



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

OCT 12 2012

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Issa:

I am writing in response to your recent letter to Commissioner Shulman regarding section 36B of the Internal Revenue Code (Code). I am responding on his behalf because your letter raises important issues regarding tax policy, the standard process by which Treasury regulations are developed collaboratively between the Department of the Treasury's Office of Tax Policy (OTP) and the IRS, and communications between the IRS and OTP regarding the proposed and final section 36B regulations promulgated by Treasury.

More specifically, your letter raises questions about whether taxpayers who purchase health insurance through exchanges operated by the federal government (federally-facilitated exchanges) are eligible for the premium tax credit under section 36B of the Code. Let me assure you that we take seriously our responsibility to implement the tax laws passed by Congress. We do so in a careful and thoughtful way, with the goal of implementing the law consistent with congressional intent and resolving any statutory ambiguities in a reasonable manner that gives effect to the purpose of the statute.

As you know, Section 36B(b)(2)(A) provides that the amount of the premium tax credit is based on the premiums for one or more qualified health plans in which a taxpayer enrolls through an "Exchange established by the State under section 1311" of the Affordable Care Act (ACA). ACA section 1311(d)(1) provides that "[a]n Exchange shall be a governmental agency or a nonprofit entity that is established by a State." Under ACA section 1321(c), if a state chooses not to establish an exchange or will not have an exchange in operation by January 1, 2014, the Secretary of Health and Human Services (HHS) "shall . . . establish and operate such Exchange within the State" to serve the residents of that state.

Treasury regulations implementing section 36B provide that individuals who enroll in coverage through a federally-facilitated exchange are eligible for premium tax credits. Treasury and the IRS developed these regulations in accordance with our standard process for drafting, approving, and publishing tax regulations. The process begins with the IRS Office of Chief Counsel. IRS lawyers review the particular statute to identify any issues that regulations should address and to develop preliminary resolutions of those issues. The IRS lawyers apply well-established principles of statutory construction and draw on their long experience implementing the Code. The analysis is then shared with OTP tax lawyers, and the two groups confer about the proper

interpretation of the statute, discuss any differences of opinion, and develop a consensus approach.

Under this standard procedure, OTP and IRS lawyers work together to draft a Notice of Proposed Rulemaking, which is published in the Federal Register. Treasury solicits public comments on the proposed regulations during an official comment period; and, in many cases, the IRS also holds a public hearing to allow stakeholders to provide feedback in person. IRS and OTP lawyers review any comments they receive and consider whether any of the suggested changes should be adopted. Last, IRS and OTP lawyers draft a final regulation, which includes responses to any comments and makes modifications to the proposed regulations as necessary. All final tax regulations are signed by both the IRS Deputy Commissioner for Services and Enforcement and the Treasury Assistant Secretary for Tax Policy.

The IRS and OTP followed this standard procedure in developing the proposed and final regulations under section 36B. In particular, first the IRS, and then the OTP lawyers considered the express language of section 36B, as well as other relevant provisions of the ACA. They separately and together concluded that the ACA should be interpreted to provide tax credits to individuals enrolling through all exchanges, whether directly operated by a state government or federally-facilitated. This approach was reflected in proposed regulations issued in August 2011. We received numerous written and oral comments in response to the proposed regulations – some of which were supportive; others argued for a different interpretation. The IRS and OTP reviewed the issue again, taking into account the numerous comments, and concluded the statute should be interpreted as in the proposed regulations. Treasury published final regulations in May 2012 that adopted this view.

Your letter inquires about the legal basis for Treasury's position. We interpreted the statutory language in context and consistent with the purpose and structure of the statute as a whole, pursuant to longstanding and well-established principles of statutory construction. For example, ACA section 1311 refers to an exchange being "established by a State." Congress provided in section 1321, however, that where a state was not proceeding with an exchange, HHS would establish and operate "*such* Exchange within the State," making a federally-facilitated exchange the equivalent of a state exchange in all functional respects. Moreover, throughout the ACA, Congress refers to the exchanges as "exchanges," "exchanges established by a state," and "exchanges established under the ACA." There is no discernible pattern that suggests Congress intended the particular language in section 36B(b)(2)(A) to limit the availability of the tax credit.

In addition, the information reporting requirements of section 36B(f)(3) apply to exchanges under both ACA sections 1311 and 1321. This requirement relates to administration of the premium tax credit. The placement of this provision in section 36B and the information required to be reported – including information related to eligibility for the credit and receipt of advance payments – strongly suggests that all taxpayers who enroll in qualified health plans, either through the federally-facilitated exchange or a state exchange, should qualify for the premium tax credit. Our interpretation is consistent with the explanation of the ACA released by the non-partisan Congressional Joint Committee on Taxation and with the assumptions made by the Congressional Budget Office in estimating the effects of the ACA.

Finally, we have enclosed documents responsive to your requests. Please let us know if you need additional information. We hope this is helpful and we look forward to working with you in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark J. Mazur". The signature is fluid and cursive, with a prominent initial "M".

Mark J. Mazur
Assistant Secretary (Tax Policy)

Enclosures