H. TAS Prepares for Implementation of Filing Season 2015 Affordable Care Act Provisions

For the past few years, TAS has maintained a careful watch on all IRS activities concerning the Affordable Care Act (ACA). The IRS is implementing complicated ACA provisions that require updating information technology systems, issuing guidance, and collaborating with other federal agencies.[1] The true test for the IRS and individual taxpayers will begin in 2015, when these taxpayers begin filing their 2014 federal income tax returns and will have to report that they have minimal essential health coverage or are exempt from the responsibility to have the required coverage. If the taxpayer does not have health coverage and is not exempt, he or she must make an individual shared responsibility payment (ISRP) 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 must receive and process a significant amount of new information returns from insurers and exchanges to identify errors and noncompliance.

The Taxpayer Advocate Service's focus during IRS ACA program design and implementation is to ensure that the IRS treats both individual and business taxpayers appropriately and fairly, and protects taxpayer rights. The National Taxpayer Advocate represents TAS on the ACA Executive Steering Committee while TAS employees participate on many ACA joint implementation teams.[4]

Health Care Training for TAS Employees and Low Income Taxpayer Clinics

During fiscal year (FY) 2014, TAS developed high-level training on the ACA provisions to prepare all its employees to help taxpayers.[5] In the remaining months of FY 2014 and the beginning of FY 2015, TAS will progress to more in-depth instruction on specific provisions of the law such as the Premium Tax Credit, Individual Shared Responsibility, and Employer Shared Responsibility provisions. All TAS employees will receive this training, with additional instruction for technical advisors who will serve as experts for complicated ACA cases. TAS will also conduct another round of training to prepare case advocates to handle cases they may receive when taxpayers begin filing their tax year 2014 returns.

During FY 2014, TAS conducted initial training on ACA provisions for key personnel working at Low Income Taxpayer Clinics (LITCs). In FY 2015, TAS will provide a second round of training at the LITC annual conference to educate those tax professionals about the

1 See Patient Protection & Affordable Care Act of 2009, Pub. L. 111-148, 124 Stat. 119 (Mar. 2010), as amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

2 IRC § 5000A.

3 The Premium Tax Credit is a refundable tax credit available paid both in advance and at return filing to help taxpayers with low to moderate income purchase health insurance through the Marketplace. IRC § 36B.

4 TAS is represented on the following ACA Joint Implementation Teams: Customer Service Operations, Outreach, Tax Return Receipt and Processing, ACA Notices and Correspondence, Compliance – Individuals, Compliance – Business, and Collection.

5 TAS has developed the following three high-level ACA self-study courses for its employees: (1) Course 55213 – *Introduction*; (2) Course 55447 – *Part 1, Individual Topics*; and (3) Course 55449 – *Part 2, Employer Topics*. The courses discussed ACA provisions that took effect in 2014.

provisions relevant to the low income taxpayers they assist. We will also look for opportunities to provide virtual training for the clinics to prepare them for cases involving the ACA.

TAS Case Advocacy Prepares to Track Health Care Cases

To prepare for implementation of the main tax provisions of the ACA, TAS has developed issue codes to track health care cases in our case management system and enable offices to advocate for taxpayers by identifying trends or systemic issues. The new issue codes will help the National Taxpayer Advocate identify the most serious taxpayer problems related to the new provisions. TAS will assess the skills of its employees in using the new codes accurately before the filing season to determine if supplemental training is necessary.

Communications and Outreach Efforts

TAS has taken substantive steps to provide assistance and education to taxpayers regarding the ACA. TAS developed an estimator for the Small Business Health Care Tax Credit, which allows small businesses to estimate their credits and find out how changes in circumstances will impact their eligibility.[6] TAS will expand its outreach through the end of FY 2015 by requiring all Local Taxpayer Advocates (LTAs) to conduct grassroots outreach to health care groups in their communities as well as grassroots organizations that serve the population impacted by the Premium Tax Credit.

A focus of TAS's outreach efforts will be to educate taxpayers who receive premium tax credits (in the form of premium subsidies) about the critical need to update their information with the exchanges throughout the year, either to increase their credit amount or avoid a tax liability if changes result in eligibility for a smaller credit.

A focus of TAS's outreach efforts will be to educate taxpayers who receive premium tax credits (in the form of premium subsidies) about the critical need to update their information with the exchanges throughout the year, either to increase their credit amount or avoid a tax liability if changes result in eligibility for a smaller credit. TAS believes this is a critical message that taxpayers should hear regularly. TAS has also created a calculator that estimates how changes in circumstances affect the amount of the credit.[7]

TAS also plans to develop outreach materials on a number of health care issues that LTAs and others can use. Further, TAS will develop outreach videos for the TAS toolkit (at www.TaxpayerAdvocate.irs.gov) to educate taxpayers on the ACA provisions and what they need to know prior to the 2015 filing season.

