155.302, *Options for conducting eligibility determinations*.

[41] 45 C.F.R. § 155.305.

[42] Lawful presence is discussed in more detail below.

[43] 45 C.F.R. § 155.410. Medicaid does not have enrollment periods; applicants can be enrolled at any time during the year.

[44] 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.

[45] *See*, Amy Goldstein and Juliet Eilperin, *Health-care enrollment on Web plagued by bugs*, The Washington Post, Dec. 2, 2013.

[46] *See*, CMS Interim Final Rule, 78 Fed. Reg. 76,212 (Dec. 17, 2013).

[47] See, discussion in preamble to Interim Final Rule, 78 Fed. Reg. 76,212, 76,214 (Dec. 17, 2013).

Unfortunately, technical and operational problems continued throughout the initial open enrolment period. The federal exchange and many state exchanges responded by creating Special Enrollment Periods for people who had tried unsuccessfully to enroll during open enrollment.[49] It is possible that this could happen again if technical and operational problems impact the 2015 open enrollment period.

QHP Subsidies

Qualified Health Plans are subsidized by the federal government for taxpayers with income up to 400% of the federal poverty line.[50] In 2014, that is $46,680 for a single individual and $95,400 for a family of four. Subsidies take the form of premium tax credits and cost-sharing reductions. Premium tax credits can be estimated, and paid in advance to reduce monthly premium bills.[51] QHP enrollees with income under 250% FPL may also receive cost-sharing subsidies.[52] These reduce out-of-pocket costs like co-pays. In order to receive cost-sharing reductions, most taxpayers must enroll in a QHP at the silver level.[53]

At least one state offers additional subsidies beyond the federal subsidy level.[54] All exchanges offer at least the federal subsidies.[55]

Both advance payments of the premium tax credit and cost-sharing reductions are implemented behind the scenes, between the insurance company, the exchange, and HHS.[56] An individual with subsidies should receive a reduced monthly premium bill

[48] E.g., America's Health Insurance Plans (AHIP) accepted payment through January 10, 2014. Press release at *http://ahip.org/Press-Room/Extend-Deadline-Premium-Payment* (Dec. 18, 2013).
[49] *See*, HHS Issue Brief, Health Insurance Marketplace: Summary Enrollment Report for the Initial Annual Open Enrollment Period, page 44, (May 2, 2014), available at *http://aspe.hhs.gov/health/reports/2014/MarketPlaceEnrollment/Apr2014/ib_2014Apr_enrollment.pdf*
[50] PPACA § 1401, 124 Stat. at 213-30 (codified at I.R.C. § 36B). The ACA refers to the "poverty line", but HHS prefers the term "poverty guidelines." *See* HHS, Frequently Asked Questions Related to the Poverty Guidelines and Poverty, *http://aspe.hhs.gov/poverty/faq.cfm*. The poverty line and guidelines are available at *http://aspe.hhs.gov/poverty/index.cfm*.
[51] PPACA § 1412, 124 Stat. at 231-33 (codified at 42 U.S.C. § 18082).
[52] ACA § 1402, 124 Stat. at 220-24 (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*.
[53] *Id.* There is an exception for Native Americans. 42 U.S.C. § 18071(d).
[54] *See,* Vermont Fiscal Year 2014 Appropriations Act, § E.309.1 (codified at 33 V.S.A. § 1812).
[55] There have been multiple cases filed to challenge the lawfulness of providing subsidies through federally-facilitated exchanges. One of these cases is currently before the U.S. Supreme Court. See, *King v. Burwell*, U.S. Supreme Court Docket No. 14-114. Challengers argue that subsidies may only be provided through state-run exchanges, under the plain language of the ACA.
[56] *See*, 45 C.F.R. § 155.340.

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.[57]

The ACA also created an Employer Shared Responsibility Payment.[58] 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.[59] Implementation of this penalty was postponed until 2015.[60] In addition, the employer penalty will be phased in.[61] The IRS currently intends to fully enforce the employer penalty starting in 2016.

Timeline[62]

Oct. 1, 2013 – Mar. 31, 2014[63]	Initial open enrollment period on exchanges. Individuals could apply for QHP coverage for 2014.
Jan. 1, 2014	Medicaid eligibility expanded at state option; some Medicaid eligibility categories shift to a tax-based methodology.
	QHPs begin to provide coverage.
	QHP subsidies begin, including advance payment of the premium tax credit.

57 I.R.C. § 5000A.
58 I.R.C. § 4980H.
59 For an overview of employer shared responsibility, see the Henry J. Kaiser Family Foundation, *Employer Responsibility Under the Affordable Care Act*, at http://kff.org/infographic/employer-responsibility-under-the-affordable-care-act/. See also IRS.gov, *Employer Shared Responsibility*, at http://www.irs.gov/uac/Newsroom/Employer-Shared-Responsibility.
60 IRS Notice 2013-45, I.R.B. 2013-31 (July 29, 2013).
61 79 Fed. Reg. 8,544 (Feb. 12, 2014).
62 For comprehensive health reform implementation timelines, *see* http://kff.org/interactive/implementation-timeline/ and http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html.
63 Open enrollment was effectively extended to May 31, 2014 in some states, through the use of special enrollment periods. *See*, HHS Issue Brief, *supra* n. 49.

