MSP #6 HEALTH CARE IMPLEMENTATION: Implementation of the Affordable Care Act May Unnecessarily Burden Taxpayers

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DEFINITION OF PROBLEM

The Patient Protection and Affordable Care Act of 2009 (ACA) was enacted by Congress in 2010 to provide affordable health care coverage for all Americans. To accomplish this goal, the ACA provides targeted tax credits for low income individuals and for small businesses, while imposing a personal responsibility on individuals to have health coverage.[1]

Since enactment, the IRS has been implementing complicated ACA provisions that require developing or updating information technology systems, issuing guidance, and collaborating with other federal agencies. The true test for the IRS and individual taxpayers begins in 2015, when taxpayers filing tax year (TY) 2014 federal income tax returns have to report that they have "minimum essential coverage" or are exempt from the responsibility to have the required coverage. If the taxpayer does not have coverage and is not exempt, he or she must make a shared responsibility payment (SRP) when filing a return.[2] Additionally, many taxpayers will have to reconcile the Premium Tax Credit (PTC) amounts they received in advance with the amounts to which they are entitled.[3] At the same time, the IRS will receive and process a significant amount of new information returns from employers, insurers and exchanges.[4]

Through representation on the IRS ACA Executive Steering Committee and several joint implementation teams, the National Taxpayer Advocate and Taxpayer Advocate Service (TAS) have identified the following concerns with ACA procedures and implementation:

- Delays in implementing health care procedures have impacted the training of IRS employees;

1 Internal Revenue Code (IRC) § 4980H(a)(1) also imposes a responsibility for applicable large employers to offer health care to employees in certain circumstances. Patient Protection & Affordable Care Act of 2009, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care & Education Reconciliation Act of 2010 (HERCA), Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010); Senate Finance Committee, *Description of Policy Options: Expanding Health Care Coverage: Proposals to Provide Affordable Coverage to All Americans* (May 14, 2009).

2 IRC § 5000A.

3 The Premium Tax Credit is a refundable tax credit paid both in advance and at return filing to help taxpayers with low to moderate income purchase health insurance through the marketplace. IRC § 36B. As explained below, the amount of the credit paid in advance is based on projected income, while the amount for which a taxpayer is actually eligible is based on actual income.

4 The Health Insurance Marketplace, also called the "Exchange," is a state or federally operated program where individuals can buy health care coverage. Coverage is available to people who are uninsured or buy insurance on their own. *See* http://www.irs.gov/uac/Newsroom/The-Health-Insurance-Marketplace. IRC § 6055 requires annual information reporting by health insurance issuers, self-insuring employers, government agencies, and other providers of health coverage. Section 6056 requires annual information reporting by applicable large employers relating to the health insurance that the employer offers (or does not offer) to its full-time employees. IRS Notice 2013-45, 2013–31 IRB 116, provides transition relief but the IRS has encouraged entities to voluntarily provide information returns for coverage provided in 2014, which are due to be filed and furnished in early 2015.

- IRS outreach and education should continue to focus on increasing taxpayer awareness of the need to update information with the exchanges throughout the year;
- Problems with state calculations of the advanced PTC and delays in processing PTC Change in Circumstances information can result in inaccurate advanced PTC payments and thereby harm taxpayers;
- The inability of the IRS to adequately test the accuracy of information-reporting data before the filing season can inhibit IRS verification efforts and cause significant taxpayer burden;
- The IRS may take inappropriate collection actions on shared responsibility payment liabilities;
- The use of "combination letters" for a disallowed PTC may confuse taxpayers;
- The inability of health insurers and self-insured employers to match tax identification numbers (TINs) before filing their information returns may lead to mismatches and unnecessary notices; and
- The IRS should provide additional guidance to employers on how to calculate the number of full-time equivalents for purposes of meeting the minimum essential coverage requirements.

Notwithstanding these concerns, we acknowledge the tremendous efforts made by the IRS to implement the healthcare provisions given their interdependency on decisions made by other federal agencies. Because the IRS's role is downstream of many external reporting processes, taxpayers and the IRS may experience problems over which the IRS has no control. Yet, the IRS will certainly bear much of the public blame because many of the problems will arise in the context of return filing. Conversely, taxpayers and the IRS will experience problems created specifically by IRS policies or processes, some of which are exacerbated by the general reduction in funding for taxpayer service.[5]

ANALYSIS OF PROBLEM

Background

Shared Responsibility Payment

Beginning in January 2014, non-exempt U.S. citizens and legal residents are required to maintain minimum essential coverage[6] or be subject to a shared responsibility payment (SRP).[7] The individual shared responsibility provision (ISRP) of the ACA phases in the amount of the payment until tax year (TY) 2016, when the payment amount will be the greater of:

1. 2.5 percent of household income for the taxable year over the threshold amount of income required for tax return filing for that taxpayer under § 6012(a)(1); or
2. $695 per uninsured adult in the household and indexed for inflation thereafter.