6 The small business health care tax credit estimator is available at http://www.taxpayeradvocate.irs.gov/calculator/SBHCTC.htm.

7 At the date of publication, the PTC calculator is undergoing internal IRS review and testing.

The unique intersection of taxes and health care in the ACA also makes it important to talk with health care and social services groups about the tax implications of certain health care decisions so they provide their clients with the most comprehensive and accurate information. Because many such organizations do not regularly deal with tax issues, it is critical for the IRS and TAS to educate them about where to go if they have questions or concerns.

TAS Continues to Monitor Emerging Systemic Issues.

As the IRS implements the ACA provisions, TAS's Office of Systemic Advocacy will monitor emerging systemic issues. In FY 2015, Systemic Advocacy will continue to identify such issues before they impact taxpayers and work with the IRS to resolve them. TAS will do this through its representation on multiple ACA joint implementation teams, by working with LTAs to identify health care case trends, and by tracking issues submitted on the Systemic Advocacy Management System (SAMS).[8]

TAS will continue to review draft guidance as well as solicit comments and observations from taxpayers, TAS and IRS employees, and stakeholders on potential systemic issues that require elevation to IRS leadership and potential discussion in the Annual Report to Congress. Our ability to identify and mitigate issues during implementation depends in part on our ability to review IRS forms, instructions, and other guidance before they are finalized. Review of ACA-related forms and instructions has been challenging because of the shortened review periods, necessitated by the time required for programming changes.

TAS Has Identified Several ACA Implementation Issues.

Through TAS's involvement on the ACA executive steering committee and implementation teams, as well as discussions with internal and external stakeholders, we have identified the following concerns about the IRS implementation of ACA provisions for the 2015 filing season:

- Training assistors to respond to taxpayer questions on health care issues should be a high priority;
- The IRS should focus on increasing taxpayer awareness of the need to update information with the Exchange throughout the year;
- ACA audit and collection activity may unduly burden low income taxpayers;
- Taxpayers may receive incorrect Advance Premium Tax Credit amounts;
- The IRS may take inappropriate collection actions on Individual Shared Responsibility Payment (ISRP) liabilities;
- The use of "Combination Letters" for disallowed Premium Tax Credit (PTC) may confuse taxpayers; and

8 To access SAMS, visit IRS.gov/sams.

- The IRS should expand its Q&A web page to provide additional guidance to employers on how to calculate the number of full time equivalents.

Training assistors to respond to taxpayer questions on health care issues should be high priority.

The new work caused by the ACA will likely compound the IRS's already low level of service on its phone lines, as well as increase the existing backlog of correspondence from taxpayers.[9] The IRS has estimated that it needs almost 2,000 new employees to handle ACA implementation requirements, additional calls, and correspondence.[10] The IRS also must ensure that employees who work ACA-related issues, especially those in taxpayer-facing roles, are properly trained. TAS is aware that the IRS is developing training for its employees even as ACA-related forms and instructions are being finalized. Ideally, TAS will have an opportunity to review the content of this training and plans to supplement it with additional content for training TAS employees.

The IRS 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 Premium Tax Credit amounts they received in 2014 based on projected 2014 income with the credit amounts to which they are entitled, based on their actual income.[11] TAS remains concerned that the IRS could do more to educate taxpayers as early as possible about the importance of updating their information throughout the year with the Exchange if they are receiving the advance credit.[12] To avoid receiving an excess credit, taxpayers must update their information with the marketplace if their income or other relevant circumstances change. Educating taxpayers early and repeatedly about this requirement will help prevent them from owing money to the IRS (or reducing their refunds), or qualifying for too little advanced credit during the year.[13] Because almost 80 percent of individual returns are refund returns, in which the IRS may offset some or all of a reconciliation amount (resulting in a reduced credit), the IRS should do all it can to ensure that as few taxpayers as possible have excessive advanced premium tax credit payments and instead receive the correct amount throughout the year.[14]

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

10 IRS FY 2014 Congressional Budget Submission, Table 4.9 at 177.

11 The Premium Tax Credit is a refundable, advanceable tax credit available to help certain low and moderate income taxpayers purchase health insurance through a Marketplace. IRC § 36B.

12 To apply for the advanced premium tax credit, an individual goes to an Exchange, which will attempt to verify household income with the IRS. The Exchange can verify data with the Department of Health and Human Services (HHS). 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 or owe the taxpayer a refund. IRC § 36B(f)(2)(B). Note, however, that taxpayers who are below certain income levels may not have to repay the excess.

13 The IRS has developed Publication 5152, *Report Changes to the Marketplace as They Happen*. Other IRS publications explaining the PTC include: Publication 5120, *Facts About the Premium Tax Credit* (Flyer) and Publication 5121, *Facts about Premium Tax Credit* (Brochure).