	The individual obligation to have health coverage or pay a penalty goes into effect.
Mar. 31, 2014	QHP open enrollment ends.
May 1, 2014	Individuals who obtained health insurance, from whatever source, by May 1 will not owe an ACA penalty for the months before their insurance coverage began.[64]
Nov. 15, 2014 – Feb. 15, 2015	QHP open enrollment period for 2015 coverage.[65]
Feb. 15, 2015	Deadline to apply for a hardship exemption from the 2015 ACA penalty, based on a projected lack of affordable coverage.[66]
Tax filing season, late Jan.[67] – Apr. 15, 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 advance payments of the credit in 2014 must file a return to reconcile those with the actual credit due.
Spring - summer 2015	ACA-related IRS audits, automated assessments, and collection disputes begin.

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

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[64] CMS, Center for Consumer Information and Insurance Oversight (C.C.I.I.O.), *Special Enrollment Periods and Hardship Exemptions for Persons Meeting Certain Criteria* (May 2, 2014), at *http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/SEP-and-hardship-FAQ-5-1-2014.pdf*.

[65] See, *https://www.healthcare.gov/glossary/open-enrollment-period/* ("For coverage starting in 2015, the Open Enrollment Period is November 15, 2014–February 15, 2015.").

[66] *See*, 45 C.F.R. § 155.605(g)(2)(v). Penalty exemptions are discussed further below.

[67] The opening date of the filing season is not yet known. Last year it began on January 31, 2014. *See also*, Ken Berry, *IRS Commissioner Koskinen Fears Delay in Tax Filing Season*, Accounting Web, (Nov. 5, 2014), *at* *http://www.accountingweb.com/article/irs-commissioner-koskinen-fears-delay-tax-filing-season/224078*

starts with an individual's adjusted gross income (AGI) as defined in section 62.[68] 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.[69] 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.[70]

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.[71] 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."[72]

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).[73] 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 a dependent must file solely because of self-employment

[68] AGI is found at the bottom of the first page of Form 1040. On the Form 1040, AGI is on line 37. *See*, *http://www.irs.gov/pub/irs-pdf/f1040.pdf*.
[69] 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*. Note that this summary does not include MAGI calculations for the individual shared responsibility payment.
[70] 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).
[71] Exemptions are claimed on line 6 of the Form 1040. Exemption amounts are deducted from income on line 42. *See*, *http://www.irs.gov/pub/irs-pdf/f1040.pdf*.
[72] I.R.C. §§ 36B(d)(2)(A), 5000A(c)(4)(B); 42 C.F.R. § 435.603(d)(2).
[73] 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 IRS Rev. Proc. 2013-35; 2015 amounts were announced in Rev. Proc. 2014-61.

tax or to report an early distribution penalty, their MAGI is not included in "household income."[74]

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"

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.[75] In turn, that section refers to §152.2.

The definition of "lawfully present" includes a long list of statuses.[76] 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.[77] 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.

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[74] *See,* discussion in preamble to IRS rule, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377, at 30,377-78 (May 23, 2012).
[75] Treas. Reg. §§ 1.36B-1(g); 1.5000A-3(c)(2)(ii)(B).
[76] *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.
[77] *Id.*; Centers for Medicare and Medicaid Services (CMS) interim final rule, 77 Fed. Reg. 52614 (Aug. 30, 2012).

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 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.[78]

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.[79] The penalty is reported on individual income tax returns. It went 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.[80]

Most health insurance qualifies as minimum essential coverage (MEC).[81] 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.[82] MEC does not include insurance that only covers a specific type of service, for example dental coverage.[83]

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[78] 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*.

[79] I.R.C. § 5000A; Treas. Reg. § 1.5000A-1(a).

[80] Treas. Reg. § 1.5000A-4(a).

[81] *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*.

[82] *Id.*; *see also*, I.R.S. Notice 2014-71, *Eligibility for Minimum Essential Coverage Under Pregnancy-Based Medicaid and CHIP Programs*; C.M.S. SHO # 14-002, *Minimum Essential Coverage* (Nov. 7, 2014) (providing guidance related to Medicaid and CHIP).

[83] 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 Fed. Reg. 77632, 77633 - 37 (Dec. 24, 2013). The final rule was published at 79 Fed. Reg. 59,130 (Oct. 1, 2014).

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.[84]

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.*[85]

Individuals who are not "lawfully present" in the U.S. are not subject to a penalty.[86] This makes sense, since they are barred from purchasing even an unsubsidized QHP.[87]

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, as described by the IRS.[88] Note that some people may be exempt for reasons that don't fit any of these categories.[89] Nevertheless, the nine categories are:

1. Religious conscience[90]
2. Health care sharing ministry[91]
3. Indian tribes[92]
4. Household income below filing threshold[93]
5. Short coverage gap[94]
6. Hardship[95]
7. Unaffordable coverage options[96]
8. Incarceration after disposition of charges[97]

[84] Treas. Reg. § 1.5000A-1(b)(2).
[85] 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, at http://www.irs.gov/publications/p519/.
[86] I.R.C. § 5000A(d)(3).
[87] 45 C.F.R. § 155.305.
[88] *See,* IRS Q&A at http://www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision.
[89] For example, people with "non-resident alien" tax status are exempt under Treas. Reg. § 1.5000A-3(c).
[90] Treas. Reg. § 1.5000A-3(a); 45 C.F.R. § 155.605(c).
[91] 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).
[92] Treas. Reg. § 1.5000A-3(g); 45 C.F.R. § 155.605(f).
[93] Treas. Reg. § 1.5000A-3(f); 45 C.F.R. § 155.605(g)(3).
[94] Treas. Reg. § 1.5000A-3(j).
[95] Treas. Reg. § 1.5000A-3(h) 45 C.F.R. § 155.605(g).
[96] Treas. Reg. § 1.5000A-3(e); 45 C.F.R. §§ 155.605(g)(2) & (5).

