

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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Submitted via <http://www.regulations.gov>.

April 28, 2014

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Room 5205
Washington, DC 20044

RE: Comments on CC:PA:LPD:PR (REG-141036-13), Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals

I write on behalf of the Tribal Technical Advisory Group (TTAG) of the Centers for Medicare & Medicaid Services (CMS) to comment on the Notice of Proposed Rulemaking by the Internal Revenue Service (IRS), Department of the Treasury on REG-141036-13, Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals (the “Proposed Rule”).

The TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children’s Health Insurance Program, and any other health care program funded (in whole or in part) by CMS. In particular, the TTAG focuses on providing policy advice to CMS regarding improving the availability of health care services to American Indians and Alaska Natives (AI/ANs) under these Federal health care programs, including through providers operating under the health programs of the Indian Health Service, Indian Tribes, tribal organizations and urban Indian organizations (referred to as Indian Health Care Providers or I/T/Us).

We wish to comment on the avenues available to apply for and claim an exemption from the Patient Protection and Affordable Care Act’s (ACA) individual shared responsibility payment for persons who are eligible for services from an Indian Health Care Provider (referred to as the IHCP-eligible exemption). At present, such individuals may only claim the IHCP-eligible exemption through a Marketplace.¹ In contrast, the exemption for a person who is a “member of an Indian tribe” (referred to as the Indian exemption) can be obtained *either* through a Marketplace *or* through the Federal tax filing process. The two processes are causing considerable confusion for many AI/ANs and causing Tribes and Tribal health organizations to expend considerable resources to assist them.

¹ The terms “Exchanges” and “Marketplaces” are used interchangeably in this letter.

We believe it is important to make the application avenues consistent between the two exemptions and to allow application for the IHCP-eligible exemption through Federal tax filing. To this end, we support the provision in the Proposed Rule to establish a streamlined regulatory process for the IRS to accept a delegation of authority from the Department of Health and Human Services (HHS) to process applications for additional exemption types. We appreciate the opportunity to submit these comments on the Proposed Rule.

BACKGROUND AND PREVIOUS DEVELOPMENTS

In separate comments submitted to CMS (in response to CMS-9958-P) and to the IRS (in response to IRS REG 148500-12),² Tribal representatives requested CMS and the IRS to:

1. Establish a hardship exemption for persons eligible for health services through an IHCP;³ and
2. Allow persons eligible for services from an IHCP to apply for the hardship exemption through either a Marketplace or through the Federal tax-filing process.

Tribes and tribal advocates subsequently reiterated these comments in various consultation sessions with HHS and the IRS.⁴

Through CMS-9958-F, CMS accepted the first Tribal recommendation and established at 45 C.F.R. § 155.605(g), a hardship exemption for persons eligible for health services from Indian Health Care Providers.⁵ However, CMS did not accept at that time the tribal request to authorize the IRS to process the IHCP-eligible exemption.

² See comments from the TTAG to CMS on March 18, 2013 and comments from the TTAG to IRS on May 2, 2013. The IRS issued the final rule for REG 148599-12 as TD 9632.

³ The exemption is available to an individual who is an American Indian or Alaska Native eligible for services through an Indian health care provider, as defined in 42 CFR 447.51, or an individual eligible for such services in accordance with 25 U.S.C. 1680c(a), (b), or (d)(3).

⁴ For example, a February 21, 2013 consultation session on CMS-9958-P (Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions) and IRS-issued REG-148500-12 (Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage).

⁵ This hardship exemption for certain American Indians and Alaska Natives is in addition to a provision in the Affordable Care Act that established an exemption for an individual if he or she is a member of

any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

In the preamble to the final rule on REG-148500-12, the IRS subsequently acknowledged that several commentators had requested that the IHCP exemption be available through an eligible individual's Federal income tax returns. The IRS noted that section 5000A(e) of the Internal Revenue Code provides HHS, through Exchanges, with the exclusive authority to grant those hardship exemptions not specifically delegated to the IRS.⁶ As a result, the IRS therefore did not believe that it could process IHCP-eligible exemptions through the Federal tax-filing process because HHS had not previously delegated authority for the IRS to do so.

However, HHS has delegated the IRS authority to grant exemptions for nine of the fourteen existing exemption categories, including seven of the eight statutory exemption categories and two of the six hardship exemption categories. In addition, HHS recently announced it will permit another, newly-established hardship exemption type to be claimed through the Federal tax-filing process without the applicant first having to apply through a Marketplace.⁷ With the addition of this exemption category, applicants for three of the soon-to-be seven hardship exemption categories and seven of the eight statutory exemptions will be able to apply through the Federal tax-filing process.

We believe that HHS's continued delegation of exemption-processing authority underscores the common understanding of the benefits of providing the same avenues to apply for and claim both the IHCP-eligible hardship exemption and the Indian-specific exemption. We are therefore hopeful that HHS and the IRS will jointly agree to delegate authority from HHS to the IRS for the purpose of enabling a taxpayer to apply for and claim an IHCP-eligible hardship exemption on a Federal income tax return.

