

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-119632-11]

RIN 1545-BK87

Regulations pertaining to the disclosure of return information to carry out eligibility requirements for health insurance affordability programs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the disclosure of return information under section 6103(l)(21) of the Internal Revenue Code, as enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. The regulations define certain terms and prescribe certain items of return information in addition to those items prescribed by statute that will be disclosed, upon written request, under section 6103(l)(21) of the Internal Revenue Code.

DATES: Written (including electronic) comments must be received by July 30, 2012.

Outlines of topics to be discussed at the public hearing scheduled for Friday, August 31, 2012, must be received by July 30, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-119632-11), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-119632-11), Courier's Desk, Internal Revenue

Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-119632-11). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Steven Karon, (202) 622-4570; concerning the submission of comments, the public hearing, and to be placed on the building access list to attend the public hearing, Olumafunmilayo Taylor, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### **Background**

Beginning in 2014, under the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act), Affordable Insurance Exchanges (Exchanges) will provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options (qualified health plans, or QHPs) on the basis of price, quality, and other factors, and to purchase such coverage. A Federally-facilitated Exchange will operate on behalf of States electing not to pursue a State-based Exchange. In general, a QHP is a health plan offered by a health insurance issuer that meets minimum standards in the law and set by an Exchange.

Qualified individuals and small employers will be able to purchase private health insurance through Exchanges. Certain individuals who choose to obtain coverage

through an Exchange will be eligible to qualify for a new premium tax credit and/or cost-sharing reductions established to help make the purchase of insurance more affordable.

Section 1401 of the Affordable Care Act amended the Internal Revenue Code to add section 36B, providing for the premium tax credit to help eligible individuals and families afford health insurance coverage. Section 1402 of the Affordable Care Act provides reduced cost-sharing for certain individuals enrolled in qualified health plans through the Exchange, decreasing the individual's out-of-pocket limits, deductibles, co-insurance, and co-payments in certain situations.

Section 1411(a) of the Affordable Care Act directs the Secretary of the Department of Health and Human Services (HHS) to establish a program under which Exchanges will determine whether individuals are eligible to enroll in QHPs through the Exchange, and whether they are eligible for advance payments of the premium tax credit and cost-sharing reductions. Section 1412 of the Affordable Care Act directs the Secretary of HHS to establish a program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions that may be paid directly to an insurance company on behalf of a taxpayer. Eligibility for advance payments, like eligibility for the premium tax credit itself, is based in part on the household income of the individual who will claim the credit. Household income is defined in section 36B(d)(2) as the total of the modified adjusted gross incomes (MAGI) of the taxpayer claiming the premium tax credit and those other individuals for whom the taxpayer was allowed a deduction under section 151 and who were required to file a tax return.

Section 1413(a) of the Affordable Care Act directs the Secretary of HHS to establish a system under which an individual may submit a single, streamlined application to apply for specified insurance affordability programs (that is, the premium tax credit under section 36B, cost-sharing reductions under section 1402 of the Affordable Care Act, Medicaid, the Children's Health Insurance Program (CHIP), and a State's basic health program, if applicable, under section 1331 of the Affordable Care Act). The system must be compatible with the processes set up to determine eligibility for advance payments of the premium tax credit and cost-sharing reductions. Where an individual seeking eligibility for any of these insurance affordability programs is found to be eligible for Medicaid or CHIP, the individual is enrolled in that program. If an individual is not eligible for one of these programs, the Exchange will make the determination (or provide for HHS to make the determination) as to the individual's eligibility for advance payments of the premium tax credit under section 36B and for cost-sharing reductions, and the amount of any advance payments. Under section 1412(c)(2) of the Affordable Care Act, advance payments are made monthly (or on another periodic basis as HHS may provide) directly to the issuer of the qualified health plan in which the individual enrolls.