9. Not lawfully present[98]

Some exemptions must be claimed through an exchange, some need to be claimed on a tax return, and some do not need to be formally claimed at all. In addition, sometimes the taxpayer can choose whether to apply to the exchange or claim an exemption on his or her tax return. [99] The IRS currently publishes a chart at *http://www.irs.gov/uac/ACA-Individual-Shared-Responsibility-Provision-Exemptions*.[100]

How are exemptions claimed?

- Individuals who are not required to file a federal income tax return do not need to take any action.[101]
- General hardship exemptions and the religious conscience exemption can only be granted by an exchange, except as specified by HHS and Treasury in published guidance.[102]
- Members of federally recognized Indian tribes, members of health care sharing ministries, individuals who are incarcerated, and people eligible for services through an Indian health care provider may choose whether to apply for an exemption certificate from an exchange or claim the exemption on their tax return.[103]

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[97] 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.

[98] Treas. Reg. § 1.5000A-3(c).

[99] *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*.

[100] This chart may not be comprehensive. For example, it currently does not include the 2014 exemption for people who obtained coverage from any source by May 1, 2014. *See*, C.C.I.I.O. guidance, *supra* n. 64.

[101] Treas. Reg. § 1.5000A-3(f)(3); I.R.S. Notice 2014-76, I.R.B. 2014-50; *see also*, CMS, C.C.I.I.O., *Shared Responsibility Guidance – Filing Threshold Hardship Exemption* (Sept. 18, 2014), at *http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Filing-Threshold-Exemption-Guidance-9-18-14.pdf* (announcing intent to amend 45 C.F.R. § 155.605(g)(3)). There are technically two separate exemptions here: first, where "household income" is below the filing requirement, and second, where the income of a dependent causes household income to exceed the income tax filing threshold. These exemptions may be claimed on the filer's tax return, if the taxpayer chooses to file a return despite not having a filing requirement. *Id.*

[102] *See*, Treas. Reg. §§ 1.5000A-3(a) & (h); I.R.S. Notice 2014-76, I.R.B. 2014-50.

[103] For the first 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. Individuals eligible for services from an Indian health care provider previously had to apply through the exchange. *See*, CMS, C.C.I.I.O., *Shared Responsibility Guidance – Exemption for Individuals Eligible for Services through an Indian Health Care Provider* (Sept. 18, 2014), at *http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/guidance-exemption-certain-AIAN.pdf;* I.R.S. Notice 2014-76, I.R.B. 2014-50.

- 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.[104]
- There are two ways to claim an exemption for lack of affordable coverage.[105] It can be claimed on the tax return, based on the income reported on the return.[106] Or, it can be granted by the exchange during the QHP open enrollment period, based on projected income.
- There are some "hardship" exemptions that may be claimed on a tax return.[107]
- For 2014 only, people ineligible for Medicaid due to their state's failure to expand coverage may claim that exemption on their tax return.[108]
- There are special hardship exemptions for 2014, which are claimed in various ways.

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.[109]

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

- The religious conscience and Indian tribe exemptions may be claimed prospectively or retrospectively.[110] The regulations do not provide any deadline for applying.[111] The exchange may grant these exemptions prospectively for multiple years.
- The exemptions for health sharing ministries and incarceration may only be claimed retrospectively.[112] 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.[113]

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[104] These exemptions do not appear in HHS regulations; they are only detailed in IRS regulations.
[105] Technically these are separate exemptions. The exemption available through HHS based on projected affordability is technically a hardship exemption.
[106] *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); I.R.S. Notice 2014-76, I.R.B. 2014-50.
[107] *See*, I.R.S. Notice 2014-76, I.R.B. 2014-50; Treas. Reg. § 1.5000A-3(h)(3).
[108] C.C.I.I.O., *Guidance on Hardship Exemptions for Persons Meeting Certain Criteria* (Nov. 21, 2014), at *http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Hardship-Exemption-Guidance-11-21-14-final.pdf*; I.R.S. Notice 2014-76, I.R.B. 2014-50.
[109] Treas. Reg. § 1.5000A-3(j).
[110] 45 C.F.R. §§ 155.605(c)(3) & (f)(3).
[111] 45 C.F.R. § 155.610(h).
[112] 45 C.F.R. §§ 155.605(d)(2) & (e)(2).
[113] 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.[114] The hardship exemption for projected lack of affordable coverage must be applied for prospectively, during open enrollment.[115]

When an exemption is claimed through an exchange, the taxpayer is generally required to report any changes that affect eligibility for the exemption.[116] When new information is reported, the exchange is required to redetermine the taxpayer's eligibility for the exemption.[117] The one exception to this rule is the projected unaffordability exemption.[118] Once an exchange has determined that premiums will be unaffordable to an individual, based on projected income, that determination will not be revisited. An individual with that exemption does not need to report changes.

