



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

ASSISTANT SECRETARY

October 25, 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 Secretary Geithner and Commissioner Shulman regarding section 36B of the Internal Revenue Code (Code). We appreciate your continued interest in this issue and, in particular, the proposed and final regulations promulgated by the Department of the Treasury (Treasury) implementing section 36B.

Your letter questions whether taxpayers who purchase health insurance through exchanges operated by the federal government (known as federally-facilitated exchanges) are eligible for the premium tax credit under section 36B of the Code. Section 36B 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). Section 1311, in turn, provides that an exchange “shall be a governmental agency or a nonprofit entity that is established by a State.” If a state, however, chooses not to establish an exchange—or will not have an exchange in operation by January 1, 2014—section 1321 of the ACA directs the Secretary of Health and Human Services to “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 either a state-run or a federally-facilitated exchange are eligible for premium tax credits. As Assistant Secretary for Tax Policy Mark Mazur stated in his recent letter to you, Treasury implements the tax laws passed by Congress in a careful and thoughtful manner, with the goal of effectuating congressional intent. In this case, Treasury’s Office of Tax Policy (OTP) and the Internal Revenue Service (IRS) Office of Chief Counsel interpreted the statutory language in context and consistent with the purpose and structure of the ACA as a whole, pursuant to longstanding and well-established principles of statutory construction. Specifically, as Mr. Mazur noted in his letter, 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 that Congress intended the particular language in Section 36B(b)(2)(A) to limit the availability of the tax credit.

In developing the section 36B regulations, we followed our standard process for drafting, approving, and publishing tax regulations. Treasury published a proposed regulation in August 2011, and the public submitted numerous written and oral comments in response. The OTP and the IRS reviewed each comment carefully and concluded that, regarding this issue, the statute should be interpreted as in the proposed regulations. Treasury published final regulations in May 2012 reflecting this view. Assistant Secretary Mazur enclosed with his recent letter certain OTP and IRS documents responsive to your requests regarding Treasury's rulemaking process.

Your most recent letter requests additional documents related to the legal interpretation and analysis of section 36B by Treasury and IRS counsel. In particular, you seek internal legal analysis and any other related documents that predate the proposed rule. These materials implicate longstanding Executive Branch confidentiality interests. It is well-established that agency staff and counsel must have the ability to engage in free, full, and unfettered discussions and debate about important policy and legal matters. Accordingly, as the Executive Branch has long maintained, public disclosure of such material could have a significant chilling effect on agency staff and could inhibit their ability to fulfill their statutory responsibilities. As such, we have concerns about the scope of your request.

Moreover, this issue—the proper legal interpretation of section 36B—is subject to ongoing litigation in federal court. On September 19, 2012, the Oklahoma Attorney General amended an existing civil lawsuit in the Eastern District of Oklahoma to include claims challenging Treasury regulations promulgated under section 36B. We disagree strongly with these claims, and we intend to defend the lawsuit vigorously. Ultimately, however, it will be up to the courts to determine the proper interpretation of section 36B, and we believe that any questions about the permissibility of Treasury's statutory interpretation should be resolved through the judicial process.

Nonetheless, we recognize the important oversight role of Congress, and we are committed to working with the Committee to provide the information you need to fulfill that role. Accordingly, we are prepared to meet with your staff to discuss your particular oversight interests in this matter and to explore ways that we can accommodate those interests, while still protecting the important institutional interests described above.

Thank you for your letter. We look forward to continuing to work with you and your staff on these important matters.

Sincerely,



Alastair M. Fitzpayne  
Assistant Secretary for Legislative Affairs