October 31, 2011

CC:PA:LPD:PR (REG-131491-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
1111 Constitution Avenue, NW
Washington, DC

Re: Notice of Proposed Rulemaking, Health Insurance Premium Tax Credits

Dear Sir/Madam:

Thank you for giving the State of Vermont an opportunity to comment on the Internal Revenue Service (IRS) proposed regulations on Health Insurance Premium Tax Credits enacted pursuant to the Patient Protection and Affordable Care Act (PPACA) as amended by the Health Care and Education Reconciliation Act of 2010.

While a number of specific issues are addressed below, our overriding concern is the potential that individuals may choose to go uninsured rather than risk that they may have to repay a credit after the process of reconciliation proposed in the draft regulations.

The core tax component of the Affordable Care, and a critical financial contribution to federal health care reform, is the health insurance premium tax credit. Because the credit is determined based on yearly, as opposed to current income, it is likely that there will be instances where a taxpayer's income will increase during the course of the year so that he or she will no longer be financially eligible for the credit. Besides issues in reporting (e.g., a newly employed worker may not, for various reasons, immediately report the change income), an employee who was legitimately eligible for the credit at the time it was received may find that he or she must repay the credits at year's end. And notwithstanding the limits placed on repayment, individuals who straddle the poverty line, move in and out of the workforce,

receive an end-of-the-year bonus which pushes them outside the range of financial eligibility, or whose household composition may be unstable or vary throughout the year, may find it difficult or impossible to repay the credit.

The proposed use of estimated advance payments of a premium tax credit, which are subject to reconciliation at the end of the tax year, will expose many low-income taxpayers to economic risk. Taxpayers who may count on tax refunds as an informal savings vehicle could be faced with unanticipated tax burdens, if they experience increased earnings or changes in household composition.

Under the proposed rules, an individual could be subject to repaying the full credit if their income increases in the latter half of the year, even though the individual was legitimately eligible during the first half of the year. We support the analysis of federal law contained in the Center on Budget's comments and support their suggestions for alleviating potential harm to individuals and families:

- **Prorate the caps on liability based on the number of months a household received premium credits.** The best way to deal with a mid-year change in circumstances for families that receive advance payments of premium credits for part of the year would be to reconcile the advance payments based on income and family circumstances during the months the advance payments were received. We believe that such an approach is well within the Secretary's legal authority, but recognize that it would be very difficult to administer and is inconsistent with current IRS practice. Therefore we suggest a fallback approach of prorating the caps by the portion of the year that the family or individual received advance payments. For example, if a family with annual income of 375 percent of the poverty line received premium credits for six months of the year when its income was 200 percent of the poverty line, the maximum amount the family would have to pay would be $1,250, which is one-half of the $2,500 cap that would otherwise apply to this family based on its annual income. Prorating the caps should be relatively simple for the IRS to administer, requiring only a simple calculation based on readily available information. As discussed below, the IRS will receive information on the number of months that individuals and families receive premium credits over the course of the year as well as the amount of advance payments the taxpayer received.

- **Provide a safe harbor for households that are eligible for credits in the months credits were received even if their taxable income exceeds 400 percent of the poverty line.** As illustrated in the examples above, many families could correctly receive premium credits for some months in the year but end up having to repay the entire amount of the credits, because their annual income exceeds 400 percent of the poverty line. This can occur when a family gains or loses a job and employer-based coverage during the year or even when an adult child gets a job and leaves the household mid-year. Families in this situation should be provided with a safe harbor that treats them as if their annual income was 400 percent of the poverty line and prorates the cap in the same way as described above.

- **Treat couples that marry during the year based on their status during the coverage months.** The proposed rule would reconcile advance payments made to two single people who marry during the year based on their filing status as a married couple and their annual income despite the direction in section 36B(g) to issue regulations addressing this situation. We recommend a change in the proposed rule to compute the contribution amount for the couple that allocates their annual income based on whether they were married or single during the coverage months.