The 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.[119] This percentage is indexed; it will be 8.05% for 2015.[120] The exchange is permitted to issue an exemption prospectively, based on projected income, if an application is filed during open enrollment.[121]

Hardship exemptions are defined by HHS in regulations and guidance.[122] HHS has significant flexibility to create and change hardship exemption criteria. For example, after the exchanges got off to a bumpy start, HHS announced a new hardship exemption for individuals who enroll in a QHP by the end of 2014's open

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[114] 45 C.F.R. § 155.610(h)(2).
[115] 45 C.F.R. § 155.605(g)(2)(v).
[116] 45 C.F.R. § 155.620(b).
[117] 45 C.F.R. § 155.620(a).
[118] 45 C.F.R. §§ 155.620(a) & (b).
[119] 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); I.R.S. Notice 2014-76, I.R.B. 2014-50. 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).
[120] *Exchange and Insurance Market Standards for 2015 and Beyond*, 79 Fed. Reg. 30,240, 30,304 (May 27, 2014).
[121] 45 CFR 155.605(g)(2).
[122] *See*, I.R.C. § 5000A(e)(5); PPACA § 1311(d)(4)(H), 124 Stat. 177 (codified at 42 U.S.C. 18031).The HHS exemption regulations are located at 45 C.F.R. 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 Fed. Reg. 39,493 (July 1, 2013).

enrollment period.[123] As the bad news continued, this exemption was expanded to include individuals who enroll in MEC from any source on or before May 1, 2014.[124] Similarly, HHS declared that consumers whose individual market plans were "cancelled" will be granted a hardship exemption for 2014.[125] Later this exemption was expanded to October 1, 2016.[126]

Another hardship exemption available for 2014 only is for individuals serving in Americorps or similar programs, with health coverage that is not MEC.[127]

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..."

HHS guidance[128] states that exchanges will 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;

[123] *See*, C.C.I.I.O., *Enrollment Period FAQ* (Oct. 28, 2013), at *http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf*.
[124] C.C.I.I.O., *Special Enrollment Periods and Hardship Exemptions for Persons Meeting Certain Criteria*, *supra* n. 64.
[125] *See*, C.C.I.I.O., *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*.
[126] C.M.S., C.C.I.I.O., *Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016* (Mar. 5, 2014), at *http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf*.
[127] C.C.I.I.O., *Special Enrollment Periods and Hardship Exemptions for Persons Meeting Certain Criteria*, supra n. 64.
[128] C.C.I.I.O., *Guidance on Hardship Exemption Criteria and Special Enrollment Periods* (June 26, 2013), at *http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/exemptions-guidance-6-26-2013.pdf*; C.C.I.I.O., *Guidance on Hardship Exemptions for Persons Meeting Certain Criteria, supra* n.108.

- 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. This exemption is only provided for the months during which the medical support order is in effect;
- 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; or
- enrolled in or benefitted from certain types of Medicaid and CHIP that are not MEC.

The HHS hardship exemption application also includes a general catchall category.[129] Under the guidance, state-run exchanges may develop their own criteria within the requirements of the regulation, or they may use the federal criteria.

A hardship exemption is also available for individuals who are found ineligible for Medicaid due to their state's failure to expand.[130] The individual must submit an exchange application during the tax year and receive an exemption certificate. Fortunately, this requirement has been waived for 2014.[131]

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.[132]

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[129] *See*, HHS hardship application, at *https://marketplace.cms.gov/applications-and-forms/hardship-exemption.pdf*.
[130] 45 C.F.R. § 155.605(g)(4).
[131] *See*, C.C.I.I.O., *Guidance on Hardship Exemptions for Persons Meeting Certain Criteria, supra* n. 108 (individuals may claim this exemption if their household income is below 138% FPL and the individual resided in a non-expansion state at any time during 2014); I.R.S. Notice 2014-76, I.R.B. 2014-50.
[132] 45 C.F.R. § 155.605(g)(1).

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. For 2014, a single taxpayer's penalty rises above $95 as soon as his or her AGI passes $19,650. A married couple without children will owe more than the flat dollar amount if their household income passes $39,300.[133]

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 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."[134] If an individual who qualifies as the taxpayer's

[133] For charts of the penalty thresholds, see the Center on Budget and Policy Priorities, Exemptions, Penalties and Special Enrollment Periods webinar, slides 52-54 (Mar. 26, 2014), at *http://www.healthreformbeyondthebasics.org/slide-deck-exemptions-penalties-and-special-enrollment-periods-webinar/*.

[134] 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/*.

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.[135]

The ACA penalty is firmly attached to the dependent exemption. If a noncustodial parent is entitled to claim his child in alternate years 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.[136] 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.[137] 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. Strangely, 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.[138]

For section 5000A purposes, "MAGI" is AGI increased by tax-exempt interest and any foreign income excluded under section 911.[139]

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.[140]

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.[141] Collection is expected to occur through voluntary payments and offsets of federal tax refunds.

In a 2013 article, *Tax Notes International* editor Ajay Gupta argues that the penalty should not be disregarded as meaningless, and nor should the IRS's powers

Advocates should be aware that "dependent" is defined differently in different contexts. This article uses the tax definition.

[135] *See,* discussion in preamble to IRS rule, *Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage*, 78 Fed. Reg. 53,646, 53,647 (Aug. 30, 2013).

[136] I.R.C. § 5000A(c)(2)(B).

[137] I.R.C. § 5000A(c)(4)(B).

[138] Compare the definitions of "family," "household income," and "shared responsibility family" set out in Treas. Reg. § 1.5000A-1(d).

[139] I.R.C. § 5000A(c)(4)(C).

[140] *See*, 78 Fed. Reg. 53,655 (Aug. 30, 2013).

[141] I.R.C. § 5000A(g)(2)(B).

be underestimated.[142] The IRS could potentially take the position that there is no time limit on collecting the penalty, because the code section establishing the collection statute expiration date only explicitly limits levies and proceedings in court.[143] However, this would be a major departure from prior IRS practice in the income tax context.[144] Gupta further points out that the ACA failed to give taxpayers any pre-assessment appeal rights.

