



September 6, 2016

The Honorable Jacob J. Lew  
Secretary of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

RE: REG-109086-15 - Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

Dear Secretary Lew:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. The members of NAHU work on a daily basis to help individuals and employer groups purchase, administer and utilize health insurance coverage. As such, we are pleased to have the opportunity to provide comments on the notice of proposed rulemaking titled "Premium Tax Credit NPRM VI."

NAHU greatly appreciates the willingness of the Internal Revenue Service and the Treasury Department to accept comments from stakeholders about the proposed requirements relative to both the premium tax credit and the impact these proposed requirements will have on employer group health plans and applicable large employers subject to the IRC §4980H employer shared responsibility requirements. In developing these comments, we have consulted extensively with health insurance agents and brokers who work directly with both tax-credit eligible individual market health insurance consumers and with employers striving to offer coverage to their employees that meet the law's coverage affordability and minimum value tests. So please note that our comments, which are divided by topic, reflect the viewpoint of experts assisting both group and individual insurance consumers in the field.

#### **Proposed Changes Related to Premium Tax Credit Eligibility Determinations**

The proposed rule contains a number of provisions amending §26 CFR Part One regarding eligibility determinations made by the health insurance exchange marketplaces. NAHU supports the proposed changes intended to prevent and discourage tax credit and health coverage program fraud that would establish that if an individual intentionally or recklessly misstated income and received an advance payment of the premium tax credit then such a person would ultimately not be considered an applicable taxpayer once income taxes were reconciled. Similarly we support the provision establishing that if an individual intentionally or recklessly gave false information to the exchange that resulted in a Medicaid, Children's Health Insurance Program (CHIP) or similar program determination then that person would be deemed ineligible for the program when the fraud was ultimately revealed. Additionally, NAHU suggests that when implementing these provisions, the health insurance exchange marketplaces be required to clearly notify consumers of the consequences of potential income-based eligibility fraud at the time of application, in order to help discourage it from ever happening.

NAHU would appreciate additional guidance about two other proposed changes relative to premium tax credit eligibility determinations. Our questions concern coverage options that may be offered by employers to employees and therefore



could impact an employee's premium tax credit eligibility determinations. The first proposed change would require the health insurance exchange marketplaces to consider an offer of coverage made through the non-appropriated funds health benefit program, which is coverage offered by the federal Department of Defense to certain employees, as an offer of coverage through an employer-sponsored plan. Therefore if this coverage does not meet the law's affordability and/or minimum plan value requirements, then an individual offered such coverage may be eligible for a premium tax credit through the exchange. NAHU supports this technical correction as this coverage is otherwise treated as employer-sponsored coverage. However, we request for clarification in the final rule as to how the exchange will determine and verify that such an offer of coverage does not meet the law's minimum value and affordability standards.

As we have expressed in comments to previous rulemaking efforts, NAHU remains concerned that without proper coordination between the Departments of Treasury and Health and Human Services (HHS) to create sound employer-coverage verification on the front-end of the exchange eligibility determination process, inappropriate determinations could easily occur. There is much confusion about the "affordability" standard as it is applied to employer-sponsored coverage offers amongst consumers and we believe that it is fairly easy for consumers to mistakenly apply for and then receive advanced payments of a premium tax credit for which they are not eligible. Without sufficient initial verification, these payments may extend for a year or more before employer reporting under IRC §6056 and a consumer's income tax filings are reconciled, leaving consumers ultimately on the hook for thousands of dollars in advance credit repayment expenses. NAHU believes the best solution to this looming problem is prospective, rather than retroactive, reporting of employer-sponsored coverage offers coupled with a coordinated verification process at the time of the eligibility determination. However, we recognize that this approach requires statutory changes. In the meantime, we urge the Treasury Department to work with HHS on more immediate employer-coverage verification processes. We also suggest that the final rule include enhanced requirements for both state and federal exchanges to provide clearer and more consumer-friendly explanations of what constitutes an "affordable" and minimum value offers of employer coverage in the premium tax credit application process.

Similarly, NAHU has concerns about the planned verification procedures relative to the proposed requirement that if an employer offers and an employee accepts an offer of employer-provided health coverage comprised solely of excepted benefits, then this acceptance of coverage does not preclude the employee and any dependents from eligibility for a premium tax credit. While NAHU understands and does not dispute the premise behind the proposed requirement, we have significant concerns about how the exchanges will accurately determine the status of such a coverage offer during the premium tax credit determination process. Based on our membership's extensive work with employee participants in employer-sponsored group benefit plans, we can say with confidence that the vast majority of employees do not readily understand the various ACA-related labeling nuances of their employer-sponsored health insurance coverage offerings. Terms that are now commonplace to health policy professionals, like minimum essential coverage and excepted benefits, are meaningless to mainstream consumers. While consumers know what kind of benefits they have on their terms, it is unreasonable to expect employees to accurately report the official terms of such coverage offers to an exchange without significant assistance. Therefore, we believe that the Treasury Department needs to address how the exchanges provide such assistance to consumers. What documentation of coverage status will be required on the consumer's end and where will it come from? How will such offers and provisions of coverage be reflected on employers and issuers required information reporting relative to IRC §§ 6055 and 6056? NAHU has significant concerns that under the current exchange constructs, the exchanges will not be able to accurately assess if a taxpayer had been