- **Apply special rules for married couples filing separately.** Under the ACA, married filing couples filing separately cannot claim premium credits, which is also the rule for the earned income tax credit and other credits. However, premium tax credits are different, because they will be used to purchase health coverage which will be required beginning in 2014. Therefore, as recognized in the preamble, relief is needed in some circumstances for married taxpayers who file their taxes separately. There are several legitimate reasons that it may be inadvisable or even impossible for married taxpayers to file jointly. One obvious reason is that victims of domestic violence may be keeping their whereabouts a secret. In these cases, it would be inappropriate to require a woman to file a joint return. In fact, domestic violence was a condition discussed extensively during the health care debate when it was discovered that women with a history of domestic violence were often considered uninsurable by health plans. As a result, section 2705 of the Public Health Services Act, as added by section 1201 of the ACA, expressly prohibits discrimination by insurers against conditions arising out of acts of domestic violence. It is appropriate that the IRS make a similar distinction for this class of individuals and allow an exception from the joint filing requirement for victims of domestic violence.

  Abandoned spouses also warrant special protection. Such individuals have no choice but to file a separate return in cases when they cannot locate their spouse. Incarceration is another possible barrier to joint filing, particularly if a tax filer has not obtained power of attorney for the incarcerated spouse. In addition, there should be exceptions in the case of a spouse living out of the country.

  To facilitate the identification of cases that merit exceptions from the requirement to file a joint return, we recommend that taxpayers be able to certify on the schedule used to calculate the premium tax credit whether one of these conditions applies. The list of exceptions should capture general categories (domestic abuse, abandoned spouse, incarceration, spouse out-of-the-country). They should also be allowed to make such a certification when they apply for advance payments of premium credits at the Exchange. In other words, the exception should not just be applied to individuals who expect to file a

joint return, receive advance payments on that basis, and then have to file their tax returns separately.

When such exceptional circumstances are identified, the individual should be permitted to file separately and still receive a premium tax credit. In cases where both spouses, at some point in the year, were enrolled in the same insurance plan, the IRS could allocate the advance credit and calculate the benchmark premium according to household income (with the absent spouse's income being determined by their tax filing) in the same way as proposed for couples who divorce during the year. This would help protect the lower-income spouse. If the absent spouse did not file a tax return or if the filing spouse does not know their spouse's social security number, a reasonable allocation is 50 percent. In these cases, the repayment limits for single individuals should apply.

The preamble to the proposed rule requests comment on whether the rule should take into account whether a couple filed together in the previous year and whether they attested their expectation to file jointly in order to obtain tax credits. An attestation should not be a bar to eligibility for an exception, because changes can occur during the year. For example, a couple may indicate that they intend to file together when applying for credits in November 2013 but face a completely different scenario 17 or 18 months later when it is time to reconcile the premium tax credit on their tax return. It is reasonable to expect that these exceptions would have limitations, but restricting the exception to one year may be too restrictive since many situations, such as a complicated divorce involving custody or criminal charges, may take a long time to resolve. Limiting the exception to three consecutive years would be helpful to accommodate these types of situations.

We raise the concern about repayment to highlight the necessity for encouraging, rather than discouraging, eligible individuals to utilize the credit when needed. An individual whose income is subject to recapture of the credits may subsequently refrain from participation. Though bright-line rules make for easier decisions, we expect that in practice, there will be a need for discretion and flexibility in the rule's implementation, and that the issue will be further discussed and refined, within the guidelines provided by PPACA.

The following are more specific comments:

§ 1.36B-2(b)(6) -- Vermont strongly supports the special rule for taxpayers with income below 100% of the FPL allowing these taxpayers to remain eligible for the credit. This rule will not only protect the most vulnerable taxpayers from repaying a credit, but will also allow lower-income families with fluctuating incomes to stay ensured in one program (thus reducing churn and the potential loss of coverage).