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.[145]

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.[146]

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.

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.[147]
- 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.

[142] Ajay Gupta, ACA PENALTY: TOOTHLESS? HARDLY! CORPORATE RAIDERS FARE BETTER, 141 Tax Notes 877 (Nov. 25, 2013)
[143] *See* I.R.C. § 6502(a). Federal tax refund offsets are conducted under I.R.C. § 6402(a).
[144] See, IRS Program Manager Technical Advice 2011-035 (8/8/11), published at 2012 TNT 18-23.
[145] *See* I.R.C. § 6211(a) (definition of a deficiency).
[146] Only children who are U.S. citizens or residents of the U.S., Canada, or Mexico may be claimed as dependents on U.S. tax returns. *See*, IRS Publication 501, *supra* note 134. *See also* IRS Publication 519, *supra* note 85.
[147] *See*, IRS Publication 519, *supra* note 85.

Can't Rob get an exemption?

- Rob won't qualify for an affordability exemption, because he could have received a Premium Tax Credit limiting his premium contribution to 2% of his income.
- Rob could apply for a hardship exemption if he feels that circumstances beyond his control prevented him from obtaining health insurance.

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.[148]
- Rob's penalty amount can't exceed the monthly national average bronze plan premiums for six months, for a single person. For 2014, this figure is $204 per month, which is $1224 for six months.[149]
- Rob's penalty is $47.53.

While it may seem like a waste of the IRS's time to collect such a small penalty, there is no minimum threshold in the statute or regulations.

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.[150] If Rob wants to purchase a QHP for coverage while he's in the U.S., he needs to apply within 60 days of arriving in the country.[151]

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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[148] Treas. Reg. § 5000A-3(c)(2)(ii)(B).
[149] Rev. Proc. 2014-46, I.R.B. 2014-33 (Aug. 11, 2014).
[150] 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, *Back by Popular Demand: Special Enrollment Periods and Exemptions*, available at http://www.healthreformbeyondthebasics.org/cbpp-webinar-back-by-popular-demand-special-enrollment-periods-and-exemptions/.
[151] *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.

Low-income individuals in non-expansion states may not realize that they need to apply for Medicaid through the exchange to obtain an exemption certificate, before they can claim an exemption on the basis that their state did not expand Medicaid.[152] The requirement was waived for 2014 on that very basis.[153] If the 2014 guidance is not extended to future years, this will be an issue needing significant education and outreach in non-expansion states.

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 February 15 for 2015.[154]

We do not yet know how HHS (or its contractor) will treat hardship applications that are based on circumstances not that are not enumerated in guidance. It is not difficult to think of people who might not be able to navigate the new system and get health insurance, 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 getting or keeping health insurance. This problem could be lessened if state-based exchanges adopt additional hardship criteria as comparable circumstances are identified.

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[152] Health Affairs blog contributors have argued that the Medicaid application requirement makes no sense, as the federal government could easily figure out which taxpayers qualify for this exemption. Timothy Jost and Brian Haile, *Tax Filing and the ACA: Helping Americans Meet the Challenge*, at *http://healthaffairs.org/blog/2014/11/07/tax-filing-and-the-aca-helping-americans-meet-the-challenge/*.
[153] *See*, C.C.I.I.O., *supra* n. 108 at p.4.
[154] Open enrollment dates can be changed by HHS.

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.[155] This means that it can generate a cash refund for taxpayers who owe little or no tax.[156] The credit may be taken wholly or partially in advance through an exchange.[157] Advance payments are made directly to QHP issuers (private insurance companies).[158] This is a seamless process for the consumer.

Advance payment of the PTC (APTC) is based on the applicant's projected annual household income. For example, most taxpayers will apply for 2015 APTC during the 2015 open enrollment period. Currently, this is November 15, 2014 through February 15, 2015.[159] 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.[160]

Once QHP enrollment criteria are met, there are four additional requirements for the Premium Tax Credit.[161] 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.

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[155] PPACA § 1401, 124 Stat. at 213-30 (codified at I.R.C. § 36B).
[156] 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 federal and state tax debts, child support, and federally-guaranteed student loans. For more information on offsets, see the Treasury Offset Program website, at *http://fiscal.treasury.gov/fsservices/gov/debtColl/dms/top/debt_top.htm*.
[157] PPACA § 1412, 124 Stat. at 231-33 (codified at 42 U.S.C. § 18082).
[158] *See*, 45 C.F.R. § 155.340. Advance payments are not subject to offset for debts of the taxpayer. Michelle Andrews, *A Reader Asks: Will A Tax Lien Affect My Premium Tax Credit?,* KAISER HEALTH NEWS (Jan. 13, 2014), *http://www.kaiserhealthnews.org/Stories/2014/January/13/Michelle-Andrews-reader-question-on-tax-liens-and-premium-subsidy.aspx* (quoting an unnamed Treasury official).
[159] *See*, *https://www.healthcare.gov/glossary/open-enrollment-period/* ("For coverage starting in 2015, the Open Enrollment Period is November 15, 2014–February 15, 2015.").
[160] 45 C.F.R. § 155.305.
[161] *See generally*, I.R.C. § 36B.