Section 1411(b)(3) of the Affordable Care Act requires that individuals seeking an eligibility determination for advance payments of the premium tax credit or for cost-sharing reductions provide the Exchange with information regarding their household income and family size to demonstrate that they meet the income-based eligibility requirements. However, section 1411(c)(4)(B) of the Affordable Care Act grants the Secretary of HHS authority to modify the methods used for the verification of information

if the Secretary of HHS determines those modifications would reduce the administrative costs and burdens on individuals seeking coverage through an Exchange. The section explicitly gives the Secretary of HHS authority to change the manner in which Exchanges determine eligibility for advance payments of the premium tax credit or for cost-sharing reductions, so long as any applicable requirements under section 6103 of the Internal Revenue Code with respect to the confidentiality, disclosure, maintenance and use of return information would still be met. Section 1411(g) of the Affordable Care Act further provides that individuals will be required to provide only the minimum amount of information needed to authenticate an individual's identity and to determine the individual's eligibility for, and amount of, advance payments of the premium tax credit or cost-sharing reductions.

In proposing regulations in the **Federal Register** on August 17, 2011, the Secretary of HHS concluded that a less burdensome and more reasonable eligibility process would not require an individual to provide an Exchange with specific income-related information, such as the individual's MAGI (76 FR 51202 at 51214). Accordingly, the Secretary of HHS promulgated final regulations published in the **Federal Register** on March 27, 2012 (77 FR 18310), limiting the information an individual needs to provide to an Exchange for purposes of income verification and allowing the Exchange to solicit information from the IRS through HHS with respect to the individual and his family members whose names and social security numbers, or adoption taxpayer identification numbers, are provided. The regulations also provide guidance on the eligibility determination process for enrollment in a QHP, advance payments of the premium tax credit and cost-sharing reductions, and other insurance

affordability programs. Additionally, the Secretary of HHS promulgated final regulations published in the **Federal Register** on March 23, 2012 (77 FR 17144) that provide revised eligibility rules for Medicaid. The Treasury Department and the IRS proposed regulations in the **Federal Register** on August 17, 2011 (76 FR 51202) to implement the new premium tax credit.

Section 6103(l)(21) permits the disclosure of return information to assist Exchanges in performing certain functions set forth in section 1311 of the Affordable Care Act for which income verification is required (including determinations of eligibility for the insurance affordability programs described in the Affordable Care Act), as well as to assist State agencies administering a State Medicaid program under title XIX of the Social Security Act, CHIP under title XXI of the Social Security Act, or a basic health program under section 1331 of the Affordable Care Act (if applicable). Section 6103(l)(21) identifies specific items of return information that will be disclosed and permits the disclosure of such other items prescribed by regulation that might indicate whether an individual is eligible for the premium tax credit under section 36B or cost-sharing reductions under section 1402, and the amount thereof. After an individual submits an application for financial assistance in obtaining health coverage provided pursuant to Title I, subtitle E, of the Affordable Care Act (“the application”) to an Exchange or State agency, the IRS will disclose the available items of return information described under section 6103(l)(21)(A) to HHS. Pursuant to section 6103(l)(21)(B), HHS will then disclose the information to the Exchange or State agency that is processing the application.

As a condition for receiving return information under section 6103(l)(21)(A) and (B), each receiving entity (that is, HHS, the Exchanges, and State agencies that administer Medicaid, CHIP, or basic health plans, and their respective contractors) is required to adhere to the safeguards established under section 6103(p)(4). Final HHS regulations published in the **Federal Register** on March 27, 2012 (77 FR at 18446, 18450) state that to be certified by HHS an Exchange must demonstrate readiness to meet the section 6103 confidentiality requirements with respect to the items of return information the Exchange will receive. As described in section 6103(l)(21)(C), each receiving entity may then use the return information received under sections 6103(l)(21)(A) and (B) only for the purposes of, and to the extent necessary in, establishing eligibility for participation in the Exchange, verifying the appropriate amount of any advance payments of the premium tax credit or cost-sharing reductions, and determining eligibility for participation in a State Medicaid program, CHIP, or basic health program under section 1331 of the Affordable Care Act.

