

**MSP
#15****AFFORDABLE CARE ACT (ACA) – INDIVIDUALS: The IRS Is Compromising Taxpayer Rights As It Continues to Administer the Premium Tax Credit and Individual Shared Responsibility Payment Provisions****RESPONSIBLE OFFICIALS**

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*

DEFINITION OF PROBLEM

Overall, the IRS has done a commendable job of implementing the first stages of the Patient Protection and Affordable Care Act of 2010 (ACA), including developing or updating information technology systems, issuing guidance, and collaborating with other federal agencies.² The 2015 filing season (FS) presented difficult challenges with the introduction of the Individual Shared Responsibility Payment (ISRP)³ and the Premium Tax Credit (PTC)⁴ on tax year (TY) 2014 federal income tax returns. At the

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (2010).

3 Internal Revenue Code (IRC) § 5000A. Taxpayers filing tax year (TY) 2014 federal income tax returns were required to report they have “minimum essential coverage” (MEC) or were exempt from the responsibility to have the required coverage. If the taxpayer did not have coverage and was not exempt, he or she was required to make a shared responsibility payment (SRP) when filing a return.

4 PTC is a refundable tax credit paid either in advance or at return filing to help taxpayers with low to moderate income purchase health insurance through the exchange. IRC § 36B. The amount of the credit paid in advance is based on projected household income (HHI) and family size for the year of coverage, while the amount for which a taxpayer is actually eligible is based on actual HHI and family size for the year reflected on the tax return. Many taxpayers were required to reconcile the credit amount they received in advance with the PTC to which they were actually entitled. IRC § 36B(f).

same time, the IRS received and processed new information returns from insurers and exchanges.⁵ While the IRS performed well overall, several developments will likely result in significant burden imposed on both taxpayers and the IRS in future years:

- Taxpayers who received the advanced premium tax credit (APTC) in 2014 and did not file TY 2014 returns (and the Form 8962, *Premium Tax Credit (PTC)*) by Fall 2015 will face difficulties receiving APTC payments in 2016;
- The pre-refund Automated Questionable Credit (AQC) procedures for PTC mismatches impose the same burden as a post-refund PTC examination without the same due process protections, thereby subverting the statutory protections against multiple audits of the same return;⁶
- Taxpayers who receive certain large lump sum payments after receiving APTC may be caught off guard by having to repay APTC amounts, as well as penalties and interest;
- The absence of the Second Lowest Cost Silver Plan (SLCSP) amounts on some Forms 1095-A, *Health Insurance Marketplace Statement*, are delaying the processing of PTC returns and imposing unnecessary burden on taxpayers; and
- The inability of health insurers and self-insured employers to match taxpayer identification numbers (TINs) before filing leads to unnecessary mismatches and notices, increasing issuer burden and wasting IRS resources.

ANALYSIS OF PROBLEM

Background

ACA was enacted by Congress in 2010 to provide affordable health care coverage for all Americans. To accomplish this goal, the ACA provides targeted tax credits for low income individuals and for small businesses, while imposing a personal responsibility on individuals to have health coverage.⁷

Filing Season 2015 Overall Results

Since enactment, the IRS has been implementing complicated ACA provisions that require developing or updating information technology systems, issuing guidance, and collaborating with other federal agencies. The IRS implementation efforts were tested during FS 2015. The IRS achieved a relatively high level of service (LOS) on the ACA telephone hotline (800-919-0452) at about 61 percent for fiscal year (FY) 2015, which far exceeded the 38 percent overall LOS on the Accounts Management (AM) toll-free

5 The Health Insurance Marketplace, also called the “exchange,” is a state- or federally-operated program where individuals can buy health care coverage. Coverage is available to people who are uninsured or who buy insurance on their own. See <http://www.irs.gov/uac/Newsroom/The-Health-Insurance-Marketplace>. IRC § 6055 and the regulations thereunder require every person (*i.e.*, health insurance issuers, self-insuring employers, government agencies, and other providers of health coverage) that provides MEC (as defined in IRC § 5000A(f)) to an individual to report to the IRS information about the coverage of each individual covered under the policy. IRC § 6056 requires annual information reporting by applicable large employers (ALEs) relating to the health insurance that the employer offers (or does not offer) to its full-time employees. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013) and T.D. 9660, 2014-13 I.R.B. 842 provide transition relief by delaying the information reporting required under IRC §§ 6055 and 6056 until 2016 for coverage in 2015, but the IRS has encouraged entities to voluntarily provide information returns for coverage provided in 2014, which was due to be filed and furnished in early 2015.

6 The IRS is prohibited from conducting unnecessary examinations or investigations pursuant to IRC § 7605(b).

7 IRC § 4980H(a)(1) imposes a responsibility for ALEs to offer health care to employees in certain circumstances. ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by HCERA, Pub. L. No. 111-152, 124 Stat. 1029 (2010); Senate Finance Committee, *Description of Policy Options: Expanding Health Care Coverage: Proposals to Provide Affordable Coverage to All Americans* (May 14, 2009).

lines.⁸ The IRS received and processed new information returns from employers, insurers, and exchanges. Taxpayers filing TY 2014 federal income tax returns were required to report that they had “minimum essential coverage” (MEC) or were exempt from the responsibility to have the required coverage in 2014. If the taxpayer did not have coverage and was not exempt, he or she was required to make an ISRP when filing the 2014 return.⁹ The following figure provides data on the reporting of ISRPs on TY 2014 returns:

FIGURE 1.15.1, Reporting of Individual Shared Responsibility Payments on TY 2014 Returns Through August 27, 2015¹⁰

Returns claiming coverage	106 million
Returns with ISRP	7.6 million
Average ISRP	\$204
Prepared returns reporting ISRP	5.0 million
Forms 8965	12.1 million
Forms 8965 Claiming Household Coverage Exemption	3.65 million
Forms 8965 Claiming Coverage Exemption	8.4 million
Forms 8965 Submitted with Prepared Return	6.5 million

Additionally, eligible individual taxpayers claimed the PTC for the first time on TY 2014 returns filed during FS 2015 filing. If the taxpayers received the credit in advance, they had to reconcile the APTC amount with the amount of the credit to which they were entitled.¹¹ The following figure provides information regarding the extent to which individual taxpayers claimed the PTC on their TY 2014 returns.