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

TAS is developing an estimator to help taxpayers and practitioners understand how changes in circumstances will impact their Premium Tax Credit amounts. The Commissioner has instructed the IRS to incorporate the estimator into its ACA outreach once the tool is finalized.

In addition, taxpayers may have their refunds delayed if, due to an unreported change in circumstances, they claim a larger Premium Tax Credit on their returns than what is advanced to the insurance company during the year. If the IRS flags these returns as potentially fraudulent, it may hold up legitimate refunds, which TAS has seen happen with other refundable credits, especially when large dollar amounts are at stake.[15] While there is always a risk of individuals trying to game the system, the risk of fraud may be less with the PTC than with other refundable credits because the advanced PTC is paid directly to established insurance companies when the policy is actually in place. When the taxpayer reconciles the advanced PTC on the return and is due a refund, the excess PTC amount claimed has already been paid as premiums by the taxpayer throughout the year. The IRS will also be able to verify coverage and premium through third-party information reporting, assuming the reports are accurate and timely.

Finally, after taxpayers file their TY 2014 returns in the 2015 filing season, TAS plans to explore whether the IRS could have alleviated taxpayer burden by identifying earlier in the process any discrepancies between income reported on taxpayers' health care applications and income actually reported on their TY 2013 returns. Currently, the IRS sends TY 2012 data to the Exchanges to determine income discrepancies. However, a substantial portion of TY 2013 data may be available months before the 2015 filing season. We plan to use filing season 2015 data to evaluate whether the issuance of soft notices 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.

IRS ACA Audit and Collection Activity May Unduly Burden Low Income Taxpayers.

The IRS uses different software to assess liability under the ACA than to process returns.[16] Where a taxpayer's return presents both ACA and non-ACA issues, this process may prolong the time taxpayers must wait to fully and finally resolve their tax liabilities for a given year and burden them with additional IRS contacts or audits. In addition, these issues may disproportionately affect low income taxpayers. For example, if the IRS audits a taxpayer and denies a qualifying child, it would decrease both the Earned Income Tax Credit (EITC) and the Individual Shared Responsibility Payment. The IRS would assess additional tax

15 See National Taxpayer Advocate 2012 Annual Report to Congress 111-113; National Taxpayer Advocate 2012 Objectives Report to Congress 28-32; National Taxpayer Advocate 2011 Annual Report to Congress 687-689.

16 The traditional software the IRS uses for audits, Report Generating Software, is not yet programmed to assess ACA tax liabilities on the same audit record.

during the first audit, but the taxpayer's final liability, determined after the ISRP issue is addressed, may be lower. Meanwhile, the taxpayer would receive demands for payment related to the disallowed EITC, and the IRS may have collected too much once the ISRP reduction is factored in.[17]

Taxpayers May Receive Incorrect Advance Premium Tax Credit Amounts.

It has been reported that over one million taxpayers may receive an incorrect advanced PTC due to income discrepancies on their health care applications.[18] For example, if a consumer inadvertently understates her projected 2014 income on an application for insurance coverage through the Marketplace, the advanced PTC may be too high. When the taxpayer subsequently reconciles the advanced PTC amount with the actual amount on her 2014 tax return, she might find that she must return the excess. The Marketplace verifies the income listed on the Marketplace insurance applications with IRS data from the most recent tax returns and upon identifying a discrepancy, the Marketplace (which is the Centers for Medicare and Medicaid Services (CMS) in the case of the federal insurance exchange)) asks the taxpayer to submit proof of income. Only a fraction of these taxpayers have submitted such proof to CMS, and their documents are sitting in a queue waiting for CMS to build a matching system.[19]

For those who underestimated their income, the more time that passes, the more advanced PTC they will need to return at year's end. Moreover, it is unclear whether taxpayers who have reported a change in circumstance throughout the year are caught up in this CMS queue as well, creating a disincentive for reporting changes.

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

The ACA prohibits the IRS from filing a notice of lien or levying on any ISRP liabilities.[20] However, when the IRS levies to collect non-ISRP liabilities, it could potentially receive levy payments that exceed the amount of the non-ISRP liabilities, and these excess payments might then be applied to the ISRP liabilities. Because the IRS cannot levy on the ISRP liabilities, the IRS should return any levy payments applied to the ISRP liabilities.[21] IRS programming, however, may cause the IRS to automatically apply excess levy proceeds to ISRP liabilities instead. Ensuring that levy proceeds are not applied to ISRP liabilities would require manual processing.

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17 IRS ACA Individual Compliance Joint Implementation Team Meetings (Feb. 14, 2014; Feb. 25, 2014; Mar. 14, 2014).

18 Amy Goldstein and Sandhya Somashekhar, *Health Payouts May Be Wrong, Subsidies Too High or Low for 1 Million, Government Flags Errors But Cannot Fix Them Yet*, Washington Post (May 17, 2014).