Under section 6103(l)(21)(A), the IRS will disclose to HHS (including its contractor(s)) certain items of return information, as enumerated in the statute or by regulation, for any relevant taxpayer. For purposes of these regulations, a relevant taxpayer is defined to be any individual listed, by name and social security number or adoption taxpayer identification number (“taxpayer identity information”), on the application whose income may bear upon a determination of the eligibility of an individual for an insurance affordability program. For each relevant taxpayer, section 6103(l)(21) explicitly authorizes the disclosure of the following items of return information from the reference tax year: taxpayer identity information, filing status, the

number of individuals for which a deduction under section 151 was allowed (“family size”), MAGI, and the taxable year to which any such information relates or, alternatively, that such information is not available. The “reference tax year” is the first calendar year or, where no return information is available in that year the second calendar year, prior to the submission of the application. MAGI is defined under section 36B as the taxpayer’s adjusted gross income defined under section 62, increased by three components: (1) any amount excluded from gross income under section 911, (2) any amount of interest received or accrued by the taxpayer during the taxable year that is exempt from tax, and (3) the amount of social security benefits of the taxpayer excluded from gross income under section 86 for the tax year.

In some situations, the IRS will be unable to calculate MAGI. While uncommon, for certain relevant taxpayers who receive nontaxable social security benefits, the IRS may not have complete information from which to determine the amount of those benefits. If the IRS has information indicating that a relevant taxpayer received nontaxable social security benefits, but is unable to determine the amount of those benefits, the IRS will provide the aggregate amount of the other components used to calculate the relevant taxpayer’s MAGI, as well as information indicating that the amount of nontaxable social security benefits must still be taken into account to determine MAGI. Similarly, where MAGI is not available, the IRS will disclose the adjusted gross income, as well as information indicating that the other components of MAGI must still be taken into account to determine MAGI. Because the Affordable Care Act and HHS’s final regulations (77 FR at 18456-18458) require that Exchanges use alternative means to verify income where information is not available from the IRS,

these explanatory items may assist an Exchange in determining an individual's eligibility for, and amount of, any advance payment of the premium tax credit or cost-sharing reductions.

The proposed regulations further provide that, in certain instances, where some or all of the items of return information prescribed by statute or regulation is unavailable, the IRS will provide information indicating why the particular item of return information is not available. Where an individual jointly filed with a spouse who is not a relevant taxpayer (that is, that spouse is not included on the application), the IRS will not disclose MAGI from the joint return because it cannot be appropriately allocated between the two spouses. Instead, the IRS will disclose that a joint return had been filed. This additional information may help individuals correct any errors or understand why they need to pursue alternative routes to verify their income. This information, therefore, also can assist Exchanges in determining whether an individual is eligible for advance payments of the premium tax credit or cost-sharing reductions.

Additionally, the IRS may have information in its records indicating that a relevant taxpayer had been a victim of identity theft or that a relevant taxpayer has been reported as deceased. The proposed regulations provide that the IRS will disclose that, although a return for that taxpayer is on file, the information described under section 6103(l)(21) is not being provided because IRS records suggest that the Exchange should take additional steps to authenticate the identities of the relevant taxpayers and may need to use alternate means for income verification.

Where an individual who is listed as a dependent on the application (for the tax year in which the premium tax credit will be claimed) filed a return in the reference tax

year but did not have a tax filing requirement for that year (based upon the return filed), the IRS will provide information indicating the dependent listed did not have a filing requirement because the information is relevant to the Exchange's computation of household income.

The final regulations issued by HHS provide that advance payments of the premium tax credit will not be permitted where the relevant taxpayer has received advance payments in the reference tax year and failed to file a return reconciling the advance payments with the actual premium tax credit. (77 FR at 18453). Therefore, these proposed regulations provide that the IRS will disclose to HHS that a relevant taxpayer who received an advance payment of a premium tax credit in the reference tax year did not file a return reconciling the advance payments with any premium tax credit available.

### **Special Analyses**

It has been determined that this Notice of Proposed Rule Making is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that, because the regulations proposed do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Comments and Public Hearing**

The Treasury Department and the IRS request comments on all aspects of the proposed rules. A public hearing has been scheduled for August 31, 2012, at 10:00 a.m., in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the “FOR FURTHER INFORMATION CONTACT” section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by July 30, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### **Drafting Information**

The principal author of the regulations is Steven L. Karon of the Office of the Associate Chief Counsel, Procedure and Administration.

### **List of Subjects in 26 CFR Part 301**

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 301 is amended as follows:

PART 301 -- PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding the entry for § 301.6103(l)(21) to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Section 301.6103(l)(21)-(1) also issued under 26 U.S.C. 6103(l)(21) and 6103(q).