FIGURE 1.15.2, Reporting of the Premium Tax Credit on Forms 8962 for TY 2014 Returns Through August 27, 2015¹²

Forms 8962	3.3 million
Total PTC Claimed	\$9.9 billion
Average PTC	\$3,011
Returns reporting APTC	3.1 million (93% of total PTC returns)
Total APTC Reported	\$11.3 billion
Forms 8962 Submitted with Prepared Returns	2.0 million (61% of total PTC returns)

8 The AM LOS of approximately 38 percent is a combined figure reflecting 30 customer service lines. The higher LOS on the ACA line may be due, at least in part, to the fact that the number of calls to the ACA line was significantly lower than the IRS anticipated. IRS, *FY 2015 President’s Budget* 4-5, 19-23. The ACA line received about one million net attempted calls, as compared with over 101 million on the AM lines overall during the period. IRS, Joint Operations Center (JOC), *Product Line Detail (Enterprise Performance)* (week ending Sept. 30, 2015); IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2015).

9 IRC § 5000A.

10 Wage & Investment Research and Analysis (WIRA), *ACA Fact Sheet* (Oct. 8, 2015) (returns processed through August 27, 2015, Cycle 34). This data is based on amounts claimed on returns that had posted as of August 27, 2015, and is preliminary and subject to change as the IRS reviews the data, processes additional TY 2014 returns and conducts compliance activities. IRS Compliance Data Warehouse (CDW), Individual Returns Transaction File for TY 2014 (through cycle 201534).

11 IRC § 36B(f). The amount of the credit paid in advance is based on projected income while the amount for which a taxpayer is actually eligible is based on actual income.

12 WIRA, *ACA Fact Sheet* (Oct. 8, 2015) (returns processed approximately Aug. 27, 2015). This data is based on amounts claimed on returns that had posted as of August 27, 2015, and is preliminary and subject to change as the IRS reviews the data, processes additional TY 2014 returns, and conducts compliance activities.

Significant Issues That Arose During Filing Season 2015

As FS 2015 progressed, the IRS ran into the following three significant issues.¹³

A SIGNIFICANT NUMBER OF TAXPAYERS OVERSTATED THE ISRP ON TY 2014 RETURNS

Approximately 412,000 taxpayers overstated their ISRP, totaling about \$50.6 million through August 27, 2015 (cycle 34).¹⁴ The *average* ISRP overstatement amount was almost \$123 per return.¹⁵ These taxpayers did not owe an ISRP for reasons that include:¹⁶

- The taxpayer was eligible for an ISRP exemption because the reported income is below the income tax filing threshold;¹⁷
- The taxpayer indicated that he or she could be claimed on another return;¹⁸ and
- Transposition, calculation, or input error.

The IRS decided to issue soft notices to impacted taxpayers. On November 27, 2015, the IRS began issuing approximately 319,000 Letters 5600-C informing taxpayers of the potential overpayment and instructing them to file an amended return and attach Form 8965, *Health Coverage Exemptions*, if applicable. The IRS is exploring the feasibility of systemically adjusting ISRP amounts through programming. If feasible, the IRS would be able to take this action in late Spring 2016.¹⁹ We believe that the IRS should take preventative measures to avoid ISRP overpayments in the future, such as distributing educational notices to preparers associated with overpayments and conducting a comprehensive review and testing of private-sector tax filing software to ensure that problems arising in FS 2015 do not recur.²⁰

13 For a detailed discussion of these issues, see National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 38-47 (*The IRS's Administration of the Affordable Care Act Has Gone Well Overall, But Some Glitches Have Arisen*).

14 WIRA analysis on ISRP overstatements, through cycle 34 (August 27, 2015), on file with TAS Research. The IRS cannot calculate the exact amount of ISRP overpayments until all dependents have filed their TY 2014 tax returns (The amount of the ISRP depends on HHI pursuant to IRC § 5000A(c)).

15 This average only includes returns with an ISRP overstatement.

16 More than 268,000 taxpayers were eligible for an ISRP exemption. These taxpayers paid in over \$33 million in ISRP. In addition, more than 50,000 taxpayers paid a total of nearly \$12.7 million because the ISRP amount was miscalculated. The remaining nearly 93,000 taxpayers had multiple adjustments to an ISRP, overstatements of \$50 or less, or returns under IRS Examination (totaling almost \$4.7 million). These amounts include returns processed by the IRS through the end of August 2015. WIRA estimates from the Individual Returns Transaction File on the IRS CDW. This data is preliminary and is subject to change as the IRS reviews the data, processes additional TY 2014 returns, and conducts compliance activities.

17 IRC § 5000A(e)(2).

18 IRC § 5000A(a).

19 W&I response to TAS information request (Oct. 29, 2015); W&I response to TAS fact check (Dec. 14, 2015) (the IRS expected to mail all letters by December 31, 2015).