The dependent exemption dictates who can claim a Premium Tax Credit for a child.[162] 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.[163]

PTC Income Criteria

To qualify for PTC, an individual must generally have household income between 100% and 400% of the federal poverty line (FPL).[164] The PTC uses the federal poverty levels in effect on the first day of QHP open enrollment.[165] For 2013 (and the 2014 Premium Tax Credit), 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 Medicaid.[166] Also, individuals who receive advance payments of the PTC are not penalized if their actual annual income comes in under 100% FPL.[167]

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.[168] 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.[169]

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.[170,171]

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.[172, 173] This means that married

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[162] When a filer claims a personal exemption for a dependent, it is called a dependent exemption.
[163] *See* discussion in preamble to final rule, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377, 30,377 (May 23, 2012).
[164] I.R.C. § 36B(c)(1)(A).
[165] *See*, Treas. Reg. § 1.36B-1(h) (defining *federal poverty line* for purposes of the Premium Tax Credit).
[166] I.R.C. § 36B(c)(1)(B).
[167] Treas. Reg. § 1.36B-2(b)(6).
[168] Treas. Reg. § 1.36B-1(e).
[169] *See*, Treas. Reg. § 1.36B-1(d).
[170] 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.
[171] Social Security disability and retirement benefits can be partially taxable. I.R.C. § 86. 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/.

individuals who are considered unmarried under section 7703 (filing as Head of Household) are entitled to claim a PTC.[174] In addition, two exceptions to the joint filing requirement have been proposed.[175] Married victims of domestic violence who are unable to use the head of household filing status will be able to qualify for PTC if at the time the return is filed, the taxpayer is living apart from the spouse and is unable to file a joint return because the taxpayer is a victim of domestic violence or is the victim of spousal abandonment. Relief from the joint filing requirement may not be taken for more than three consecutive years.

Changes in filing status during the year are addressed in the Treasury regulations at § 1.36B-4(b) and in temporary regulations at § 1.36B-4T(b)(3). In three additional situations, advance credits must also be allocated between taxpayers.[176]

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 claimed by the other taxpayer.[177]

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.[178] This means that people who could get employer-sponsored or government-sponsored insurance generally do not qualify for a Premium Tax Credit.[179]

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172 I.R.C. § 36B(c)(1)(C); Temp. Treas. Reg. § 1.36B-2T(b)(2). In some circumstances, a married taxpayer is considered unmarried under section 7703. Those individuals will use Head of Household filing status.

173 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 134.

174 For more information on when a married taxpayer is considered unmarried, see IRS Publication 501, *supra* note 134.

175 Temporary Treasury Regulation §1.36B-2T(b)(2)(ii); *Rules Regarding the Health Insurance Premium Tax Credit*, 79 Fed. Reg. 43,622 (Jul. 28, 2014).

176 *See*, Treas. Reg. § 1.36B-3(h); Temp. Treas. Reg. §§ 1.36B-4T(a)(1)(ii)(B); 1.36B-4T(b)(4).

177 *See* discussion in preamble to IRS rule, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377, 30,377-78 (May 23, 2012); Treas. Reg. § 1.36B-2(b)(3).

178 I.R.C. § 36B(c)(2)(B).

179 If Medicaid eligibility determinations are not delegated to the exchange, consumers will experience a delay in their application for QHP subsidies while a Medicaid determination is being made by their state Medicaid agency. *See generally*, CMS, Center for Medicaid and CHIP Services, Medicaid and CHIP FAQs: Coordination between Medicaid/CHIP and the Federally-Facilitated Marketplace (May 2012, updated April 2013), at *http://www.medicaid.gov/State-Resource-Center/FAQ-Medicaid-and-CHIP-Affordable-Care-Act-Implementation/Downloads/FAQs-by-Topic-Coordination-with-Marketplace.pdf*.

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.[180] 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.[181]

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[182]
- TRICARE[183]
- Medicare coverage requiring a Part A premium[184]
- State high risk pools[185]
- Employer-sponsored insurance that is not affordable or that does not provide minimum value[186]
- 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)[187]

Student health plans that are not self-funded are considered individual market plans, so they are not disqualifying.[188]

"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

[180] If a taxpayer actually *enrolls* in the plan, these exceptions do not apply and the individual will not be eligible for a PTC.
[181] *See*, Treas. Reg. § 1.36B-2(c); Temp. Treas. Reg. § 1.36B-2T(c)(3)(v)(C).
[182] I.R.S. Notice 2013-41.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Treas. Reg. § 1.36B-2(c)(3); *see also* I.R.S. Notice 2014-69, I.R.B. 2014-48 (Nov. 24, 2014) (minimum value regulations are expected to be amended in 2015). 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/.
[187] Treas. Reg. § 1.36B-2(c)(4).
[188] *See*, HHS final rule, *Student Health Insurance Coverage*, 77 Fed. Reg. 16,453-70. (March 21, 2012).

household income in 2014.[189,190] 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.[191] The credit is capped by the premium amounts actually paid by the family.[192]

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.[193] It ranges from 2% to 9.5% of household income.[194]

The PTC uses the federal poverty levels in effect on the first day of QHP open enrollment.[195] For 2014, open enrollment began on October 1, 2013. The 2014 federal poverty levels were released by HHS in early 2014, but the 2014 Premium Tax Credit will continue to be calculated based on 2013 poverty levels.

> Example:[196] It's January 2014. Debbie and Joe are a married couple with one son. Debbie has net self-employment income of $34,000. She has no health

[189] Treas. Reg. § 1.36B-2(c)(3)(v); Temp. Treas. Reg. § 1.36B-2T(c)(3)(v)(C). This is the so-called "family glitch". *See*, Health Affairs, Health Policy Brief, *The Family Glitch* (Nov. 10, 2014), at *http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=129*.