\* \* \* \* \*

Par. 2. Section 301.6103 is amended by adding § 301.6103(l)(21)-1 to read as follows:

§ 301.6103(l)(21)-1 Disclosure of return information to the Department of Health and Human Services to carry out eligibility requirements for health insurance affordability programs.

(a) General rule. Pursuant to the provisions of section 6103(l)(21)(A) of the Internal Revenue Code, officers and employees of the Internal Revenue Service will disclose, upon written request, for each relevant taxpayer on a single application those items of return information that are described under section 6103(l)(21)(A) and paragraphs (a)(1) through (6) of this section, for the reference tax year, as applicable, to officers, employees and contractors of the Department of Health and Human Services, solely for purposes of, and to the extent necessary in, establishing an individual's eligibility for participation in an Exchange established under the Patient Protection and Affordable Care Act, including eligibility for, and determining the appropriate amount of, any premium tax credit under section 36B or cost-sharing reduction under section 1402 of the

Patient Protection and Affordable Care Act, or determining eligibility for the State programs described in paragraph (A) of section 6103(l)(21).

- (1) With respect to each relevant taxpayer for the reference tax year where the amount of social security benefits not included in gross income under section 86 of the Internal Revenue Code of that relevant taxpayer is unavailable:
  - (i) The aggregate amount of the following items of return information --
    - (A) Adjusted gross income, as defined by section 62 of the Internal Revenue Code;
    - (B) Any amount excluded from gross income under section 911 of the Internal Revenue Code; and
    - (C) Any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.
  - (ii) Information indicating that the amount of social security benefits not included in gross income under section 86 of the Internal Revenue Code is unavailable.
- (2) Adjusted gross income, as defined by section 62 of the Internal Revenue Code, of a relevant taxpayer for the reference tax year, in circumstances where the modified adjusted gross income (MAGI), as defined by section 36B(d)(2)(B) of the Internal Revenue Code, of that relevant taxpayer is unavailable, as well as information indicating that the components of MAGI other than adjusted gross income must be taken into account to determine MAGI;

- (3) Information indicating that certain return information of a relevant taxpayer is unavailable for the reference tax year because the relevant taxpayer jointly filed a U.S. Individual Income Tax Return for that year with a spouse who is not a relevant taxpayer listed on the same application;
  - (4) Information indicating that, although a return for an individual identified on the application as a relevant taxpayer for the reference tax year is available, return information is not being provided because of possible authentication issues with respect to the identity of the relevant taxpayer;
  - (5) Information indicating that a relevant taxpayer who is identified as a dependent for the tax year in which the premium tax credit under section 36B of the Internal Revenue Code would be claimed, did not have a filing requirement for the reference tax year based upon the U.S. Individual Income Tax Return the relevant taxpayer filed for the reference tax year; and
  - (6) Information indicating that a relevant taxpayer who received advance payments of the premium tax credit in the reference tax year did not file a tax return for the reference tax year reconciling the advance payments of the premium tax credit with any premium tax credit under section 36B of the Internal Revenue Code available for that year.
- (b) Relevant taxpayer defined. For purposes of paragraph (a) of this section, a relevant taxpayer is defined to be any individual listed, by name and

social security number or adoption taxpayer identification number, on an application submitted pursuant to Title I, Subtitle E, of the Patient Protection and Affordable Care Act, whose income may bear upon a determination of any advance payment of any premium tax credit under section 36B of the Internal Revenue Code, cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, or eligibility for any program described in section 6103(l)(21)(A) of the Internal Revenue Code.

(c) Reference tax year defined. For purposes of subparagraph (A) of section 6103(l)(21) of the Internal Revenue Code and this section, the reference tax year is the first calendar year or, where no return information is available in that year, the second calendar year, prior to the submission of an application pursuant to Title I, Subtitle E, of the Patient Protection and Affordable Care Act.

(d) Effective/applicability date. This section applies to disclosures to the Department of Health and Human Services on or after these proposed regulations are published as final regulations in the **Federal Register**.

Steven T. Miller,  
Deputy Commissioner for Services and Enforcement.