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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9628]

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: Final regulations.

SUMMARY: This document contains final 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).

DATES: Effective date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability date: For date of applicability, see § 301.6103(l)(21)-1(d).

FOR FURTHER INFORMATION CONTACT: Steven Karon, (202) 622-4570; (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 6103(l)(21) of the Internal Revenue Code (the Code) permits the disclosure of return information to assist Exchanges in performing certain functions set forth in the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)) (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, a State's children's health insurance program under title XXI of the Social Security Act (CHIP), or a basic health program (BHP) under section 1331 of the Affordable Care Act (if applicable). Section 6103(l)(21) identifies specific items of return information that will be disclosed. For taxpayers whose income is relevant in determining eligibility for an insurance affordability program, Medicaid, CHIP, or BHP, section 6103(l)(21) explicitly authorizes the disclosure of the following items of return information: taxpayer identity information, filing status, the number of individuals for whom a deduction is allowed under section 151 of the Code, the taxpayer's modified adjusted gross income as defined under section 36B of the Code (MAGI), and the taxable year to which any such information relates or, alternatively, that such information is not available. Section 6103(l)(21) also authorizes the disclosure of such other information prescribed by regulation that might indicate whether an individual is eligible for the premium tax credit under section 36B of the Code, or cost-sharing reductions under section 1402 of the Affordable Care Act, and the amount thereof.

The Treasury Department and the IRS published a notice of proposed rulemaking (REG-119632-11) in the **Federal Register**, 77 FR 25378, on April 30, 2012, proposing additional items to be disclosed pursuant to section 6103(l)(21). A public hearing was scheduled for August 31, 2012. The IRS did not receive any requests to testify at the public hearing, and the public hearing was cancelled. Five written comments responding to the proposed regulations were received. All comments were considered and are available for public inspection at <http://www.regulations.gov> or upon request. Additionally, the IRS received information from the Department of Health and Human Services (HHS) that pertains to the disclosure of items pursuant to section 6103(l)(21). After consideration of the written comments and the information provided to the IRS by HHS, the proposed regulations under section 6103(l)(21) are adopted as revised by this final regulation. The public comments, the information HHS provided to the IRS, and the revisions are discussed in the following section.

Summary of Comments and Explanation of Provisions

The IRS received five written comments in response to the proposed regulations. Two commentators expressed support for the proposed regulations and had no suggested changes. A third commentator provided a comment, discussed in this section, concerning the items disclosed under section 6103(l)(21) and the proposed regulations. The remaining commentators made comments, also discussed in this section, pertaining to section 6103 generally, but did not make comments specific to the proposed regulations under section 6103(l)(21) and the additional items to be disclosed under that section.

A commentator stated that the premium tax credit under section 36B applies to low income filers. The commentator stated that, when a filer's income exceeds the maximum income allowable for the credit, the IRS should only disclose that the individual's income is above the maximum allowable amount, and not provide the return information as described by section 6103(l)(21) or the proposed regulations. As noted in the preamble to the proposed regulations, 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, or verified by, the IRS. Providing the specific delineated items described by section 6103(l)(21) and these regulations, as opposed to simply stating that an applicant's income is above the threshold for a premium tax credit, will inform an Exchange of the degree to which alternative verification may be needed. Therefore, disclosing these items to an Exchange will assist the Exchange in determining an individual's eligibility for, and the amount of, any advance payment of the premium tax credit or cost-sharing reductions. Accordingly, after careful consideration of the comment, the regulations remain unchanged.

The commentator additionally noted that taxpayers should be able to request that the IRS tell them if anyone requested information about their return using this regulation. No changes were made to these regulations as a result of this comment. Section 6103(l)(21) and these regulations concern the disclosure of items of return information to HHS, Exchanges, and certain State agencies, and not the disclosure of whether anyone requested a taxpayer's return information under section 6103 in general. Section 6103(p)(3) describes certain requirements with respect to the

maintenance of a system of records or accountings of all requests for inspection or disclosure of return or return information under section 6103 generally.

The commentator also stated that the regulation should contain a penalty for individuals that fraudulently request information. The commentator further suggested that the regulation should contain a penalty for HHS, Exchanges, and any other organizations that do not comply with the data protection requirements. No changes were made in response to these comments. Section 6103(l)(21) does not permit the Treasury Department or the IRS to establish penalties under these regulations. The Treasury Department and the IRS note, however, that section 1411(h)(1)(B) of the Affordable Care Act states that any person who knowingly and willfully provides false or fraudulent information shall be subject to a penalty of not more than \$250,000 in addition to any other penalties prescribed by law. Additionally, penalties may be imposed under sections 7213, 7213A, and 7431 of the Code for unauthorized disclosures of return information obtained under section 6103(l)(21).