[190] The 9.5% figure is indexed. It will be 9.56% for 2015. Rev. Proc. 2014-37, I.R.B. 2014-33 (Aug. 11, 2014). It will be 9.66% for 2016. Rev. Proc. 2014-62, I.R.B. 2014-50 (Dec. 8, 2014).

[191] Treas. Reg. §§ 1.36B-3(f) & (h).

[192] 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 by the Center on Budget and Policy Priorities, available online at *http://www.healthreformbeyondthebasics.org/category/issues/premium-tax-credits/*.

[193] Treas. Reg. § 1.36B-3(g); Temp. Treas. Reg. § 1.36B-3T(g)(1).

[194] Treas. Reg. § 601.605. For 2015, the expected contribution ranges from 2.01% to 9.56%. Rev. Proc. 2014-37 § 5.01 (Aug. 11, 2014). For 2016, the expected contribution ranges from 2.03% to 9.66%. Rev. Proc. 2014-62, I.R.B. 2014-50 (Dec. 8, 2014).

[195] *See*, Treas. Reg. § 1.36B-1(h) (defining *federal poverty line* for purposes of the Premium Tax Credit).

[196] 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/*.

insurance. Joe has Social Security Disability income of $11,500, and he has Medicare. The only adjustment to income is $2,400 in self-employment tax.[197] 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.[198] This is 221% of the 2013 FPL.[199]
- 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 is more complicated and often problematic. Finally, many families will worry about the immigration consequences that may result from using an exchange.

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.[200]

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[197] 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 68.
[198] 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.
[199] 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.
[200] Treas. Reg. § 1.36B-2(b)(4).

Immigration status affects Premium Tax Credit calculations in two ways. First, individuals who are not U.S. citizens may receive a PTC even if their household income is under 100% of the FPL if they are not eligible for Medicaid due to their immigration status.[201]

Second, the FPL percentage used in the calculations is adjusted in mixed status families.[202] However, it appears that these calculations (as written in the current statute and regulations) result in the exact same expected contribution as for families without undocumented members.

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.[203] Individuals without a valid SSN should leave that space on the application blank; they should not provide an ITIN.[204]

In order to submit an application online, an individual must verify her identify. The federal exchange and many state exchanges have contracted with the credit bureau Experian to conduct identity verifications. Not surprisingly, many people without an SSN are having difficulty accessing health insurance because of this system.[205] Applicants may answer questions incorrectly, or they simply may not have a sufficient credit history in the U.S. for Experian to generate questions. If those cases, individuals must go through a process of proving their identity by submitting documents, or else submit a paper application.

After an application is filed, the exchange will try to verify as much information as possible through electronic data sources.[206] This system may not work as well for individuals without an SSN. The IRS will not verify tax information for ITIN filers.[207] Other data sources in the hub may likewise fail to match the information

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[201] Treas. Reg. § 1.36B-2(b)(5).
[202] Treas. Reg. § 1.36B-3(l).
[203] 45 C.F.R §§ 155.310(a)(3); 155.305(f)(6); *see also* 45 C.F.R. § 155.315(i).
[204] *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*.
[205] See, National Immigration Law Center, *The Use (and Overuse) of Credit History: Credit-based ID Verification Creates Barriers to ACA Access* (August 2014), available at *http://www.nilc.org/ACAfacts.html*.
[206] *See*, discussion of Health Insurance Exchanges Program in HHS Notice, 78 Fed. Reg. 8,538-42 (Feb. 6, 2013).
[207] *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 Fed. Reg. 49,367, 49,369 (Aug. 13, 2013) (noting

on the taxpayer's application. The result is that many applicants will need to provide proof of their income and identity to the exchange.[208]

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.[209] In fact, there are significant protections in place. ACA regulations block the use of personally-identifiable information (including immigration status) for purposes other than an eligibility determination.[210] Exchanges cannot ask about the immigration status of family members who are not applying for coverage for themselves.[211] Similar protections have been codified in guidance for Medicaid and the Children's Health Insurance Program (CHIP).[212]

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…"[213] 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.

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that HHS will only request return information for individuals whose SSNs have been verified by the Social Security Administration).

[208] *See*, verification procedures in 45 C.F.R. § 155.315.

[209] *See*, HHS, *More information for immigrant families*, at https://www.healthcare.gov/immigrants/immigrant-families/; 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-immigrants/; National Immigration Law Center FAQ, *The Affordable Care Act & Mixed-Status Families*, at http://nilc.org/aca_mixedstatusfams.html.

[210] ACA § 1411(g), 124 Stat. at 224 (codified at 42 U.S.C. 18081); 45 C.F.R. §§ 155.260, 155.270. *See also*, National Immigration Law Center FAQ, *The Affordable Care Act & Mixed-Status Families*, at http://nilc.org/aca_mixedstatusfams.html.

[211] 45 C.F.R § 155.310(a)(2).

[212] 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 Fed. Reg. 17,144, 17,164 (Mar. 23, 2012).

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

Reconciliation of advance payments of the Premium Tax Credit

Anyone who receives advance PTC payments must file a tax return to reconcile the advance payments with the PTC actually due to the taxpayer.[214] Excess advance payments are treated as additional income tax liability.[215] 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.[216] Exchanges will report a date of birth where an SSN is not available.[217]

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.

That advice may ring hollow to many consumers. In 2014 some exchanges were unable to process reported changes in circumstance for lengthy periods of time.[218] Also, exchanges made mistakes in processing applications.[219] Certainly, some taxpayers have received too much APTC through no fault of their own. Unfortunately for those individuals, there is no exception to APTC reconciliation for errors made by an exchange.