STREAMLINED PROCESS TO ESTABLISH AVENUE TO CLAIM EXEMPTION THROUGH TAX-FILING PROCESS

The Proposed Rule would establish a streamlined process under § 1.5000A-3 of the Internal Revenue Code whereby IRS may publish "guidance of general applicability" to allow an individual to claim an additional type of hardship exemption on a Federal income tax return without the individual first obtaining a hardship exemption through a Marketplace. This would be conditioned on HHS similarly issuing guidance of general applicability describing the hardship exemption and indicating that the hardship exemption may be claimed on a Federal income tax return (without first obtaining a hardship exemption through a Marketplace). The preamble to the Proposed Rule states:

Consistent with guidance released by the Secretary of HHS on October, 28, 2013, the proposed regulations provide that an individual who enrolls in a

I.R.C. § 5000A(e)(3), codified at 26 U.S.C. § 45A(c)(6). In the various regulations and guidance addressing the individuals who have been determined to fall within this definition, the members of these entities have been generally referred to as "members of Federally-recognized Tribes," for the sake of convenience we assume. This exemption is referred to in this letter as the Tribal Member exemption.

⁶ 78 Fed. Reg. 53646, 53654 (Aug. 30, 2013).

⁷ 79 Fed. Reg. 4302, 4306 (Jan. 27, 2014).

plan through an Exchange during the open enrollment period for coverage for 2014 may claim a hardship exemption for months in 2014 prior to the effective date of the individual's coverage without obtaining a hardship exemption certification from an Exchange. If additional situations are identified where an individual should be allowed to claim a hardship exemption without obtaining a hardship exemption certification from an Exchange, the Secretary of HHS and the Secretary of the Treasury will continue to coordinate guidance. To facilitate issuing guidance in this situation, the proposed regulations provide that a taxpayer may claim a hardship exemption on a return if the Secretary of HHS issues published guidance of general applicability describing the hardship and indicating that the hardship can be claimed on a Federal income tax return pursuant to guidance published by the Secretary of the Treasury, and the Secretary of the Treasury issues published guidance of general applicability allowing an individual to claim such hardship exemption on a Federal income tax return without obtaining a hardship exemption from an Exchange.⁸

The TTAG strongly supports the establishment of such a streamlined process.

THERE IS AN URGENT NEED TO ESTABLISH A TAX-FILING PROCESS AS AN AVENUE FOR CLAIMING THE IHCP-ELIGIBLE EXEMPTION

Many AI/AN people are confused over which of the two processes to follow in applying for an exemption. Like many in the uninsured population, AI/ANs have low health and income tax filing literacy. We are concerned that some AI/AN households will simply abandon the process because of the confusion, which could lead to potential tax liability. The inconsistency in application processes for the two Indian exemptions currently requires Tribes and Tribal Health Organizations to expend substantial resources assisting Tribal members with filing paper applications for the IHCP-eligible exemption. These resources might otherwise be used to proactively enroll other Tribal members into health insurance coverage through Marketplaces or other comparatively more beneficial uses. These unnecessary expenditures of time and capital could be avoided if HHS and the IRS authorized the Federal tax-filing process to be used for both exemptions without first having to apply through a Marketplace.

Establishing a single process for a family (i.e., tax-filing unit) no matter the status of the family members as Indians or IHCP-eligibles will greatly reduce the administrative burden on families to claim this exemption. For example, for tax-filing units that have not obtained exemptions for all IHCP-eligible members of the household prior to filing Federal income tax returns, it will be confusing and cumbersome to permit some Tribal members to claim the Indian Exemption from the IRS while requiring others to go back to the Marketplace to receive a certification number. Being able to use a single process to apply for and claim the appropriate Indian-specific exemption for all Tribal members of a family eliminates a significant degree of duplicative effort that would be required of many taxpayers under the

⁸ 79 Fed. Reg. 4302, 4307 (Jan. 27, 2014) (emphasis added).

existing regulatory structure. This would also reduce the overall effort required, not just of applicants, but also of Tribal governments, the Indian Health Service, as well as Marketplace and IRS staff and contractors. We urge that the IRS and HHS establish parallel processes to claim the two Indian-specific exemptions as quickly as possible to mitigate confusion, minimize expenditures, maximize the best use of resources, and ensure that AI/AN exemptions are processed accurately.

TRIBAL RECOMMENDATION

We recommend that the IRS institute the streamlined process outlined in the Proposed Rule and to be established under § 1.5000A-3 of the Internal Revenue Code. Also, the TTAG recommends that, in the preamble to the final rule, the IRS cite as a potential example of the use of the streamlined process to be established under § 1.5000A-3 the expedited establishment of authority for IHCP-eligible persons to apply for and claim an exemption from the shared responsibility payment through the Federal tax-filing process.

The TTAG appreciates the opportunity to comment on the Proposed Rule and looks forward to a continued open dialogue with the IRS on the issues discussed above.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Valerie Davidson', with a stylized flourish at the end.

Valerie Davidson
Chair, TTAG

Cc: Christie Jacobs, Director, Office of Tribal Governments, IRS
Mandy Cohen, Director, CCIIO
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