One commentator expressed concerns about taxpayer privacy and wanted assurances that HHS and other agencies receiving return information are required to adopt the safeguarding requirements of section 6103. By operation of law, the safeguards established by section 6103(p)(4) apply to those entities described in section 6103(l)(21), namely HHS, the Exchanges established under the Affordable Care Act, and the State agencies administering a State program described under section 6103(l)(21), as well as their contractors. No regulatory changes are needed to have section 6103(p)(4) apply to those entities. The commentator also noted that section 1411(g)(2)(b) of the Affordable Care Act imposes penalties on HHS employees and

contractors who improperly use or disclose tax return information, and suggested that the regulations should clarify that this penalty may be imposed in addition to the penalty imposed under section 7213 of the Code when there are certain unauthorized disclosures of return information. The commentator is correct that both statutory provisions provide for civil or criminal penalties for the improper use or disclosure of tax return information. Because those provisions govern the imposition of those penalties, no changes are needed with respect to these regulations.

Finally, another commentator remarked about the timing and characteristics of particular communications made from Exchanges to an applicant, stating that notices should be sent throughout the application process. The commentator stated the notices should be in language appropriate for all populations, suggesting that existing guidance from the Department of Justice (DOJ) and HHS on providing appropriate documents to limited English proficiency populations may be helpful. These comments regarding the timing and characteristics of such communications are outside the scope of section 6103(l)(21) and these regulations.

After the Treasury Department and the IRS published the proposed regulations, HHS informed the IRS that it may be receiving certain items of information from the Social Security Administration (SSA). One of the items that HHS expects to receive from SSA is the total amount of the social security benefits for each individual whose income is relevant to the determination of eligibility for health insurance affordability programs described in the Affordable Care Act. If the IRS also provides HHS with the amount of social security benefits included in gross income under section 86, an Exchange or State agency will be generally able to determine the amount of social

security benefits not included in gross income under section 86. This amount is one of the components of an individual's MAGI. Eligibility for the premium tax credit, and advance payments of the credit, is based on the household income of the applicant, which is the sum of the MAGI of those individuals who comprise the household. As a result, providing the amount of social security benefits included in gross income under section 86, along with other items contained in these regulations, will help an Exchange determine whether a taxpayer is eligible for the premium tax credit under section 36B or cost-sharing reductions under section 1402 of the Affordable Care Act, and the amount of the credit or reductions. Section 301.6103(l)(21)-1(a) of these final regulations, therefore, includes the amount of social security benefits included in gross income under section 86 as an item that will be disclosed to HHS pursuant to section 6103(l)(21).

In the proposed regulations, a relevant taxpayer, for whom return information would be disclosed under section 6103(l)(21), was defined as any individual listed by name and social security number or adoption taxpayer identification number (ATIN) on an application submitted pursuant to Title I, Subtitle E, of the Affordable Care Act whose income may bear upon a determination of eligibility for a health insurance affordability program. Subsequent to the publication of the proposed regulations, the IRS recognized that requests relating to ATINs would not be received because individuals' identification numbers will first be verified against SSA records. Under section 1411(c) of the Affordable Care Act, HHS is to provide the name, date of birth, and social security number of each individual on the application to the SSA for a determination that the information provided is consistent with the information in SSA records. HHS will only

request return information for those individuals whose numbers are verified. Since the SSA has no records of ATINs, these numbers will not be verified and HHS will not request return information for individuals using adoption taxpayer identification numbers. While the income of an individual with an ATIN may be relevant for determining household income and, therefore, eligibility for a health insurance affordability program, an Exchange or State agency will use alternate verification procedures as provided under regulations prescribed by HHS, including procedures under part 155.320 of chapter 45 of the Code of Federal Regulations, instead of getting return information under section 6103(l)(21). Accordingly, §301.6103(l)(21)-1(b) of these final regulations removes the reference to ATINs.

Special Analyses

It has been determined that these final regulations are 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, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received from that office.

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.

Adoption of 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. Add § 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 (7) of this section, for the reference tax year, as applicable, to officers, employees, and contractors of the Department of Health and Human Services. Such information shall be provided 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, verifying 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 section 6103(l)(21)(A).

- (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 that 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) The amount of social security benefits of the relevant taxpayer that is included in gross income under section 86 of the Internal Revenue Code for the reference tax year;
- (4) 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;
- (5) 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;
- (6) 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
- (7) 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, 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 section 6103(l)(21)(A) 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 **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER.]**

Beth Tucker
Acting Deputy Commissioner for Services and
Enforcement.

Approved: July 10, 2013

Mark J. Mazur
Assistant Secretary of the Treasury (Tax Policy).

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