19 *Id.* The article states that the Marketplace identified income discrepancies in 1.1 to 1.5 million applications but taxpayers only mailed in proof documents for approximately one out of every six inconsistency identified. Those proof documents were sitting in the queue waiting to be addressed.

20 IRC § 5000A(g)(2)(B).

21 IRC § 6343(d).

In addition, IRS collection efforts may indirectly burden taxpayers with ISRP liabilities. For example, we believe the IRS should not include an ISRP liability in calculating the dollar threshold when determining whether to file a Notice of Federal Tax Lien on non-ISRP liabilities.[22]

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.[23] 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. Further, in addition to information about appeal rights, we believe the 30-day letters should include information about the Taxpayer Advocate Service and LITCs.

The IRS should expand its Q&A web page to provide additional guidance to employers on how to calculate the number of full time equivalents.

Employers not in compliance with the provisions under IRC § 4980H will be subject to an assessable payment, referred to as the "Employer Shared Responsibility" payment. 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)).[24] The Employer Shared Responsibility provisions generally are not effective until January 1, 2015, meaning that no Employer Shared Responsibility payments will be assessed for the 2014 tax year.[25] 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.[26]

22 It is our understanding that the IRS is looking into this issue. IRS ACA Compliance Joint Implementation Team (May 22, 2014). See IRM 5.19.4.5.2 for general lien determination procedures.

23 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 raised in the National Taxpayer Advocate's 2001 Annual Report to Congress 20-22; National Taxpayer Advocate 2002 Annual Report to Congress 55-63; National Taxpayer Advocate 2003 Annual Report to Congress 87-98, National Taxpayer Advocate 2004 Annual Report to Congress 163-180; National Taxpayer Advocate 2005 Annual Report to Congress 95-122, National Taxpayer Advocate 2006 Annual Report to Congress 289-310; National Taxpayer Advocate 2007 Annual Report to Congress 222-241; National Taxpayer Advocate 2008 Annual Report to Congress 227-259; National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 85.

24 IRC § 4980H(c)(2).

25 Notice 2013-45 2013-31 I.R.B. 116.

26 IRC § 4980H(c)(4).

On February 12, 2014, the IRS and Treasury issued final regulations on the Employer Shared Responsibility payment provisions.[27] 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 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 a Q&A page located on IRS.gov.[28] While they contain helpful information, the limited Q&As on this page do not adequately address many questions that employers may have about the calculation of FTEs. It would not be realistic to expect the IRS to post the answers to every single possible scenario, but it should expand this page. For example:

- What would be a reasonable method of determining FTE for the clergy (who have not taken a vow of poverty)? Often, members of religious orders have responsibilities that do not fit within a typical "9 to 5" work 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? Pilots have a lot 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 credit?

To educate small business taxpayers, TAS developed an online estimator for the SBHCTC.[29] This tool allows small businesses to estimate their credits and find out how changes in circumstances will impact their eligibility. Since its launch in November 2012, we have promoted the SBHCTC estimator on the TAS Tax Toolkit[30] where small businesses and tax

27 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.

28 http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act#Identification.

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

30 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/.

professionals can access it easily, and have continually promoted the estimator through social media, including Twitter and Facebook.[31]

In FY 2015, TAS will:

- Provide more in-depth training to employees on specific provisions of the law such as the Premium Assistance Tax Credit, Individual Responsibility Requirement, and Employer Responsibility Requirement.
- Assess the skills of its case advocacy employees in using the new ACA issue codes before the 2015 filing season to determine if they need supplemental training.
- Provide a second round of training at the LITC annual conference to educate those tax professionals about ACA provisions relevant to the low income taxpayers they assist.
- Launch the estimator to help taxpayers calculate changes in the Premium Tax Credit after a change in circumstances.
- After taxpayers file their TY 2014 returns in the 2015 filing season, explore whether the IRS could have alleviated taxpayer burden by identifying earlier in the process any discrepancies between income reported on taxpayers' health care applications and income actually reported on their TY 2013 returns.
- Expand Premium Tax Credit-related outreach by requiring all Local Taxpayer Advocates to conduct grassroots outreach to health care groups in their communities as well as grassroots organizations that serve the population impacted by the Premium Tax Credit.
- Develop outreach materials for LTAs and others on health insurance tax issues.
- Create outreach videos for the TAS toolkit (at www.TaxpayerAdvocate.irs.gov) to educate individual taxpayers on various ACA provisions and what they need to know prior to the 2015 filing season.
- Continue to review draft guidance as well as solicit comments and observations from taxpayers, TAS and IRS employees, and stakeholders on potential systemic ACA issues that require elevation to IRS leadership and potential discussion in the Annual Report to Congress.

31 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 went from a quarterly average of 110 per day to 1,502 and 614 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).