5 For a discussion of the reduction in taxpayer services, see Most Serious Problem: *TAXPAYER SERVICE: Taxpayer Service Has Reached Unacceptably Low Levels and Is Getting Worse, Creating Compliance Barriers and Significant Inconvenience for Millions of Taxpayers*, *supra*. For a discussion of how the IRS should prioritize taxpayer services, see Most Serious Problem: *TAXPAYER SERVICE: Due to the Delayed Completion of the Service Priorities Initiative, the IRS Currently Lacks a Clear Rationale for Taxpayer Service Budgetary Allocation Decisions*, *supra*.

6 Minimum essential coverage includes government-sponsored programs, eligible employer-sponsored plans, plans in the individual market, grandfathered group health plans and other coverage as recognized by the Secretary of Health and Human Services (HHS) in coordination with the Secretary of the Treasury. IRC § 5000A(f).

7 Individuals are exempt from the requirement for months they are incarcerated, not legally present in the United States, or maintain religious exemptions. IRC § 5000A(d).

If an uninsured individual in the household has not attained the age of 18 as of the beginning of a month, the penalty amount for that individual for the month is equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.[8] For TY 2014, the phased-in amount is the greater of (1) one percent of excess household income or (2) $95 per uninsured adult in the household.[9]

The SRP is considered an excise tax that is assessed in the same manner as an assessable penalty under the enforcement provisions of the Code. While the IRS has the authority to offset refunds or credits to collect the SRP, it does not have the authority to collect through the use of liens and seizures. Moreover, noncompliance with the SRP requirement to have health coverage is not subject to criminal or civil penalties under the Code.[10]

Premium Tax Credit

Individuals and families who purchase health insurance through an exchange may be eligible for the PTC (also called the "premium assistance credit"), which subsidizes the purchase of certain health insurance plans through an exchange.[11] The credit is refundable and payable in advance directly to the insurer. It is available for individuals (single or joint filers) who have household incomes between 100 and 400 percent of the federal poverty line (FPL) for the family size involved and who do not receive health insurance through an employer or a government-sponsored program.[12]

When applying for the credit, the individual must submit income and family size information to the exchange.[13] During the open enrollment period, participants must provide an estimate of their projected household income based on their most recently filed income tax return and any anticipated changes to income in the upcoming year. The exchange can verify data with the Department of Health and Human Services (HHS), which has authority under the ACA to obtain limited IRS data, and then disclose any inconsistency to the exchange.[14] The IRS provides limited tax return information to the marketplace, using the latest tax return information relevant to the healthcare coverage year.

The IRS data used is typically two years prior to the coverage year at issue.[15] For example, during the open enrollment season for 2015, which runs from November 15, 2014, through February 15, 2015, an applicant estimates projected 2015 household income to the exchanges, which typically involves looking at the most recently filed tax return (in this case usually TY 2013) with modifications to reflect any projected changes for 2015.[16] The exchange then verifies, via the Department of Health and Human Services (HHS), the taxpayer's projected 2015 household income against IRS records based on the taxpayer's most

8 IRC § 5000A(c)(3)(C).

9 IRC § 5000A(c)(2)(B)(i) & (c)(3)(B).

10 IRC § 5000A(g); J. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act,"* JCX-18-10 31 2 (Mar. 21, 2010).

11 The Health Insurance Marketplace, also called the "Exchange," is a state or federally operated program where individuals can buy health care coverage. Coverage is available to people who are uninsured or buy insurance on their own. *See* http://www.irs.gov/uac/Newsroom/The-Health-Insurance-Marketplace.

12 IRC § 36B; J. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act,"* JCX-18-10 17 (Mar. 21, 2010).

13 *See* ACA § 1411(b), 124 Stat. 119, 224 (2010).

14 *See* IRC § 6103(l)(21).

15 IRC § 6103(l)(21). The Treasury Inspector General for Tax Administration (TIGTA) conducted a review of the IRS's response to 101,018 income and family size verification (IFSV) information requests received by the IRS between October 1 and October 4, 2013, and found that the IRS provided accurate responses for 100,985 (99.97 percent) of the 101,018 requests. TIGTA, Ref. No. 2014-43-044, *Affordable Care Act: Accuracy of Responses to Exchange Requests for Income and Family Size Verification Information and Maximum Advance Premium Tax Credit Calculation* (July 3, 2014).

16 *See* https://www.healthcare.gov/income-and-household-information/.

recently processed tax return, typically TY 2013 in this case.[17] If IRS information is outdated due to the time difference, the individual may need to provide updated documentation or other evidence to the exchange to establish eligibility for the PTC.

The eligibility for and amount of the PTC are determined in advance of the coverage year, on the basis of:

1. Projected household income and family size; and
2. The monthly premiums for qualified health plans in the individual market in which the taxpayer, spouse and any dependent enroll in an exchange.

