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October 27, 2014

CC:PA:LPD:PR (REG-104579-13),
Internal Revenue Service, POB 7604,
Ben Franklin Station,
Washington, DC 20044.

RE: RIN 1545–BM09 – Comments on July 28, 2014 Temporary and Proposed Rules Regarding the Health Insurance Premium Tax Credit

Dear Sir/Madam:

The National Health Law Program (NHeLP) is a public interest law firm working to protect health rights and advance access to comprehensive, quality healthcare for low-income and underserved people. The oldest non-profit of its kind, NHeLP advocates, educates, and litigates at the federal and state levels.

We appreciate the opportunity to provide comments in response to the Temporary and Proposed Rules allowing married persons who experience domestic abuse or spousal abandonment to file their federal income taxes separately and be deemed to have satisfied the Affordable Care Act's joint filing requirement to obtain Premium Tax Credits (PTCs) and Cost Sharing Reductions (CSRs) (hereinafter "the exception").

Definition of Domestic Abuse

NHeLP applauds the IRS for broadly defining domestic abuse to include not only physical abuse, but also psychological, sexual, and emotional abuse, including efforts to control, isolate, humiliate, intimidate, or undermine the survivor's ability to reason independently. Advocates for survivors of domestic abuse, as well as the U.S. Department of Justice, have long recognized that domestic abuse takes many forms and is not limited to physical abuse or violence. We encourage the IRS to retain the broad scope of this definition in final rulemaking.

In addition, we appreciate that the Proposed and Temporary Rules allow an individual to qualify under this exception when his/her spouse's abuse targets a child or other family member living in the household. This provision is particularly important when the family member experiencing abuse is a minor or another relative that may be dependent on the individual claiming this exception to leave the household. However, no matter the circumstances, abuse of any household member creates a climate of fear and intimidation for all individuals in the home and should always be considered an adequate basis for claiming this exception.

Certification Process

According to the Proposed and Temporary Rules, to qualify for the domestic abuse or spousal abandonment exception, an individual must file federal income taxes using the "married filing separately" filing status and, *inter alia*, certify on the federal income tax return that he or she qualifies for this exception.

We have serious concerns that an individual claiming this exception must certify on a tax return that she/he has experienced domestic abuse or spousal abandonment. Tax returns are often used in contexts other than annual tax filings. For example, mortgage applications require one or more years of federal income tax returns to prove income and credit worthiness. By having to report domestic abuse on their tax returns, survivors may face stigma, discrimination, financial repercussions, and possibly retribution from their abusers.

Accordingly, we urge the IRS to adopt a mechanism for certification to protect the privacy of vulnerable tax filers in qualifying situations. We recommend IRS allow tax filers to certify using a simple, supplemental form, separate from the federal income tax return and which is subject to strict privacy protections. Individuals should not be required to provide detailed information regarding the nature of the abuse, but rather should be able to check a box indicating that the exception applies.

We support the general approach to certification in the Draft IRS Form 8962, which provides a simple, discreet check box to claim relief from the joint filing requirement. We also appreciate that the certification process, as indicated in the draft instructions to IRS Form 8962, does not require a filer to submit supplemental documentation in order to claim this relief. However, we remain concerned that proposed IRS Form 8962 may not be subject to adequate privacy protections.

The IRS should provide clear and detailed instructions for tax filers that articulate strong confidentiality and privacy protections. We also urge the IRS to clarify and clearly state on all related forms and instructions that the IRS will not notify the spouse of the filer claiming the exception.

Documentation of Abuse

We urge the IRS to clarify that self-attestation of domestic abuse is all that is required to claim this exception. Survivors of domestic abuse should never be required to submit supporting documentation such as police reports or health records to prove abuse. Domestic abuse is chronically underreported and it is often difficult for individuals to obtain such documentation. Additionally, serious concerns about confidentiality may keep survivors from submitting documents that contain such sensitive information to the IRS. Onerous documentation requirements that go beyond self-attestation are likely to discourage survivors of domestic abuse from claiming the exception. Further, since filing is a requirement to obtain a PTC, adding barriers to filing also adds barriers to obtaining healthcare at a time when access to healthcare is of critical importance. If the IRS decides to require additional information, it should offer an opportunity to provide any required information orally if the filer is afraid to provide it in writing.

Spousal Abandonment

The Proposed and Temporary rules allow certain abandoned spouses to qualify for the exception if they are unable to locate their spouses after “reasonable diligence.” An individual claiming the exception due to spousal abandonment should be able to self-attest that the exception applies. The IRS should not require any additional documentation. To assist filers, the IRS should list illustrative examples of actions that document “reasonable diligence” in accompanying instructions.

In addition, we strongly recommend the requirement that an individual must be “unable to locate” a spouse be broadened to accommodate situations where estranged spouses may be located, but are uncooperative or pose a threat.

Three-year Rule

Under these Proposed and Temporary Rules, an individual experiencing domestic abuse or spousal abandonment can qualify for the exception for no more than three years in a row. We strongly urge the IRS to eliminate the three-year time limit. In instances of spousal abandonment, an individual is, by definition, unable to locate her or his spouse, thus complicating and lengthening the divorce process. There may be countless circumstances in which a survivor of domestic abuse is unable to obtain a final divorce decree within three years, and would therefore be unable to obtain PTCs under this rule after that time has elapsed. Further, the three-year limit is arbitrary and unnecessary, especially given that the IRS requires individuals claiming the exception to certify that they meet the eligibility criteria each year. An individual’s attestation that she meets the criteria is no less valid in year four than in year three. Individuals should be able to qualify for this exception for as long as their life circumstances otherwise meet

the applicable criteria. At a minimum, the IRS should allow for good cause extensions beyond three years.