offered affordable and minimum value comprehensive coverage as well as the excepted benefits until after employer reporting is reconciled, which could be over a year after premium tax payments were advanced to the consumer. This weakness on the part of the exchanges could leave consumers potentially liable for thousands of dollars of tax credit repayments, all because of confusing terms and requirements and inadequate eligibility verification mechanisms. NAHU specifically asks for clarification of the issues we have raised regarding eligibility verification in any final rule, and again urge you to include in any final rule enhanced requirements for both state and federal exchanges to include clearer and more consumer-friendly explanations of what constitutes an “affordable” and minimum value offer of employer coverage in the premium tax credit application process.

#### **Proposed Changes to Premium Tax Credit Repayment Provisions**

NAHU supports the proposed changes to §26 CFR Part One which specify if an individual is transitioning from exchange-based coverage subsidized by a premium tax credit to Medicaid or CHIP, or if the individual tells the exchange he/she is no longer eligible because of other MEC offer and advance premium payments aren’t discontinued immediately, then repayment will not be required. Similarly, NAHU supports the proposed requirement that individuals who were wrongly rejected for exchange coverage eligibility but are subsequently retroactively covered as part of the appeals process will also have the opportunity to receive retroactive payments of the premium tax credit if eligible as long as they pay their share of the retroactive coverage premiums within 120 days of the appeals decision.

#### **Proposed Changes to Premium Tax Credit Calculation Provisions**

The proposed rule contains a number of provisions to adjust the premium tax credit calculation when the sole use of the second lowest premium Silver plan offered in the marketplace to determine the credit amount is not the fully appropriate choice. NAHU believes all of the proposed changes, including making adjustments for: (1) the existence of standalone dental products, (2) when family members live in different service areas of the same state, (3) when there is only one silver plan available and when (4) a silver plan is closed for enrollment to some of the family, are all fair and commonsense changes. However, we also note that making these four varied adjustments to the subsidy calculation methodology will also make it very hard for individual health insurance exchange consumers, marketplace certified agent or brokers and any other assister to perform estimated subsidy calculations without help. There are a lot of subsidy calculators available to consumers online that are used independently of the health insurance exchange marketplaces and they will now be even less accurate. NAHU requests clarification in the final rule as to how the Treasury Department will work with HHS to ensure the accuracy of all available consumer subsidy calculation tools and to ensure that all certified assisters, navigators, call center operators and agents and brokers are educated about the calculation changes.

#### **Opt Out Provisions**

The proposed rule also addresses opt out payments sometimes offered by employers to employees who elect not to take up employer-sponsored coverage offers. It specifies that conditioned opt out payments will have to be included in an employer’s plan affordability safe harbor calculation as was previously specified in Internal Revenue Service (IRS) Notice 2015-87. However, the proposed rule clarifies that collectively bargained plans in effect before December 16, 2015, which include unconditioned opt out payments are exempt from the new requirement until either the final rules go into effect or the first day of the next plan year under a new collective bargain agreement, whichever is later. NAHU supports and appreciates this clarification.



The proposed rule also establishes new grounds and standards for “conditioned” opt out arrangements to be excluded from an employer plan’s affordability calculation. NAHU has some concerns about the proposed approach. The proposed rule would deem conditioned opt out arrangements “eligible opt out arrangements” if: (1) the employee declines to enroll in the employer-sponsored plan, (2) the employee and all other individuals the employee reasonably expects to deduct on his/her taxes for the tax years bridged by the employer plan year have or will have MEC for the period covered by the opt out payment (plan year) provided it is not individual market or exchange marketplace coverage, and (3) that the employer obtains reasonable evidence of other MEC coverage from the employee, which the proposed rule states can be an attestation on the part of the employee. However, the proposed rule also would prohibit the employer from making an eligible opt out payment if the employer knows or has reason to believe that the employee’s attestation was not truthful. NAHU believes that it is inappropriate to put employers in the position of deeming the veracity of employee attestations. An attestation is by its very nature supposed to be a truthful declaration and the burden should be on the employee to be honest, rather than placing such unfair liability on the employer group plan sponsor.

If the truthfulness of an employee’s attestation is of general concern to the Treasury Department, then NAHU suggests that the final rule contain guidance about what an acceptable attestation documentation would contain, including perhaps providing a template or sample language designed to obtain accurate information from the employee. Generally employers who need to provide issuers with coverage waivers that include specification of other group coverage to meet plan participation requirements require employees to complete the issuer-approved coverage waiver documentation as part of a conditioned opt out payment. Would such issuer-approved forms be acceptable documentation? If so, NAHU would appreciate clarification in the final rule.