Any advanced PTC amount is paid during the year by the federal government to the insurer to offset the cost of the individual's insurance premiums.[18]

In the filing season for the tax year in question (for example, the 2015 filing season for TY 2014 returns), the individual taxpayer must reconcile the amount of any advanced PTC on the tax return with the allowable total credit for the year of coverage, based on that coverage year's *actual* household income, family size, and premiums. Any adjustment to tax resulting from the difference between the advance payment amount and the total allowable credit would be assessed as additional tax, subject to a repayment limitation, or a reduction in tax on the return.[19]

Delays in Implementing New Health Care Procedures Have Impacted the Training of IRS Employees.

The new work caused by the ACA will likely exacerbate the IRS's already low level of service on its phone lines, as well as increasing the backlog of correspondence from taxpayers.[20] The IRS has estimated that it needs more than 2,300 employees to handle ACA implementation requirements, additional calls, and correspondence. However, the IRS has not received funding for these necessary additional hires.[21]

The IRS also must ensure that employees who work ACA-related issues, especially those in taxpayer-facing roles, are properly trained. In general, the IRS has worked diligently to develop and deliver a substantial amount of training on schedule.[22]

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17 IRC § 36B; J. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act,"* JCX-18-10 17 (Mar. 21, 2010).

18 If a taxpayer's household status at year's end is other than anticipated—due to a change in income or family size—the Premium Tax Credit may be more or less than the amount advanced. Consequently, the IRS may recover the excess as a tax, subject to a repayment limitation, or owe the taxpayer a refund. IRC § 36B(f)(2)(B); Treas. Reg. §1.36B-4(a)(3).

19 Taxpayers are not required to claim the PTC in advance. They can claim the PTC on the tax return instead. The PTC is a refundable credit and either reduces their tax liability or increases their refund. IRC § 36B. The repayment of any additional tax computed during the reconciliation may be limited if the taxpayer's household income is less than 400 percent of the Federal poverty line. Treas. Reg. §1.36B-4(a)(3). J. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in combination with the "Patient Protection and Affordable Care Act,"* JCX-18-10 17 (Mar. 21, 2010). TAS was initially concerned that the existence of separate verification systems to process ACA items on the return would lead to either delays in processing or the issuance of multiple notices. However, we have been assured that ACA computer systems will not impose greater burdens on taxpayers. IRS response to TAS fact check (Dec. 23, 2014).

20 National Taxpayer Advocate 2013 Annual Report to Congress 20; National Taxpayer Advocate 2012 Annual Report to Congress 34.

21 Affordable Care Act (ACA) Program Management Office, ACA Enterprise Integrated Program Plan & Risk Register Executive Reports 7 (Oct. 31, 2014). For FY 2014, W&I had 180 full time equivalent employees (FTEs) working on ACA implementation and planned to have 2,358 FTEs for FY 2015. W&I response to TAS information request (Oct. 28, 2014).

22 Summary of Affordable Care Act Training Plans for W&I, W&I response to TAS information request (Oct. 28, 2014).

However, delays in implementation have impacted training for certain ACA topics. For example, it is our understanding that delays in the development of the 1094 and 1095 series forms and instructions have also delayed the associated training of employees.[23] These forms provide information-reporting data from the exchanges and employers regarding taxpayer's minimum essential coverage. Forms 8962 and 8965—on which taxpayers claim and reconcile the PTC and claim an exemption from the SRP, respectively, were only finalized on November 13, 2014 and their instructions were not finalized as of December 29, 2014. These documents are the basis of the majority of IRS training for W&I employees, and the IRS was forced to roll out its training without final forms and instructions. If IRS employees are not properly trained on these forms, they may not be able to accurately determine a taxpayer's liability for the SRP or verify eligibility for the PTC.

IRS Outreach and Education Should Focus on Increasing Taxpayer Awareness of the Need to Update Information with the Exchange Throughout the Year.

During the 2015 filing season, many taxpayers will need to reconcile the advanced PTC amounts they received in 2014 (based on *projected* 2014 income) with the credit amounts to which they are entitled (based on *actual* TY 2014 income).[24] We commend the IRS for focusing on educating taxpayers about the importance of updating their information throughout the year with the exchange if they are receiving the advance credit. To avoid complications associated with receiving an excess credit, taxpayers must update their information with the exchange if their income or other relevant circumstances change. In the future, during each tax year, we urge the IRS to educate taxpayers early and repeatedly about this requirement to prevent them from owing money to the IRS (or reducing their refunds) or claiming too little advanced credit.[25] Although almost 80 percent of individual returns are refund returns, in which the IRS may offset some or all of a reconciliation PTC amount (resulting in a reduced credit), the IRS still should do all it can to ensure that as few taxpayers as possible have excessive advanced PTC payments and instead receive the correct amount throughout the year.[26]

> **Because the IRS's role is downstream of many external reporting processes, taxpayers and the IRS may experience problems over which the IRS has no control. Yet, the IRS will certainly bear much of the public blame because many of the problems will arise in the context of return filing.**

The Taxpayer Advocate Service has developed an estimator to help taxpayers and practitioners understand how changes in circumstances will impact their PTC amounts.[27]

23 There were late revisions made to Forms 1094-B, *Transmittal of Health Insurance Coverage Information Returns*; 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*; 1095-B, *Health Coverage*; and 1095-C, *Employer-Provided Health Insurance Offer and Coverage*. Affordable Care Act (ACA) Program Management Office, *ACA Enterprise Integrated Program Plan & Risk Register Executive Reports* 4 (Oct. 31, 2014). The Forms 1094 and 1095 B and C are voluntary for TY 2014 and are not used during the filing of the tax returns. IRS response to fact check (Dec. 23, 2014).