Tax Filing & PTC Reconciliation

Individuals invoking the domestic abuse or spousal abandonment exception should not be targeted for auditing during tax filing and reconciliation because their tax filing status and information on their tax returns conflicts with the marital status listed on their Federally Facilitated Marketplace (FFM) and some State Based Marketplace (SBM) applications. The IRS must ensure that individuals qualifying under this exception are not subjected to auditing or penalties solely due to the conflict between filing tax returns as “married filing separately” and marking “single” on their marketplace applications. Similarly, processing during filing should ensure that this conflict in tax filing status on an individual’s tax return and his/her marketplace application does not subject the individual to delayed eligibility for APTCs for the following year due to unresolved PTC reconciliation issues.

Additionally, the IRS should allow an individual who experiences domestic abuse or spousal abandonment and later reconciles with her/his spouse prior to the time she/he files her/his tax return to use an alternate method to calculate PTC eligibility at reconciliation. This alternate method, similar to the alternate calculation available to individuals who marry during the tax year, would lessen the repayment burden by prorating the PTC award to reflect the months that the spouses lived separately and did not have joint income.

Additional Circumstances Warranting an Exception

The purpose of the Affordable Care Act’s joint-filing requirement for PTC eligibility is to prevent a spouse who lives with and is supported financially by her/his spouse from obtaining higher PTCs based on her/his individual income. Given this policy goal, we believe situations exist, in addition to domestic abuse or spousal abandonment, that should allow additional married individuals to be deemed to satisfy the ACA’s joint-filing requirement. We are concerned that individuals facing these additional exceptional circumstances will not be able to access affordable health coverage if required to file a joint federal income tax return:

- same-sex spouses who are separated but living in a state that does not recognize their marriage and thus will not grant them a legal divorce;¹
- individuals with incarcerated spouses;²

¹ Same-sex married spouses who have separated and ended their relationship, but live in a state that does not recognize their marriage, in many cases are unable to divorce because a divorce can only be filed in a state where one spouse resides.

- individuals with a spouse living abroad who may face administrative, language access, and documentation transport barriers to filing joint tax returns;³
- individuals who reasonably expect to finalize divorce by the end of the year;⁴ and
- individuals in long-term separations for whom a “decree of separate maintenance” is not available.⁵

We urge the IRS to extend the relief provided under the Proposed and Temporary rules to allow these categories of individuals to be deemed to have satisfied the joint filing requirement and qualify for PTCs using a filing status of married filing separately.

We also strongly suggest the IRS include an option in the regulations to issue guidance to add additional categories of individuals who can claim this relief. There are likely additional circumstances in which the ACA joint filing requirement precludes otherwise qualified individuals from obtaining health insurance. We therefore recommend adding language to the regulation that allows the IRS to deem “other categories as defined by the IRS” as satisfying the joint filing requirement without having to go through an additional regulatory process.

In addition, other individuals who are separated, but who have not initiated legal separation or divorce proceedings, should be afforded temporary relief from the joint filing requirement. A one year transition period would provide them the opportunity to file for divorce or a legal separation. Such individuals live apart from their spouses and have separate finances, but may be unaware of the joint filing requirement, denied PTCs, or may be discouraged from applying for health coverage at all.

Need for Additional Guidance and Interagency Coordination

The IRS Temporary and Proposed Rules apply when an individual files his or her federal income taxes using the “married, filing separately” filing status. However, under HHS guidance, individuals seeking the domestic abuse and abandoned spouse exception should list themselves as “unmarried” and filing taxes as “single” when

² Administrative difficulties related to incarceration may make it impossible for the spouse to complete the tax returns and have the forms signed by the incarcerated spouse prior to the tax filing deadline.

³ For example, a non-resident spouse may need to obtain an individual taxpayer identification number (ITIN) to file federal income taxes.

⁴ Acceptable documentation should include a copy of a legal filing initiating divorce or separation, filing for child support, or a restraining order, a statement from the taxpayer, or a letter from an attorney or other representative of the taxpayer.

⁵ Under 26 I.R.C. § 7703(a), those with a “decree of separate maintenance” should not be considered married for federal income tax filing purposes. However, not all states provide a “decree of separate maintenance;” the IRS thus looks to state law to determine whether a “decree of separate maintenance” affects marital status for federal income tax filing purposes. *Boyer v. C.I.R.*, 732 F.2d 191, 194 (C.A.D.C.,1984).

applying for coverage through the FFM. SBMs can choose the latter approach, or can adjust their systems to allow such individuals to check “married, filing separately” on their applications for health insurance coverage.

It is unclear when HHS will overcome the operational limitations in the FFM so that individuals can indicate through the application process that they qualify for the domestic abuse or spousal abandonment exception. Therefore, we strongly urge the IRS to provide additional guidance and informational materials so that tax filers and consumer assisters understand the process to claim the exception.

Conclusion

Thank you for the opportunity to provide comments on this Temporary and Proposed Rule. If you should have any questions regarding our comments, please contact Wayne Turner (202-289-7661 or turner@healthlaw.org) at the National Health Law Program.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth G. Taylor". The signature is written in a cursive style with a large initial "E" and a stylized "G".

Elizabeth G. Taylor

Executive Director