20 To determine the experience of taxpayers and find out if the Free File programs accurately calculate the ISRP and determine exemption eligibility, TAS created three scenarios and tested them on each of the 14 Free File sites during FS 2015. We found that four programs correctly calculated no ISRP due to an applicable exemption, but never informed the taxpayer whether he or she qualified for the exemption of income amounts that were below the filing threshold. One program did not seem to support IRS Form 8965, *Health Coverage Exemptions*. The program did not provide the appropriate prompts to take the hardship exemption and incorrectly calculated ISRP. Three programs assumed the user already knew about the available exemptions and did not provide sufficient guidance. We reported our findings to the IRS and the IRS coordinated with the Free File Alliance and all software providers associated with any of the above-mentioned problems adjusted their programs to avoid similar errors in the future. For a more detailed discussion of the FS 2015 Free File software issues, see National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 38-47 (*The IRS's Administration of the Affordable Care Act Has Gone Well Overall, But Some Glitches Have Arisen*).

EXCHANGES MADE ERRORS ON FORMS 1095-A, LEADING TO AN IRS RESOLUTION TO REDUCE TAXPAYER BURDEN

The Centers for Medicare and Medicaid Services (CMS) announced in February 2015 that about 20 percent (or 800,000) of the tax return filers who purchased health insurance from the federal exchange received Forms 1095-A, *Health Insurance Marketplace Statement*, with errors in the SLCSF information.²¹ The exchange issued corrected Forms 1095-A. The Department of Treasury publicly stated that the IRS would not pursue collection of any additional taxes or require the taxpayer to file an amended return based on the updated information in the corrected forms if the taxpayer filed a 2014 tax return with the incorrect Form 1095-A amounts.²² On April 10, 2015, the IRS issued Notice 2015-30, providing penalty relief for incorrect or delayed Forms 1095-A for taxpayers who timely filed their 2014 return.²³

The IRS identified returns with errors in the SLCSF, but did not issue guidance to all employees on how to distinguish taxpayers impacted by the CMS announcement.²⁴ We believe the IRS may adjust the PTC on returns filed with an incorrect Form 1095-A and pursue collection since there is no guidance to prevent this from occurring. TAS will be monitoring its own case receipts to see if such collection activity, including refund offsets, is taking place, and will work with the IRS to issue interim guidance.

Approximately 412,000 taxpayers overstated their Individual Shared Responsibility Payment (ISRP) totaling about \$50.6 million through August 27, 2015 (cycle 34). The average ISRP overstatement amount was almost \$123 per return.

TAXPAYERS WHO RECEIVED APTC IN 2014 AND DID NOT FILE TY 2014 RETURNS (AND FORM 8962) BY FALL 2015 WILL FACE DIFFICULTIES RECEIVING APTC IN 2016

The Department of Health and Human Services (HHS) regulations that implement the ACA include a process for re-enrolling taxpayers in health insurance and determining their eligibility for the APTC. To determine eligibility, the regulations require the exchange to verify income and family size with the IRS.²⁵ The IRS has begun to provide a response code during the verification process that signifies that a taxpayer has not filed a tax return reconciling the amount of APTC received.²⁶ The response code indicates to the Marketplace that a taxpayer may not be eligible to receive the APTC for the new coverage year. It is our understanding that the IRS began to provide such response codes during Marketplace open enrollment for coverage year 2016, which began on

21 The amount of the SLCSF is a factor used to determine the amount of PTC a taxpayer is allowed. The SLCSF is based on such factors as an individual's age and the area in which he lives. IRC § 36B(b)(3)(B).

22 U.S. Department of Treasury, Press Center, *Statement from a Treasury Spokesperson on CMS Announcement Last Week About 1095-A* (Feb. 24, 2015) and *Statement from a Treasury Spokesperson on Forms 1095-A* (Mar. 20, 2015), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl9981.aspx> and <http://www.treasury.gov/press-center/press-releases/Pages/jl10005.aspx>, respectively. See also Treasury Inspector General for Tax Administration, Ref. No. 2015-43-043, *Affordable Care Act: Assessment of Internal Revenue Service Preparation for Processing Premium Tax Credit Claims 12* (May 11, 2015) (urging the IRS to develop a tool to enable taxpayers to determine the correct SLCSF premium); SERP Alert 15A0147, *Responding to Taxpayer Inquiries about Corrected Forms 1095-A, Health Insurance Marketplace Statements* (Feb. 26, 2015, rev. Apr. 6, 2015).

23 Notice 2015-30, 2015-17 I.R.B. 928 (Apr. 27, 2015). For more information regarding the impact of the incorrect Forms 1095-A as well as the National Taxpayer Advocate's concerns, see National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 38-47 (*The IRS's Administration of the Affordable Care Act Has Gone Well Overall, But Some Glitches Have Arisen*).

24 IRM 3.12.3.75.9, *Error Code 198, Form 8962, Annual/Monthly SLCSF Amount(s), Column B (ACA)* (Jan. 1, 2015).

25 45 CFR § 155.335, Annual eligibility redetermination; HHS, *Guidance on Annual Eligibility Redeterminations and Re-enrollments for Marketplace Coverage for 2016* (Apr. 22, 2015), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/annual-redeterminations-for-coverage-42215.pdf>.

26 In some cases the taxpayer may have filed a tax return but did not attach the Form 8962 which is necessary to reconcile the APTC. IRS ACA Office response to TAS information request (Nov. 5, 2015).