§ 1.36B-2(c)(2) -- Government-sponsored minimum essential coverage. IRS has requested comments on whether rules should provide additional flexibility if operational challenges prevent timely transition from coverage under a qualified health plan to coverage under a government-sponsored program. We believe that Exchanges should be afforded as much flexibility as may be needed to ensure seamless coverage during transitions. Flexibility will ensure that states can design a program, which minimizes "churn" (individuals moving on and off coverage) where possible. In addition, transitions between programs result in individuals losing coverage and flexibility allows for states to minimize disruptions in coverage where possible.

§ 1.36B-2(c)(3) -- Employer-sponsored minimum essential coverage. If an employee is eligible for employer-sponsored insurance (ESI), the Exchange must determine whether that coverage is affordable and provides minimum value. Both of these determinations must be based on facts that can be difficult for both the applicant and the Exchange to obtain. The rules should provide a mechanism for assisting applicants and Exchanges in the collection of this information. Requiring employers (or insurers) to maintain a nationwide database of up-to-date ESI plan information is one way to achieve this objective.

§ 1.36B-2(c)(3)(iv) COBRA coverage. Vermont supports the rule as drafted, which allows individuals who discontinue COBRA coverage to qualify for the premium tax credits. There are many reasons why an individual might elect COBRA coverage to ensure there is no gap in coverage. This should not be discouraged.

§ 1.36B-2(c)(3)(v) Affordable coverage. The proposed rule provides that ESI is affordable if the portion of the annual premium that the employee must pay for self-only coverage is less than or equal to 9.5% of the taxpayer's household income for the taxable year. It is foreseeable that an employer could offer coverage that meets this standard for self-only coverage but exceeds it for family coverage. The rule, therefore, should establish affordability standards for all possible household compositions. We support the Center on Budget and Policy Priorities legal analysis of this position.

§ 1.36B-3(d) Premium assistance amount. Computation of the premium assistance amount is based on the adjusted monthly premium for the applicable benchmark plan. However, household members could be residing outside the Exchange's service area. In such cases, the Exchange would need to know the adjusted monthly premium for applicable benchmark plans other than its own or be allowed to apply the benchmark plan in the Exchange's state. 26 CFR § 1.36B-5(a)(1) currently requires the Exchanges to report to IRS the premium and category of coverage for the applicable benchmark plans used to compute advance credit payments. To simplify eligibility determinations in such cases, the rule should require IRS to publish this information in a database that Exchanges could electronically access when data from other Exchanges is needed.

§ 1.36B-4(b) Changes in filing status. The comments to this section acknowledge that individuals who marry during a taxable year and receive advance credit payments during the time before they are married could incur additional tax upon reconciliation. It appears

from the comments that IRS feels bound to determine household income on an annual basis in this context. However, it is difficult to believe that Congress would have intended to penalize marriage in this regard. If an alternative approach cannot be developed to avoid this result, we believe that the ACA should be construed to permit household income to be determined separately for coverage months preceding the marriage and jointly for succeeding coverage months.

§ 1.36B-5(a) requires the Exchanges to report to IRS all of the pertinent information needed for reconciling the premium tax credit with advance credit payments (26 CFR § 1.36B-4). IRS should determine whether it would simplify the taxpayer's tax-preparation burden if IRS were to perform the reconciliation at the close of the tax year and provide the taxpayer with notice of any adjustment. The taxpayer could then agree with or refute the calculation on his or her tax return. Such a process would resemble that required in the Exchange NPRM for the annual redetermination of eligibility (45 CFR § 155.335).

Marital status is a critical factor in determining eligibility for premium tax credits. Many states including Vermont recognize same-sex marriages or civil unions but IRS does not. ("For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife" IRS Publication 501). We urge clarity in the proposed rule regarding this conflict and prefer the regulations to allow states flexibility to follow state law on this issue and provide same-sex couples the opportunity to qualify as a married couple for a state-subsidized premium tax credit through the same system.

Thank you again for permitting us to comment on the proposed regulation. We hope you be able to give consideration to our concerns; we know some will be shared by a wide array of commentator while others will be more particular to ours state. Please be assured, however, that all are of importance to the citizens of Vermont.

Sincerely,

Robin Lunge
Director of Health Care Reform
State of Vermont