However, there are limits on the amount of excess credit that must be repaid.[220] The limits for 2014 are shown on the following chart. The liability caps are subject to adjustment for future years based on changes in the Consumer Price Index.[221]

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[214] Treas. Reg. § 1.36B-4.
[215] I.R.C. § 36B(f)(2); Treas. Reg. § 1.36B-4(a)(1)(i).
[216] The exchange application does not request ITINs. Rather, it requires an immigration document number if an applicant does not have an SSN. *See* *http://marketplace.cms.gov/applications-and-forms/individuals-and-families-forms.html*.
[217] *See generally*, Treas. Reg. § 1.36B-5(c).
[218] See, e.g., Morgan True, VTDigger.org, *Health Care Exchange Backlog Reduced, But Many Cases Still Unresolved* (Oct. 23, 2014), at *http://vtdigger.org/2014/10/23/health-care-exchange-backlog-reduced-many-cases-still-unresolved/*.
[219] *See*, HHS Office of Inspector General, *Not All Internal Controls Implemented by the Federal, California, and Connecticut Marketplaces Were Effective in Ensuring That Individuals Were Enrolled in Qualified Health Plans According to Federal Requirements* (June 30, 2014), at *https://oig.hhs.gov/oas/reports/region9/91401000.asp*; HHS Office of Inspector General, *Marketplaces Faced Early Challenges Resolving Inconsistencies With Applicant Data* (July 2, 2014), at *https://oig.hhs.gov/oei/reports/oei-01-14-00180.asp*.
[220] I.R.C. § 36B(f)(2)(B); Treas. Reg. § 1.36B-4(a)(3).
[221] Treas. Reg. § 1.36B-4(a)(3)(i).

Cap on 2014 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*, Table 2, p. 8.				

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. This could be financially advantageous for some taxpayers. However, taxpayers have a duty to report changes within 30 days.[222] Also, the exchanges will periodically check data sources for new information.[223]

Implications for low-income taxpayers and advocates

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

Access to APTC 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.[224] In states that have not expanded Medicaid, it may be beneficial for very low-income individuals with serious medical needs to refrain from claiming a

[222] 45 C.F.R. § 155.330(b).
[223] 45 C.F.R. § 155.330(d). The frequency and breadth of these data checks may vary by exchange.
[224] PTC eligibility begins at 100% of the FPL, because lower-income individuals were supposed to have access to expanded Medicaid.

dependent, in order to increase their FPL to 100%.[225] This strategy appears lawful and consistent with PTC regulations.

A second major issue is the joint return requirement. The domestic abuse and spousal abandonment exceptions are important developments and will help many taxpayers. However, for some people three years will not be enough time to get a divorce. Domestic violence victims often have more immediate priorities including physical safety, housing, employment, and the well-being of children. The cost of the divorce process is a barrier in some states. The dissolution process may not be accessible to unrepresented people who may have barriers such as low literacy. Divorce actions can last two or three years, particularly if custody or property division is contested.

Other taxpayers do not fit the current exceptions but have a compelling reason for not filing jointly. For example, a same-sex spouse may not be able to get a divorce if her state of residence does not recognize the marriage. Individuals whose spouses are incarcerated or living overseas also may have difficulty filing a joint return. This will cause significant hardship to low-income taxpayers who cannot meet the requirement, unless they qualify to file as Head of Household.

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.[226] 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.

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

[225] The taxpayer could still owe a shared responsibility payment for the dependent. *See, supra* n. 135 and accompanying text.

[226] 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), *aff'd*, 745 F.3d 890 (8th Cir. 2014). 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.

Taxpayer Clinics can be a resource for 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. 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 an ITIN to reconcile advance payments of the Premium Tax Credit. Controversies involving cancelled debt, stock basis, settlements, and retirement distributions have weightier consequences now that increased AGI could mean going without affordable health insurance, *and* paying a stiffer penalty for being uninsured.[227]

During the upcoming filing season, tax preparers, VITA sites, taxpayers, and advocates will wrestle with new IRS forms and instructions for the first time.[228] This will be a critical time for collaboration and communication. By pooling our knowledge we will be able to help many individuals, but we can also have a larger impact. Systemic advocacy is a crucial piece of the LITC program's mission, and the mission of many other advocacy groups. As ACA implementation continues, advocates can work together to identify problematic issues and bring systemic problems to the attention of policymakers and regulatory agencies.

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

[228] For an overview of the forms and practical concerns, *see* Jost & Haile, *supra* n. 152.

Resources and References

Government Resources

CMS guidance: *http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/index.html*

CMS technical assistance resources for health care assisters: *https://marketplace.cms.gov/technical-assistance-resources/technical-assistance-resources.html*. This site contains a wealth of information including detailed explanations of how the ACA applies to special populations such as Native Americans.

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

HHS exemption application forms: *https://marketplace.cms.gov/applications-and-forms/exemption-applications.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 page on ACA exemptions: *http://www.irs.gov/uac/ACA-Individual-Shared-Responsibility-Provision-Exemptions*

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

IRS page on Individual Shared Responsibility: *http://www.irs.gov/uac/Individual-Shared-Responsibility-Provision*

U.S. Department of Labor ACA guidance: *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, analysis, and policy discussions.

The Henry J. Kaiser Family Foundation health reform page: *http://kff.org/health-reform/*. This site includes a subsidy calculator, FAQs, and a comprehensive health reform timeline.

National Health Law Program, *The Advocate's Guide to MAGI*, February 2014, available online at *www.healthlaw.org/publications/agmagi*.

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://navigatorguide.georgetown.edu/*.

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