November 1, 2015.²⁷ For all taxpayers who previously received the APTC and filed their tax returns and Form 8962 by the date of the verification, the exchanges automatically re-enrolled the taxpayers and recalculated their 2016 APTC amount during the fall of 2015. Taxpayers who failed to file a tax return (or who filed and failed to attach Form 8962) by the date of the verification, regardless of whether they had a valid extension of time to file, will be re-enrolled in their insurance for 2016; however, they will not automatically receive the APTC.²⁸ To receive the APTC, these taxpayers will have to file their 2014 tax return, including a reconciliation on Form 8962, and then go back to the Marketplace for a redetermination of their eligibility for the APTC. This creates extra burden for taxpayers to reestablish their eligibility for the advanced credit. Some taxpayers may erroneously believe their automatic re-enrollment in their insurance plan also includes APTC re-enrollment and not take the steps necessary to receive the APTC in 2016.

The National Taxpayer Advocate is concerned about the burden imposed on taxpayers due to the timing of the verification process between the IRS and the exchanges. Approximately 360,000 taxpayers with APTC filed for an extension for TY 2014 returns, which allows them to file on or before October 15, 2015.²⁹ It is our understanding that balance due returns take longer to process and a significant portion of these returns may have been impacted by such response codes in the verification process.³⁰

Commendably, the IRS sent Letters 5591 or 5591A to APTC recipients who had not filed tax returns but received APTC. The IRS also sent Letter 5596 to APTC recipients who had yet to file a 2014 return but had filed for an extension. The letters urged the recipient to file as soon as possible to avoid a gap in receiving APTC in 2016.³¹ The following figure sets forth how many of each type of letter the IRS sent, as well as the dates mailed:

FIGURE 1.15.3, Letters Sent to APTC Recipients Who Had Not Yet Filed Returns³²

Type of IRS Letter	Count	Dates Mailed
Ltr 5591	567,976	July 10, 2015 to July 30, 2015
Ltr 5591A	149,688	July 31, 2015 to Aug. 21, 2015
Ltr 5596	337,065	Aug. 6, 2015 to Aug. 21, 2015

TAS did not have the opportunity to provide meaningful review of some of the letters prior to final approval by the IRS. We believe that the letters did not adequately warn taxpayers of the need to file returns by a particular date to avoid a cumbersome process to continue receiving APTC in 2016. We advise the IRS to work with the National Taxpayer Advocate on revisions to Letters 5591, 5591A, and 5596

27 IRS ACA Office response to TAS information request (Nov. 5, 2015).

28 HHS *Guidance on Annual Eligibility Redeterminations and Re-enrollments for Marketplace Coverage for 2016* (Apr. 22, 2015), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/annual-redeterminations-for-coverage-42215.pdf>. IRS ACA Office response to TAS information request (Nov. 5, 2015).

29 IRS Commissioner John Koskinen Letter to Members of Congress 3 (July 17, 2015), available at <http://www.irs.gov/pub/irs-utl/CommissionerLetterwithcharts.pdf>.

30 IRM 21.3.12.2, *Balance Due Research* (Oct. 1, 2015). TAS encounters this issue when the taxpayer needs the return posted for purposes of getting tax transcripts for financial aid, loan applications, and proof of income. The payments for some balance due returns are visible on the account, but no associated return has posted. IRM 1.2.3.5.7, *Transcript Restrictions and Special Handling* (Aug. 19, 2015).

31 IRS Letters 5591, 5591A, 5596.

32 W&I response to TAS information request (Oct. 29, 2015).

Despite the fact that the Letter 4800C begins with the language, “This is not an audit. Your return may be examined in the future,” we are concerned that the Automated Questionable Credit (AQC) process and the documentation requirements imposed on the taxpayers under AQC are substantially similar to those in an examination.

for FS 2016. The IRS should provide outreach and education early in the filing season to inform taxpayers about the consequences of filing for an extension if they received the APTC, or at least, the risk of waiting until fall to file even with a valid extension.

The Pre-Refund Automated Questionable Credit (AQC) Procedures for PTC Mismatches Impose the Same Burden As a Post-Refund PTC Exam Without the Same Due Process Protections, Thereby Subverting the Statutory Protections Against Multiple Audits of the Same Return

The IRS is generally prohibited by Internal Revenue Code (IRC) § 7605(b) from auditing a return twice.³³ IRC § 7605(b) first appeared as § 1309 of the Revenue Act of 1921.³⁴ At that time, Congress designed the section in response to taxpayer complaints that revenue agents were subjecting them to onerous and unnecessarily frequent examinations and investigations. The purpose of the section was to relieve taxpayers from unnecessary annoyance.³⁵ Accordingly, the manner in which the IRS is conducting pre-refund “reviews” of taxpayers’ PTC returns raises serious concerns about the IRS subjecting taxpayers to multiple audits and undermining this important protection.

During submission processing, the IRS ACA Verification Service (AVS) matches data reported on PTC returns with data reported from the Marketplace. AVS checks all returns to verify if the taxpayer received APTC and reconciled the advance payment on Form 8962, *Premium Tax Credit (PTC)*. If the data does not match or the APTC was not reconciled on Form 8962, the IRS will delay processing the return and send the taxpayer Letter 12C, requesting a corrected Form 8962, or Form 1095-A, *Health Insurance Marketplace Statement*, to support the credit and reconcile the APTC.³⁶

The IRS cannot use math error authority to adjust return discrepancies attributable to third-party data mismatch. In those cases, the IRS places a freeze on the refund, or a portion thereof, and refers the return to Compliance for further treatment.³⁷

33 See IRC § 7605(b); Rev. Proc. 2005-32, § 4.03, 2005-1 C.B. 1206 (discussing procedures the IRS does not consider examinations). IRC § 7605(b) provides “No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer’s books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.”