24 The Premium Tax Credit is a refundable tax credit (which may be payable in advance) available to help certain low and moderate income taxpayers purchase health insurance through a marketplace. IRC § 36B. Taxpayers will reconcile the advanced PTC with the actual PTC claimed on IRS Form 8962, *Premium Tax Credit (PTC)*.

25 The IRS has developed Publication 5152, *Report Changes to the Marketplace as They Happen*. Other IRS publications explaining the Premium Tax Credit include Publication 5120, *Facts About the Premium Tax Credit* (flyer), and Publication 5121, *Facts About the Premium Tax Credit* (brochure).

26 IRS Compliance Data Warehouse, Individual Returns Transaction File Tax Year 2012 (June 2014).

27 *Available at* http://www.taxpayeradvocate.irs.gov/Individuals/Affordable-Care-Act.

In addition, taxpayers may have their refunds delayed if, due to an unreported change in circumstances, they claim a larger PTC on their returns than what was advanced to the insurance company during the year. If the IRS flags these returns as potentially fraudulent, it may hold up the PTC portion of legitimate refunds, which TAS has seen happen with other refundable credits, especially when large dollar amounts are at stake.[28] While there is always a risk of individuals trying to game the system, the risk of fraud may be lower with the PTC than with other credits because the advance credit amount is paid directly by the federal government to established insurance companies once the policy is actually in place. The IRS will also be able to verify coverage and premiums amounts through third-party information reporting, assuming the reports are accurate and timely.

While the IRS raises awareness about the taxpayer's need to report Premium Tax Credit changes in circumstances to the exchanges, at least one state exchange experienced delays in processing this information, and was even forced to manually process such requests. When an exchange delays its processing for a significant time, the longer the delay, the more inaccurate the advanced Premium Tax Credit amount might become.

After taxpayers file their TY 2014 returns, TAS will explore whether the IRS could have alleviated burden by identifying earlier any discrepancies between income reported on taxpayers' health care applications and income actually reported on their TY 2013 returns. When taxpayers applied for coverage through the exchanges in 2014, the exchanges verified taxpayers' reported projected household income by using IRS data for TY 2012. However, a substantial portion of the more recent TY 2013 data may be available months before the 2015 filing season. We plan to use 2015 filing season data to evaluate whether the use of soft notices sent in 2014 based on TY 2013 return data would have been an effective way to inform taxpayers that they potentially need to report their change in circumstances to the exchange, based on information reported on their most recently filed tax return. The sooner the taxpayers are aware of any income discrepancies, the sooner they can address the issue.

Problems with State Calculations of Advanced PTC Amounts and Delays in Processing PTC Change in Circumstances Information Can Result in Inaccurate Advanced PTC Payments and Thereby Harm Taxpayers.

While the IRS raises awareness about the taxpayer's need to report PTC changes in circumstances to the exchanges, at least one state exchange experienced delays in processing this information, and was even forced to manually process such requests.[29] When an exchange delays its processing for a significant time, the longer the delay, the more inaccurate the advanced PTC amount might become. If the advanced PTC amount is too high, the taxpayer could have an unwelcome surprise and owe money when reconciling the advanced amount with the actual allowable PTC on the TY 2014 return. Again, this is a circumstance completely out of the IRS's control. However, the IRS will share the public blame when this pattern occurs during the 2015 filing season.

28 *See* National Taxpayer Advocate 2012 Annual Report to Congress 111-13; National Taxpayer Advocate Fiscal Year 2012 Objectives Report to Congress 28-32; National Taxpayer Advocate 2011 Annual Report to Congress 687-89.

29 *See, e.g.*, Taylor Boggs, *Vermont Public Radio, Vermont Health Connect Development Slowed By Contractor Switch, Open Enrollment* (Aug. 29, 2014); Peter Hirschfeld, Vermont Public Radio, *Thousands of Vermont Health Connect Customers Stuck on Service Backlog* (Apr. 21, 2014).

In addition, at least one state exchange calculated the amount of the advanced PTC inaccurately.[30] As a result, some taxpayers will learn about the discrepancy upon reconciling the total advanced payment amount, which was based on projected income, with the total PTC allowed on the tax return, which is based on actual income. In this case, the taxpayer owes additional money through no fault of the taxpayer or the IRS. Although the taxpayer was not in control of the advanced PTC payments paid over to the insurer, the taxpayer may be assessed a negligence penalty or underpayment penalty and have to request abatement for reasonable cause.[31]

The Inability of the IRS to Adequately Test the Accuracy of Information-Reporting Data Before the Filing Season Can Inhibit IRS Verification Efforts and Cause Significant Taxpayer Burden.