The proposed rule states that employers must obtain evidence of other coverage from the employee for every year an eligible opt out payment is made. This evidence may be obtained during open enrollment, and as for timing, the proposed rule says the evidence of coverage can’t be required earlier than a “reasonable period before the commencement of the coverage to which the opt out payment applies.” NAHU would appreciate further clarification about what constitutes a “reasonable period” in the final rule.

The proposal also specifies that an employer can do its verification process after the employer plan year commences but then needs to ascertain that the employee and dependents already have coverage in place. However, NAHU has questions about what the employer’s obligations would be in the likely event that the enrollment window for the employee’s other MEC coverage option does not line up with that of the employer sponsored plan. If the employee can document a planned less than 90-day break in coverage for the employee and/or dependents, is that acceptable? Or does the employee’s alternative coverage option need to be in force on the exact start day of the new employer plan year? NAHU would appreciate clarification on all of these matters in any final rule.

NAHU supports the provision noting if the employee’s alternative coverage is subsequently terminated, then the employer doesn’t have to factor what was initially an eligible conditioned opt out arrangement into their affordability calculation for the post-termination portion of the plan year. This is a needed specification for two reasons. First, an employer would not necessarily have any knowledge of a subsequent termination of an employee’s other MEC



coverage. Second, even if an employer was made aware of such a termination, employers determine their contribution strategy, including factoring in their affordability safe harbor, before the start of each plan year. It would be difficult, if not impossible, to change contribution percentages and affordability safe harbors midstream to make the coverage “affordable” again.

Finally, the Treasury Department has solicited comments about whether other types of “conditioned” opt out payments are ever offered by employers to employees and if so, how such arrangements should be treated under future rulemaking. NAHU members report that in almost all cases, employer opt out arrangements are either unconditioned or structured to be in some way conditional on the employee and/or dependents obtaining or having other qualified coverage. Alternative opt out arrangements are not only very rare, but would likely be specifically conditioned and NAHU does not believe that the Treasury Department needs to account for such arrangements via further rulemaking.

#### **Effective Date and Related Notification and Education**

The proposed rule specifies that generally the effective date for the requirements would be the start for the 2017 tax year. An exception to the effective date for the opt out arrangement requirements is made for employers impacted by collective bargaining agreements and certain premium tax credit changes have a proposed retroactive effective date going back to the advent of the health insurance exchange marketplaces.

While NAHU understands the desire to have consumers benefit from all of the changes outlined in the proposed rule as soon as possible, we are also concerned about the implementation and consumer education challenges a January 1, 2017 effective date creates. With regard to the premium tax credit changes, given that open enrollment for the 2017 plan year is slated to begin on November 1, NAHU has concerns that the state and federal exchange marketplace infrastructures will not have enough implementation lead time and will not be able to create appropriate consumer interfaces before open enrollment begins. Furthermore, for all of these changes to be communicated to consumers properly at the time of enrollment, agents and brokers, call center operators, navigators and other assisters will all need to be apprised of the new requirements and their impact on new and existing health insurance marketplace consumers. Given that agent and broker and other assister marketplace training content for the 2017 plan year has already been finalized and the 2017 certification process for brokers and assisters is already ongoing, it is hard to see how adequate information will be made available to those who work directly on both marketplace enrollment and assisting consumers with premium tax credit applications and eligibility determinations and appeals in time. As such, NAHU suggests an implementation delay until January 1, 2018.

Similarly, NAHU has concerns about the timing of the eligible conditioned opt out requirements for employers. Larger employers with January 1 plan renewal dates are already preparing open enrollment materials and determining employer contribution structures and plan offerings and criteria for the year ahead. Furthermore, the forms and instructions employers will use to meet their IRC §§ 6055 and 6056 reporting obligations are being finalized right now. Any changes to opt out requirements need to be made known to employers immediately if they are to be carried out during the 2017 tax year and NAHU does not see how under the current rulemaking timeframe, employers will have the tools and information they need to incorporate yet-to-be-finalized requirements into the fall and winter 2016/2017 open enrollment season. NAHU suggests an implementation delay until January 1, 2018 for these provisions as well.



NAHU sincerely appreciates the opportunity to provide comments on the proposed rule and we look forward to working with you to help both individual and group consumers of health insurance adapt to any effectuated changes to the premium tax credit as a result of the promulgation of a final rule. If you have any questions about our comments or need more information, please do not hesitate to contact me at either (202) 595-0787 or [jtrautwein@nahu.org](mailto:jtrautwein@nahu.org).

Sincerely,

A handwritten signature in black ink, which appears to read "Janet Stokes Trautwein". The signature is fluid and cursive, written over a white background.

Janet Stokes Trautwein  
Executive Vice President and CEO  
National Association of Health Underwriters