34 Revenue Act of 1921, ch. 136, § 1309, 42 Stat. 310 (1921) (now codified at IRC § 7605(b)).

35 Harold Dubroff and Brant J. Hellwig, *United States Tax Court: A Historical Analysis: A Historical Analysis*, Government Printing Office fn. 100 (2d. Ed. 2015); *United States v. Powell*, 379 U.S. 48, 54-55 (1964) (quoting the statement of Senator Penrose, the manager of the bill: “I know that, from many of the cities of the country, very bitter complaints have reached me and have reached the department of unnecessary visits and inquisitions after a thorough examination is supposed to have been had. This section is purely in the interest of quieting all this trouble, and in the interest of the peace of mind of the honest taxpayer.”).

36 For FY 2015 the IRS issued 684,332 total ACA-related correspondences. From March 2, 2015, to November 28, 2015, 124,639 returns were suspended for research prior to correspondence for PTC matching issues. Of the suspended returns, 69,019 were resolved via research and 55,620 required correspondence. W&I response to TAS information request (Oct. 29, 2015); W&I response to TAS fact check (Dec. 14, 2015).

37 IRM 21.6.3.4.2.16.3, *At-Filing Overview* (Oct. 1, 2015); IRC § 6213(b). Examples of third-party data mismatch include the following: (1) The taxpayer claims PTC but the taxpayer’s household income (HHI) is less than 100 percent of the Federal Poverty Line (FPL) and all tax family members are U.S. citizens; (2) The taxpayer claims PTC but there is no record that anyone claimed on the return was enrolled in a Qualified Health Plan through the Marketplace; (3) Marketplace data is available for all months and the taxpayer’s annual premium amount does not equal the annual premium reported by the Marketplace; (4) Marketplace data is available for all months and the taxpayer’s annual premium of SLCSPP does not equal the annual SLCSPP reported by the Marketplace; and (5) Marketplace data is available for all months and the annual APTC reported by the taxpayer does not equal the annual APTC reported by the Marketplace. IRM 25.25.7.8.1, *Premium Tax Credit (PTC) Error Codes (ERC) (associated with AQC)* (Jan. 9, 2015).

Depending on the type of PTC discrepancy, the IRS refers the return either to Examination to work as a traditional audit or to the AQC program for a similar “audit” process.³⁸ If referred to AQC, the IRS sends a Letter 4800C, *Questionable Credit 30 Day Contact Letter*, which proposes an adjustment and requests Form 1095-A.³⁹

Despite the fact that the Letter 4800C begins with the language, “This is not an audit. Your return may be examined in the future,” we are concerned that the AQC process and the documentation requirements imposed on the taxpayers under AQC are substantially similar to those in an examination. In AQC, if a Form 1095-A is not verified, the IRS will ask for “documentation proving premium payments, copies of insurance enrollment forms, invoices, or statements from the insurance providers that include the names of those covered by the benefits.”⁴⁰ An examination of the same issue requires the same documentation on Form 14950, *Premium Tax Credit Verification*, which requests “copies of insurance enrollment forms, invoices, or statements from your insurance providers.”⁴¹

The National Taxpayer Advocate believes that if a taxpayer submits the same information when the return is in AQC as he would in an exam, the AQC constitutes an actual examination of the taxpayer’s books and records. When the IRS doesn’t classify these tax AQC adjustments as an examination, the IRS does not trigger the taxpayer’s right to avoid unnecessary examinations.⁴² This position enables the IRS to later conduct an examination of a taxpayer who already has been subjected to an examination of the same return, thereby undercutting an important taxpayer protection enacted by Congress to avoid that very result.

TAS requested an opinion from the Office of Chief Counsel on whether an AQC inquiry into a PTC matching issue constitutes an audit for purposes of IRC § 7605. We received advice in the form of an email which concluded that such AQC inquiries do not constitute an exam for purposes of IRC § 7605(b). The Office of Chief Counsel, Procedure and Administration provided the following advice:⁴³

Revenue Procedure 2005-32 defines a number of taxpayer contacts that are not examinations for purpose of section 7605(b). Among those contacts that do not constitute an examination are matching information on a return with information already in the Service’s possession and

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- 38 The AQC program is a type of work stream IRS uses to resolve refundable credit discrepancies that generally do not meet the traditional Examination or AM work stream type. IRM 25.25.7.1, *Automated Questionable Credit (AQC) Overview* (Jan. 9, 2015).
- 39 If the taxpayer provides an incomplete response to the 4800C, the AQC tax examiner attempts to reach the taxpayer by phone to request additional information. If the examiner is unable to reach the taxpayer by phone, AQC sends Letter 131C, *Information Insufficient or Incomplete for Processing Inquiry*, to request additional documentation in writing. If the taxpayer provides information in response to the Letter 4800C indicating disagreement with the proposed adjustment, but the taxpayer provides documents deemed insufficient or if AQC does not receive a response from the taxpayer, the AQC tax examiner issues a Statutory Notice of Deficiency (SNOD) or Claim Disallowance letter. If there is no response within the notice period, IRS defaults the SNOD and removes the credit from the taxpayer’s account. IRM 25.25.7.2, *AQC Inventory Types* (June 1, 2015); IRM 25.25.7.4(8) & (9) (June 8, 2015).
- 40 IRM 25.25.7.2, *AQC Inventory Types* (June 1, 2015).
- 41 In FY 2015, the IRS routed 20,147 accounts to AQC for PTC mismatch issues. Of the 20,147 referred to AQC, 8,034 cases were referred to Exam (ERC 197, 198 and 199 determined to need recalculations and Exam treatment) and 6,312 were resolved. The additional 5,801 cases remained open in AQC suspense at the end of FY 2015. The IRS selected 18,810 TY 2014 PTC returns for examination during 2015 (through Sept. 25, 2015). Of the selected cases, Exam closed 2,322 returns, of which 885 were no change; 1,356 were agreed, and 81 were disagreed/default. The 885 no change cases include 462 cases selected incorrectly due to a programming error (figures reflect W&I). W&I response to TAS information request (Oct. 29, 2015); W&I response to TAS fact check (Dec. 14, 2015).
- 42 IRC § 7605(b).
- 43 Email from the Office of Chief Counsel (Nov. 13, 2015), on file with TAS.