The IRS relies on information reports to verify data relevant to the SRP liability and PTC eligibility. However, as of December 26, 2014, the IRS had not completed testing of the data from several state exchanges. As of that same date, the IRS received and tested actual data from the Centers for Medicare and Medicaid Services (CMS), the federal exchange which provides coverage information for the states that did not develop their own exchanges.[32] If the IRS cannot receive data from exchanges accurately and timely, the IRS has little opportunity to identify problems and even less opportunity to fix them. In addition, if the IRS receives incomplete or inaccurate data, it cannot accurately verify coverage, which will inhibit the IRS's ability to verify eligibility for the PTC. In response, the IRS has developed a contingency plan to enable the IRS to continue processing returns.[33] While these contingency procedures will identify questionable returns with possible ACA compliance issues, they may also inadvertently flag some compliant tax returns as well. The extent of this issue will become clear during the 2015 filing season when the IRS actually receives data from the exchanges.

The IRS May Take Inappropriate Collection Actions on Shared Responsibility Payment Liabilities.

The ACA prohibits the IRS from filing a notice of lien or levying to collect any SRP liabilities.[34] The SRP was not enacted to be a revenue raiser. In fact, the Congressional Budget Office (CBO) scored the provision to raise only $55 billion from 2015 through 2022 as compared to the total estimated cost of the ACA of over $1.1 trillion through 2022.[35] Rather, the main purpose of the provision was, working in unison with the other core provision of the ACA, to achieve "near-universal" health insurance coverage.[36]

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30 ACA Program Office response to TAS information request (Dec. 11, 2014); Cover Oregon, *Advanced Premium Tax Credit (APTC) Update* (Sept. 15, 2014).

31 IRC §§ 6662, 6664(c).

32 As of December 26, 2014, the IRS had not completed testing on the data from the exchanges in the following jurisdictions: Colorado, District of Columbia, Hawaii, Minnesota, and Oregon. ACA Program Office response to TAS information request (Dec. 30, 2014); IRS response to fact check (Dec. 23, 2014). Affordable Care Act (ACA) Program Management Office, *ACA Enterprise Integrated Program Plan & Risk Register Executive Reports* 7 (Nov. 28, 2014). As of January 2014, there were 19 state-based marketplaces. http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces.html.

33 Affordable Care Act (ACA) Program Management Office, *ACA Enterprise Integrated Program Plan & Risk Register Executive Reports* 5-6 (Oct. 31, 2014).

34 IRC § 5000A(g)(2)(B).

35 Congressional Budget Office, *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision*, Table 4 (July 2012).

36 *See Patient* Protection & Affordable Care Act of 2009, Pub. L. 111-148, 124 Stat. 119, §1501(a)(2)(D) (Mar. 2010), as amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010): Brief for State Petitioners on Severability at 11, *National Federation of Independent Business v. Sebelius*, 132 U.S. 2566 (2012) (Nos. 11-393, -400).

In accordance with this public policy, the Act limits the IRS's collection authority with respect to the SRP and currently restricts collection actions to refund offsets.[37]

IRS collection efforts for SRP liabilities may indirectly burden taxpayers. For example, if an installment agreement (IA) defaults due to insufficient payment or any reason other than an outstanding SRP liability, the IRS is currently considering only reinstating the agreement if all tax liabilities, including SRP liabilities, are included.[38] The National Taxpayer Advocate questioned whether the IRS has the legal authority to include SRP liabilities in installment agreements.

If the IRS cannot receive data from exchanges accurately and timely, the IRS has little opportunity to identify problems and even less opportunity to fix them.

In response to a query from the National Taxpayer Advocate, the Office of Chief Counsel has concluded that the IRS has authority to include SRP in IAs and offers in compromise (OICs). However, the response was issued as a draft "white paper" that is not publicly available.[39] The "white paper" also stated that the IRS is neither precluded from conditioning, nor required to condition, agreements on the inclusion of SRP liabilities. Further, the IRS has the discretion to require terms or conditions that protect the government's interests.[40] Because Chief Counsel's reasoning in this matter potentially affects millions of taxpayers, the National Taxpayer Advocate believes it should be rewritten in the form of Program Manager Technical Advice (PMTA) and released to the public.[41]

The IRS applies IA payments in a manner that will protect the government's best interests.[42] This generally means that the IRS will apply payments to the oldest liability first.[43] However, it is unclear the order in which the IRS will apply payments. It is the position of the National Taxpayer Advocate that any policy to apply payments first to SRP liabilities is inconsistent with the best interest of the government in many cases, and a deviation from established practices. If the IRS applies the payments to the SRP liability first, then it risks the oldest debt becoming unenforceable by virtue of the expiration of the statutory period to collect the tax.[44]

37 IRC § 5000A(g); J. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act,"* JCX-18-10 31 (Mar. 21, 2010). TAS was initially concerned that the IRS may attempt to apply excess levy proceeds toward SRP liabilities. However, it is our understanding that IRS collection systems have been programmed to prevent such application. In addition, IRM 5.11.2.6, *Disposing of Surplus Proceeds* (Jan. 1, 2015) prohibits such application of surplus levy proceeds to SRP balance due accounts. IRS response to TAS information request (Dec. 15, 2014).

