

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

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Via Email: lynda.gyles@hhs.gov and jack.lew@treasury.gov

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December 18, 2013

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

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

RE: Additional Comments on Exemption from Tax Penalty

Dear Secretary Sebelius and Secretary Lew:

On behalf of the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC), I write to follow-up on prior TSGAC comments provided to, and responses received back from the Department of Health and Human Services (HHS), Center for Medicare and Medicaid Services (CMS) and the Department of Treasury, Internal Revenue Service (IRS) pertaining to eligibility for exemptions from the Affordable Care Act's tax penalty for not maintaining minimum essential coverage. Established in 1996, the TSGAC provides information, education advocacy and policy guidance for implementation of Tribal Self-Governance within the Indian Health Service. We appreciate your consideration of these additional comments.

In separate comments submitted to CMS (in response to CMS-9958-P) and to IRS (in response to IRS REG 148500-12),¹ TSGAC requested CMS and IRS to: 1) establish a hardship exemption for persons eligible for health services through an Indian health care provider (IHCP)^{2,3}; and, 2) allow persons eligible for services from an IHCP (hereafter "IHCP-eligible persons") to apply for the hardship exemption through an Exchange and through the IRS tax-filing process.

In addition, on Thursday, February 21, 2013, HHS, in conjunction with the Department of the Treasury, held a Tribal consultation session on the CMS-9958-P as well as on the IRS-issued proposed rule REG-148500-12 (Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage.) We are providing these comments as a supplement to the input

¹ IRS issued the final rule for REG 148599-12 as TD 9632.

² The exemption is available to an individual who is an American Indian or Alaska Native eligible for services through an Indian health care provider, as defined in 42 CFR 447.50, or an individual eligible for such services in accordance with 25 U.S.C. 1680c(a), (b), or (d)(3).

³ Indian Health Care Providers include the Indian Health Service, Indian Tribes, tribal organizations and urban Indian organizations (and are also referred to as I/T/Us).

provided by Tribal Leaders and other Tribal representatives in the written comments and at the Tribal consultation session.

CMS Actions

Through CMS-9958-F, CMS accepted the Tribal recommendation and established at 45 CFR 155.605(g), a hardship exemption for persons eligible for health services from Indian Health Care Providers.⁴ CMS also provided for the exemption to apply retrospectively as well as prospectively without a time limit. Under the CMS regulations, a certificate of exemption will be valid for a month on a continuous basis until such time as a person may no longer be eligible for the exemption. We appreciate the actions taken by the Secretary of HHS on these Tribal recommendations.

On one further item, allowing an applicant for the IHCP-eligible exemption to secure the exemption through the Federal tax-filing process in addition to applying through a Marketplace, this recommendation was not granted in the regulations by CMS, and there was no acknowledgement or discussion of this Tribal recommendation by CMS in the preamble to the final rule (CMS-9958-F).

IRS Actions

The IRS regulations (as well as the CMS regulations) provide for applicants for the Tribal Member exemption to apply through either the Marketplace or the Federal tax-filing process. Again, we appreciate this action taken by IRS and HHS.

With regard to the response from IRS to the Tribal request to permit applicants to apply for the IHCP-eligible exemption through the Federal tax-filing process, IRS wrote in the preamble to the final rule that several commentators requested that IHCP-eligible persons be allowed to obtain the hardship exemption when filing their income tax returns, but the final regulations do not accept this suggestion because section 5000A(e) provides HHS, through Exchanges, with the authority to grant those hardship exemptions not specifically delegated to IRS.⁵ In this response, IRS indicated that it could not authorize granting exemptions through the tax-filing process to persons eligible for the IHCP-eligible exemption because HHS had not delegated authority to IRS to do this.

⁴ This hardship exemption for certain American Indians and Alaska Natives is in addition to a provision in the Affordable Care Act that established an exemption for an individual if he or she is a member of

any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

Internal Revenue Code, section 5000A(e)(3), codified at 26 U.S.C. § 45A(c)(6). In the various regulations and guidance addressing the individuals who have been determined to fall within this definition, the members of these entities have been generally referred to as “members of Federally-recognized Tribes,” for the sake of convenience we assume. This exemption is referred to in this letter as the Tribal Member exemption.

⁵ 78 Fed Reg 53654.

HHS Authority to Delegate Authority to IRS

HHS has the authority to delegate authority to IRS for this purpose. For example, HHS delegated authority to IRS to grant exemptions for 9 of the 13 other exemption categories, which includes 7 of the 8 statutory exemption categories and 2 of the 6 hardship exemption categories. In addition to delegating authority to IRS to process these exemption applications, HHS recently indicated it will permit application for yet another new hardship exemption to take place through the Federal tax-filing process.

This most recently announced hardship exemption was discussed by HHS in late October 2013, when HHS indicated it would be establishing an additional hardship exemption category for persons who fail to secure health insurance coverage that is effective prior to April 1, 2014 because of difficulty in applying through a Marketplace.⁶ In an FAQ issued by CMS on October 28, 2013, CMS stated –

Specifically, if an individual enrolls in a plan through the Marketplace prior to the close of the initial open enrollment period, when filing a Federal income tax return in 2015 the individual will be able to claim a hardship exemption from the shared responsibility payment for the months prior to the effective date of the individual's coverage, without the need to request an exemption from the Marketplace. Additional detail will be provided in 2014 on how to claim this exemption.

Applicants for 3 of the soon-to-be 7 hardship exemption categories will be able to apply through the Federal tax-filing process (in addition to 7 of the 8 statutory exemptions.) CMS also noted that “additional detail will be provided in 2014 on how to claim this exemption.”

Tribal Recommendation

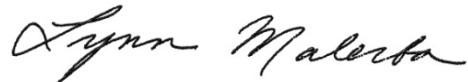
The TSGAC again requests that HHS authorize IRS to allow taxpayers to apply for the IHCP-eligible hardship exemption, as well as the Tribal Member exemption, through the Federal tax-filing process, instead of limiting that process only to the Tribal Member exemption. We believe establishing the tax-filing process as an additional avenue for applying for the IHCP-eligible exemption will reduce the overall effort required of applicants, Tribal governments, the Indian Health Service, as well as Marketplace and IRS staff and contractors.

There is no consequence for not obtaining the IHCP-eligible exemption until a tax return must be filed. For tax households who have not obtained exemptions for all eligible Tribal members of the household prior to filing, it will be confusing and cumbersome to permit some Tribal members to obtain an exemption (Tribal Member exemption) from IRS, while requiring others (those applying for IHCP-eligible exemption) to go back to the Marketplace. Being able to use a single process to apply for the exemption for all Tribal members of a family, as well as to use the same process to file taxes eliminates a significant degree of duplicative effort that would be required of many taxpayers under the existing regulatory structure.

⁶ <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf>

We greatly appreciate your willingness to consider these recommendations. Should you need additional information or have questions regarding the report, please contact me at (860) 862-6192; or via email: lmalerba@moheganmail.com.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe
Chairwoman, TSGAC

cc: Gary Cohen, Deputy Administrator and Director, Center for Consumer Information and, Insurance Oversight (CCIIO)
Dr. Yvette Roubideaux, Director, Indian Health Service (IHS)
P. Benjamin Smith, Director, Office of Tribal Self-Governance, IHS
Christy Jacobs, ITG Director, Internal Revenue Service
Valerie Davidson, Chair, TTAG
TSGAC and Technical Workgroup