considering any records the taxpayer provides voluntarily to explain a discrepancy between a filed return and information from third parties that is used as part of a matching program. Rev. Proc. 2005-32 § 4.03(1)(b) & (c). An example of this kind of contact is “a contact with a taxpayer to... verify a discrepancy between the taxpayer’s tax return and an information return, or between a tax return and information otherwise in the Service’s possession.” *Id.* at 4.03(1)(d)(ii)(C). Here, the Service is contacting a taxpayer to resolve a discrepancy between a taxpayer’s Form 1095-A or Forms 1040 and 8962 and the 1095-A, already in the Service’s possession, provided by the Health Insurance Marketplace. Such a contact falls squarely within the revenue procedure’s definition of a contact that does not constitute an examination.

Even if the Service requests that the taxpayer provide additional documentation, such as proof of premium payments or copies of insurance enrollment forms, this contact should not constitute an examination. Requesting this information is a contact designed to verify a discrepancy between the taxpayer’s return and information obtained as part of a matching program. It appears to fall within the example the Revenue Procedure provides of the type of contact that does not constitute an examination. *Id.* This interpretation of the revenue procedure is amplified by Policy Statement 4-3. That policy statement states, “contact[s] to verify a discrepancy disclosed by an information return matching program may include inspection of the taxpayer’s books of account, to the extent necessary to resolve the discrepancy, without being considered an inspection within the meaning of section 7605(b) of the Code.” IRM 1.2.13.1.1(5). In this case, the documents the Service is likely to request are only those necessary to resolve the discrepancy. See IRM 25.25.7.2 (listing the documents the Service will request).

We strongly disagree with the Office of Chief Counsel on its conclusion. Their response relies on its own administrative guidance and does not squarely address the point that the IRS is asking for the *exact same* information from a taxpayer in a post-refund audit as it asks from a taxpayer in a pre-refund “non-audit.” The Office of Chief Counsel advice is calling a wolf a lamb because it is wearing a sheepskin on its back. Because in our view the AQC review is an examination, the IRS must follow formal audit reopening procedures if it tried to conduct a subsequent examination on the tax return in question.⁴⁴

The IRS may compromise the taxpayer’s right to an appeal and impose unnecessary delays on the taxpayer while the IRS holds the PTC portion of the taxpayer’s refund.⁴⁵ If the taxpayer replies to Letter 4800C and makes changes that do not match AQC’s proposed changes, AQC sends Letter 89C, *Amended Return Required to Correct Account*, to require the taxpayer to file an amended return. If this procedure were properly characterized as an examination, and the IRS proposed an adjustment, the IRS would offer the taxpayer administrative appeal rights, and the taxpayer would eventually have the right to appeal in the U.S. Tax Court upon receiving the statutory notice of deficiency.⁴⁶

44 The audit reopening procedures can be found in Rev. Proc. 2005-32, 2005-23 I.R.B. 1206 (June 6, 2005); IRM, 1.2.13.1.1, *Policy Statement 4-3* (Dec. 21, 1984).

45 IRM 25.25.7.3, *AQC Initial Case Processing* (Jan. 9, 2015).

46 In the AQC process, the taxpayer may also face additional delays. If the taxpayer submits an amended return to AQC and the amended return changes the amount of the PTC other than the amount proposed by AQC, the taxpayer’s return must then go through the IRS AM function to process the amended return. IRM 25.25.7.4, *Taxpayer Responses* (Aug. 25, 2015). AM reviews the claim for examination criteria and refers it to Examination if the criteria are met. IRM Exhibit 21.5.3-1, *Claim Processing with Examination Involvement* (Oct. 1, 2014). If these returns were sent to Examination from the onset, there would be no need for AQC and AM involvement, which created taxpayer burden and caused unnecessary delays. IRM 25.25.7.4, *Taxpayer Responses* (Aug. 25, 2015).

We understand that the IRS has a responsibility to protect revenue and avoid issuing improper refunds. However, we believe the IRS can achieve this goal without violating the statutory restrictions on multiple audits. It needs to coordinate the detection of PTC discrepancies with the detection of other questionable claims by the IRS's other systems (*e.g.*, the Dependent Database or Electronic Fraud Detection System). It can include all such concerns in one pre-refund or post-refund contact with the taxpayer. This approach not only protects taxpayers' rights and comports with the law, but it is also a highly efficient use of IRS resources, and minimizes taxpayer burden.