38 Draft IRM 5.19.1.5.4.26, page 23, bullet 4 (Aug. 19, 2014); IRM 5.14.11.5, *Defaulted Installment Agreements: Considerations after Default or Termination, Including Reinstatement* (Jan. 1, 2015).

39 The Office of Chief Counsel sometimes provides legal analysis in the form of a "white paper" when the analysis and conclusions are the result of a collaborative effort among multiple functions. Because this draft "white paper" was meant to guide a discussion of issues and was not a formal legal opinion, it was not released to the public.

40 *See* Treas. Reg. § 301.6159-1(c)(iii)(B).

41 PMTA is legal advice, signed by attorneys in the National Office of the Office of Chief Counsel and issued to IRS personnel who are national program executives and managers. Although PMTAs are not precedential, they nonetheless are instructive and provide guidance to assist IRS personnel in administering their programs. PMTAs are publicly available in the electronic reading room at http://www.irs.gov/uac/Electronic-Reading-Room.

42 *See, e.g.*, IRM 5.14.7.5, *Payments on Trust Fund Accounts During Approved In-Business Trust Fund Installment Agreements* (Aug. 5, 2010); *Concert Staging v. Comm'r*, T.C. Memo. 2011-231 (Sept. 26, 2011).

43 Rev. Proc. 2002-26 applies to OICs and collateral agreements and does not apply to installment agreements. However, as a practical matter, it is generally in the best interest of the IRS to follow the payment application ordering rules of the Rev. Proc. in the majority of cases. Non-designated payments will generally be applied to the oldest liability first. Designated payments will generally be applied as requested by the taxpayer. Rev. Proc. 2002-26, 2002-1 C.B. 746; IRM 5.1.2.8, *Designated Payments* (June 20, 2013).

44 IRC § 6502.

The Use of "Combination Letters" for Disallowed PTC May Confuse Taxpayers.

The National Taxpayer Advocate is concerned that the IRS will use combination or "combo" letters to notify taxpayers of disallowed PTCs or advanced PTCs that have not been reconciled. These letters, which the IRS sometimes sends in an effort to "streamline" examination processes, merge two distinct audit letters:

1. The initial contact letter; and
2. The 30-day letter that includes the preliminary audit report and describes the taxpayer's appeal rights.

The National Taxpayer Advocate has consistently opposed the IRS's use of combo letters.[45] They are confusing because taxpayers do not know whether to respond to the exam and risk forfeiting their appeal rights, file an appeal and risk annoying the examiner, or both.[46] Further, in addition to information about appeal rights, we believe the 30-day letters should include information about TAS and Low Income Taxpayer Clinics (LITCs).[47]

The Inability of Health Insurers and Self-Insured Employers to Match TINs Before Filing May Lead to Mismatches and Unnecessary Notices.

The IRS has not expanded the tax identification number (TIN) matching program to health insurers and self-insured employers that are required to file Form 1095-B, *Health Coverage*.[48] The current e-Services TIN Matching Program (TMP) allows participating payers of reportable payments subject to backup withholding under IRC § 3406(b), to match the TIN and name of payees subject to potential backup withholding with IRS records prior to filing the information report.[49] Using the TMP helps payers avoid penalties for submitting incorrect TINs on information returns.[50]

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45 Statement of Procedural Rules, § 601.105(d)(1)(iv) authorizes the 30-day letter, which explains the proposed changes and advises the taxpayer of the liability and of the right to file a protest within 30 days to be considered by IRS Appeals. Concerns about the use of the combination letter in Examination were initially raised in the National Taxpayer Advocate's 2001 Annual Report to Congress 20-22 (Most Serious Problem: *Documenting Earned Income Tax Credit Eligibility*). *See also* National Taxpayer Advocate 2011 Annual Report to Congress vol. 2 85; National Taxpayer Advocate 2008 Annual Report to Congress 227-59 (Most Serious Problem: *Suitability of the Examination Process,* and Most Serious Problem: *The IRS Correspondence Examination Process Promotes Premature Notices, Case Closures, and Assessments*); National Taxpayer Advocate 2007 Annual Report to Congress 222-41 (Most Serious Problem: *EITC Examinations and the Impact of Taxpayer Representation*); National Taxpayer Advocate 2006 Annual Report to Congress 289-310 (Most Serious Problem: *Correspondence Examination*); National Taxpayer Advocate 2005 Annual Report to Congress 94-122 (Most Serious Problem: *EITC Exam Issues*); National Taxpayer Advocate 2004 Annual Report to Congress 163-180 (Most Serious Problem: *Lack of Notice Clarity*); National Taxpayer Advocate 2003 Annual Report to Congress 87-98 (Most Serious Problem: *Combination Letter*); National Taxpayer Advocate 2002 Annual Report to Congress 55-63 (Most Serious Problem: *Procedures of Examining EITC Claims Cause Hardship and Infringe on Appeal Rights*).