Taxpayers Who Receive Certain Lump Sum Payments After Receiving APTC May Be Caught Off Guard by Having to Repay Large APTC Amounts As Well As Penalties and Interest

To be an eligible taxpayer for the PTC, a taxpayer's household income (HHI) for the taxable year should be between 100 to 400 percent of the federal poverty line (FPL) for their family size.⁴⁷ When the taxpayer applies for coverage, the Marketplace estimates the amount of the PTC that the taxpayer can claim for the year using information provided about family composition and projected HHI. Based upon that estimate, the taxpayer may decide to receive the amount of PTC in advance.⁴⁸ If the PTC and APTC were calculated based on projected income between 100 and 400 percent of FPL, but the taxpayer's actual HHI calculated on the tax return is more than 400 percent of the FPL, the taxpayer must repay the full amount of the excess APTC (the amount by which APTC exceeds the PTC allowed).⁴⁹

When the IRS doesn't classify these tax Automated Questionable Credits adjustments as an examination, the IRS does not trigger the taxpayer's right to avoid unnecessary examinations.

The IRS and HHS remind taxpayers who receive APTC to report change in circumstances, including changes in income, to the Marketplace as soon as possible to prevent instances of having to repay APTC amounts.⁵⁰ It is likely that many taxpayers were not aware of the complex consequences of receiving lump sum amounts of certain types of income. It is our understanding that some taxpayers who receive lump sum amounts from retroactive awards of Social Security disability are required to repay the full amount of APTC because the lump sum amounts push HHI above the 400 percent FPL limit.⁵¹ TAS is currently reviewing this issue to determine the need for increased outreach communications to alert appropriate APTC recipients to possible consequences of receiving large lump sum distributions.

The Absence of the SLCSP Amounts on Some Forms 1095-A Are Delaying the Processing of PTC Returns and Imposing Unnecessary Burden on Taxpayers

Taxpayers who receive coverage from the Marketplace receive Form 1095-A, *Health Insurance Marketplace Statement*. Part III of Form 1095-A should provide the SLCSP amount, which is used to calculate the PTC or reconcile the amount of

47 IRC § 36B(c)(1).

48 If the taxpayer is eligible for and decides to receive APTC, the Marketplace sends payments directly to the insurance provider on the taxpayer's behalf, reducing the taxpayer's out-of-pocket premium expense. If the taxpayer receives the APTC, the taxpayer must reconcile the payments made on his or her behalf with the actual PTC allowed on the tax return, as computed on Form 8962, *Premium Tax Credit (PTC)*. IRC § 36B(f).

49 The repayment cap in IRC § 36B(f)(2)(B) does not apply to taxpayers whose HHI exceeds 400 percent FPL.

50 See IRS Pub. 5152, *Report Changes to the Marketplace as They Happen: Important Reminder About Advance Payments of the Premium Tax Credit*.

51 Systemic Advocacy Management System (SAMS) entries, on file with the National Taxpayer Advocate. SAMS is a database of issues and information reported by IRS employees and the public. TAS reviews each SAMS submission and elevates them to the IRS for advocacy and resolution as appropriate.

It is our understanding that some taxpayers who receive lump sum amounts from retroactive awards of Social Security disability are required to repay the full amount of Advanced Premium Tax Credit because the lump sum amounts push household income above the 400 percent Federal Poverty Line limit.

APTC received on Form 8962. However, if the taxpayer purchased insurance through the Marketplace, and chose not to receive the credit in advance, the Marketplace issued the TY 2014 Form 1095-A without the SLCSP information. When the taxpayer filed the TY 2014 tax return, with the Form 8962 to claim a PTC and filled in the SLCSP based on information from the Marketplace at the time of enrollment, it causes a mismatch to occur.

The absence of the SLCSP on Form 1095-A is very confusing to taxpayers. IRS Publication 974, *Premium Tax Credit*, directs the taxpayer to SLCSP premium tools on the Federally-facilitated or state Marketplace websites to look up the SLCSP premium that applies to the taxpayer's coverage family for each month.⁵² The Internal Revenue Manual (IRM) is silent on supporting documentation employees can accept from taxpayers when the SLCSP information on Form 1095-A is blank or incorrect.⁵³

The lack of procedural guidance on this issue could cause delays in processing returns even when taxpayers follow guidance provided in Publication 974 or on Healthcare.gov. TAS received reports regarding IRS employees refusing to accept taxpayer SLCSP documentation that was either not directly provided by the Marketplace or that couldn't be verified by IRS resources.⁵⁴

Taxpayers need to go directly to the Marketplace to get that information on their own, but this is something that is available early on and the Marketplace should include it on all Forms 1095-A, regardless of whether the taxpayer received the APTC. Such a seemingly minimal effort on part of the Marketplace should significantly reduce burden on both taxpayers and the IRS. The IRS should reform its rules for exchange reporting on Forms 1095-A and require the Marketplace to provide the SLCSP amounts on all such forms.

The Inability of Health Insurers and Self-Insured Employers to Match TINs Before Filing Leads to Unnecessary Mismatches and Notices, Increasing Issuer Burden and Wasting IRS Resources

The IRS has not expanded the TIN matching program to health insurers and self-insured employers that are required to file Form 1095-B, *Health Coverage*.⁵⁵ The current e-Services TIN Matching Program (TMP) allows participating payers of reportable payments subject to backup withholding under IRC § 3406(b) to match the TIN and name of payees subject to potential backup withholding with IRS

52 IRS Pub. 974, *Premium Tax Credit*, 16 (rev. Mar. 2015).

53 IRM 3.12.3.75.9, *Error Code 198, Form 8962, Annual/Monthly SLCSP Amount(s) (ACA)* (Jan. 1, 2015), instructs the examiner to compare Form 1095-A data with taxpayer's SLCSP entries on Form 8962. If the amounts do not match or Form 1095-A is not present on the IRS system, the IRS sends correspondence to the taxpayer. If the taxpayer replies providing a Form 1095-A, the IRM instructs the examiner to compare the Form 1095-A provided by the taxpayer with taxpayer's entries on Form 8962.