46 Combo letters are even more burdensome under Appeals' new Appeals Judicial Approach and Culture (AJAC) project by which Appeals will not conduct fact-finding and will send the case back to exam for further development, thereby treating the taxpayer like a ping-pong ball. Memorandum for Appeals employees from Director, Policy, Quality and Case Support, IRS Office of Appeals, Implementation of the Appeals Judicial Approach and Culture (AJAC) Project Examination and General Matters–Phase 2, Control No. AP-08-0714-0004 (July 2, 2014).

47 An example of a combo letter used for ACA purposes is Letter 566-B. The notices should provide contact information in addition to brief summaries of the services offered by each organization. Per IRC § 7526, LITCs represent low income individuals in disputes with the Internal Revenue Service, including audits, appeals, collection matters, and federal tax litigation. LITCs can also help taxpayers respond to IRS notices and correct account problems. Some LITCs provide education for low income taxpayers and taxpayers who speak English as a second language (ESL) about their taxpayer rights and responsibilities.

48 IRC § 6055.

49 IRM 5.19.3.4.1.6, *e-Services Taxpayer Identification Number (TIN) Matching Program* (Apr. 23, 2014).

50 The penalty for failure to file a correct information return is generally $100, and the penalty for failure to furnish a correct payee statement is also generally $100. IRC §§ 6721, 6722. The IRS will not impose the penalty if the filer shows the failure was due to reasonable cause and not willful neglect. IRC § 6724.

Likewise, TMP would also benefit the filers of Forms 1095-B, which provide the names and TINs of all covered individuals and the months for which they had minimum essential coverage. The IRS will use the forms to verify an individual's compliance with the ISRP. The reporting entities are not required to file the forms until the 2016 filing season.[51]

However, many Form 1095-B filers have never had to verify the accuracy of the name/TIN information, and the inability to verify the information before issuing the forms could cause inaccurate TIN reporting. If information returns with incorrect or incomplete names or TINs are submitted (because the issuers are not able to run the numbers through the IRS TIN matching program before filing), the IRS will not be able to verify that the individuals have minimal essential coverage. Therefore, even covered individuals could receive notices imposing the SRP or insurers would receive avoidable penalty assessments arising from such mismatches.[52]

The IRS Should Expand Its Employer Shared Responsibility Q&A Page to Provide Additional Guidance to Employers on How to Calculate the Number of Full-Time Equivalents for Purposes of Meeting the Minimum Essential Coverage Requirements.

Employers not in compliance with the provisions under IRC § 4980H may be subject to an assessable payment, referred to as the "employer shared responsibility payment" (ESRP). Section 4980H(a)(1) provides that an applicable large employer (ALE) must offer minimum essential coverage to its full-time employees. In general, an employer is considered an ALE if it employs 50 or more full-time workers (or full-time equivalents (FTE)).[53] The ESRP provisions generally are not effective until January 1, 2015, meaning that no ESRP will be assessed for the 2014 tax year.[54] Under the statute, an employee is deemed full-time for a calendar month, if he or she averages at least 30 hours of work per week.[55]

On February 12, 2014, the IRS and Treasury issued final regulations on the ESRP provisions.[56] The guidance acknowledges that there are certain categories of employees whose hours of service will be particularly challenging to identify and track, and advises their employers to use "a reasonable method of crediting hours of service that is consistent with section 4980H." While far from comprehensive, the preamble does provide good examples of what may be considered a reasonable method in certain industries.

In addition to the final regulations, the IRS provides additional guidance in the form of an ESRP Q&A page on IRS.gov.[57] While it contains helpful information, the limited Q&A page does not adequately address many questions about the calculation of FTEs for purposes of meeting the minimum essential

51 Notice 2013-45, 2013-31 IRB 116; T.D. 9660, 2014-13 IRB 842 (Mar. 24, 2014). Reporting entities will not be subject to penalties for failure to comply with the IRC § 6055 reporting requirements for coverage in 2014 (including the provisions requiring the furnishing of statements to covered individuals in 2015 with respect to 2014). Accordingly, a reporting entity will not be subject to penalties if it first reports beginning in 2016 for 2015 (including the furnishing of statements to covered individuals).

52 Michael M. Lloyd and S. Michael Chittenden, *Expand TIN Matching Program to Avert Another ACA Debacle*, Tax Notes Today (Jan. 15, 2014).

53 IRC § 4980H(c)(2).

54 Notice 2013-45, 2013-31 I.R.B. 116.

55 IRC § 4980H(c)(4).

56 Treas. Reg. § 54-4890H, 79 FR 8543 (Feb. 12, 2014), *available at* https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage.

57 *See* http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act#Identification (last visited Dec. 2, 2014).

coverage requirements. The IRS cannot realistically be expected to post answers to every possible scenario, but it should expand this page. For example:

- What would be a reasonable method of determining FTE for clergy who have not taken a vow of poverty?[58] Members of religious orders often have responsibilities that do not fit a typical "9 to 5" schedule. Arriving at hours to include in the calculation of FTE seems problematic for such a profession.
- What would be a reasonable method of determining FTE for commission-based salespersons? If a significant portion of a salesperson's compensation comes from commissions, and the employer does not require (or track) a certain number of hours to be worked, determining FTE could be problematic.
- What would be a reasonable method of determining FTE for pilots? Even full-time pilots generally have a good deal of downtime, so hours in the air may not be an ideal way of determining FTE. How would an employer count a pilot who is available for three flights a month for purposes of the FTE calculation for the small business health care tax credit (SBHCTC)?

To educate and assist small business taxpayers, TAS developed an online estimator for the SBHCTC.[59]

This tool allows small businesses to estimate their credits (if any) and find out how any changes in circumstances will impact their eligibility. Since November 2012, we have placed the SBHCTC estimator on the TAS Tax Toolkit,[60] where small businesses and tax professionals can access it easily, and have continually promoted the estimator through social media, including Twitter and Facebook.[61]

CONCLUSION

The IRS has made tremendous progress, considering the monumental task of implementing and administering the many complicated tax provisions of the ACA. The new systems and procedures developed for ACA administration will be tested beginning in the 2015 filing season when individual taxpayers file their TY 2014 returns, report SRP liabilities, and claim or reconcile PTC. At the same time, the IRS will receive and process a significant amount of new information returns from insurers and exchanges to identify errors and noncompliance. While the IRS has little control over some of the anticipated risks, such as delayed or inaccurate data reporting from the exchanges, it will be held publicly responsible when the associated problems surface during the tax return filing process. In addition, the IRS bears

58 Until further guidance is issued, a religious order is not required, for purposes of determining if an employee is a full-time employee for the ESRP, to include as an hour of service any work performed by clergy who have taken a vow of poverty when the work is in the performance of tasks usually required of an active member of the order. *See* Treas. Reg. § 54-4890H, 79 FR 8543 (Feb. 12, 2014), *available at* https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage.

59 The estimator is *available at* http://www.taxpayeradvocate.irs.gov/Businesses/Small-Business-Health-Care-Tax-Credit-Estimator.

60 The TAS Tax Toolkit is a website that contains useful tax information for individuals, businesses, tax professionals and media, including news and updates, ways TAS helps taxpayers, and important information about tax topics and rights and is available at http://www.taxpayeradvocate.irs.gov/.

61 The IRS linked to the estimator on IRS.gov and the Kaiser Permanente health care company placed a link to the estimator on its website. On March 10, during the 2014 filing season, the IRS placed a link to the estimator in a news release on helpful resources and tax tips. *See* http://www.irs.gov/uac/Newsroom/IRS-Encourages-Small-Employers–to-Check-Out-Small-Business-Health-Care-Tax-Credit;-Helpful-Resources,-Tax-Tips-Available-on-IRS.gov. After the new release, the number of views increased from a quarterly average of 110 per day to 1,502 and 483 for March 10 and March 11, respectively. The estimator introduction page has received high traffic overall so far in fiscal year 2014, with 30,990 views through May 2014, an average of over 3,800 per month. Weber Shandwick, *TAS Electronic Toolkit Usage Report* (Oct. 2013–May 2014).

sole responsibility for other anticipated risks, such as possible inappropriate collection actions taken with respect to the SRP.

The 2015 filing season will potentially be the most challenging in several decades and it occurs in a context of historically low levels of taxpayer service. Because of the great risk of taxpayer harm this filing season, TAS will continue to address issues as they arise and identify systemic problems. In fact, TAS will create an ACA Rapid Response team to immediately address any potential ACA systemic issues that arise during the 2015 filing season. In addition, we encourage both internal and external stakeholders to report any suspected ACA systemic issues on TAS's Systemic Advocacy Management System (SAMS).[62]

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS take the following actions:

1. Educate taxpayers early and repeatedly about the requirement to update their information throughout the year with the exchange, if they are receiving the advanced PTC, to prevent them from owing money to the IRS (or reducing their refunds) or qualifying for too little advance credit during the year.
2. For those installment agreements, partial pay installment agreements, and offers in compromise including SRP liabilities, apply payments to the oldest liability first to protect the government's best interests.
3. Reissue the current white paper addressing the IRS's authority to include SRP liabilities in installment agreements and offers in compromise in the form of Program Manager Technical Advice to be released to the public.
4. Include information about TAS and Low Income Taxpayer Clinics in 30-day letters that include both the preliminary audit report and describe the taxpayer's appeal rights.
5. Expand the tax identification number matching program to include health insurers and self-insured employers that are required to file Form 1095-B, *Health Coverage*.
6. Provide additional guidance to employers on how to calculate the number of full-time equivalents for purposes of meeting the minimum essential coverage requirements.

62 Stakeholders can report suspected systemic issues at: http://www.irs.gov/Advocate/Systemic-Advocacy-Management-System-SAMS.