54 SAMS entries, on file with TAS.

55 IRC § 6055. Currently, the law authorizes the IRS TIN Matching program only for payers of reportable payments subject to backup withholding. See IRC § 3406; Treas. Reg. § 31.3406(j)-1; Rev. Proc. 2003-9, 2003-8 I.R.B. 516 (Feb. 24, 2009).

records prior to filing the information report.⁵⁶ Using the TMP helps payers avoid penalties for submitting incorrect TINs on information returns.⁵⁷

TMP would benefit the filers of Forms 1095-B which provide the names and TINs of all covered individuals and the months for which they had MEC. The IRS will use the forms to verify an individual's compliance with the ISRP. The reporting entities are required to begin filing the forms during FS 2016.⁵⁸

Many Form 1095-B filers have never had to verify the accuracy of the name/TIN information and the inability to verify the information before issuing the forms could cause inaccurate TIN reporting. If information returns with incorrect or incomplete names or TINs are submitted (because the issuers are not able to run the numbers through the IRS TIN matching program before filing), the IRS will not be able to verify that individuals have MEC. Therefore, even covered individuals could receive notices imposing the ISRP.⁵⁹

CONCLUSION

During FS 2015, the IRS faced a few unanticipated challenges that resulted in increased taxpayer burden with respect to the ACA. In general, the IRS has sufficiently addressed the issues as they arise in order to avoid similar issues in future filing seasons. The National Taxpayer Advocate remains concerned about the burdens imposed on taxpayers who received APTC, but failed to file their TY 2014 returns by the time the IRS must verify income and family size for re-enrollment in 2016. We are also concerned that AQC procedures for APTC mismatch and reconciliation issues are in fact an examination and therefore leave taxpayers at risk of multiple examinations of the same tax return. Taxpayers and the IRS are unnecessarily burdened when the Marketplace leaves the SLCSP amounts blank on Forms 1095-A for taxpayers that choose not to receive the APTC. Accordingly, TAS will work with the IRS and advocate to ensure the changes we recommend are adopted so that taxpayers are not burdened.

56 IRM 5.19.3.4.1.6, *e-Services Taxpayer Identification Number (TIN) Matching Program* (Apr. 23, 2014).

57 The TMP would also prevent the assessment of penalties on the businesses filing the forms. The penalty for failure to file a correct information return is generally \$100 and the penalty for failure to furnish a correct payee statement is also generally \$100. IRC §§ 6721, 6722. The IRS will not impose the penalty if the filer shows the failure was due to reasonable cause and not willful neglect. IRC § 6724. See Legislative Recommendation: *Affordable Care Act Information Reporting: Allow Taxpayer Identification Number Matching for Filers of Information Returns Under IRC §§ 6055 and 6056*, *infra*.

58 Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013); T.D. 9660, 2014-13 I.R.B. 842 (Mar. 24, 2014).

59 IRC § 5000A. Insurers could also receive avoidable penalty assessments arising from such mismatches. Michael M. Lloyd and S. Michael Chittenden, *Expand TIN Matching Program to Avert Another ACA Debacle*, TAX NOTES TODAY (Jan. 15, 2014).

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Take preventative measures to avoid ISRP overpayments in the future, such as distributing educational notices about exemptions and exclusions to preparers associated with such overpayments and conducting a comprehensive review and testing of tax filing software to ensure that the problems that arose in FS 2015 do not recur.
2. Issue guidance to field compliance employees to assist them in identifying returns with a tax liability resulting from the correction of Forms 1095-A errors in the SLCSP information and not pursuing collection, including blocking the accounts from refund offsets.
3. Work with the National Taxpayer Advocate on revising Letters 5591, 5591A, and 5596 for FS 2016 to include the exact date by which the taxpayer needs to file in order to automatically re-enroll for the APTC the following year.
4. Conduct outreach and education to inform taxpayers early in FS 2016 about the consequences of filing for an extension if the taxpayer received APTC. In particular, the information should provide the taxpayer with a specific date in 2016 by which the taxpayer needs to file the TY 2015 return in order to automatically re-enroll to receive APTC in 2017.
5. Determine a method to identify all issues relating to a return, as selected by the various filters in the filing season, and include all of the issues in one notice to the taxpayer so that the taxpayer does not have multiple audits with respect to the same return.
6. Conduct outreach and education on the consequences of receiving large lump sum distributions to APTC recipients as well as other organizations making such distributions, such as the Social Security Administration.
7. Issue guidance to both taxpayers (on the IRS website as well as in the Form 1095-A instructions) and IRS employees (in the IRM) about how taxpayers can use the look-up tool on Healthcare.gov to find their SLCSP premium amount.
8. Provide a similar IRS tool to ensure IRS employees can look-up the SLCSP amount and verify the amount provided by the taxpayer. The IRS should provide employees training on the use of the tool.
9. Reform the rules for exchange reporting on Form 1095-A and require the Marketplace to provide the SLCSP amounts on all such forms.
10. Expand the TIN matching program to include health insurers and self-insured employers that are required to file Form 1095-B, *Health Coverage*.