

Area of Focus #11 **While the IRS Continues to Do a Reasonable Job in Administering the Affordable Care Act (ACA), Taxpayers Still Encounter Difficulties Attempting to Comply With the Complex Provisions**

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*

DISCUSSION

The IRS is charged with implementing certain provisions of the Patient Protection and Affordable Care Act of 2009 (ACA).² To ensure that taxpayer rights are protected, TAS has been actively involved with the implementation of the ACA provisions. Some of the issues we reviewed include:

- The IRS halted plans to reject “silent returns” in response to an executive order;
- TAS’s Premium Tax Credit (PTC) case receipts decreased significantly in fiscal year (FY) 2017;
- A commercial tax preparation software program incorrectly calculated PTC or failed to submit Form 8962, *Premium Tax Credit (PTC)*;
- Taxpayers had difficulty receiving advanced PTC (APTC) due to “failure to reconcile” flags; and
- Uncertainty regarding how the IRS will propose and assess the employer shared responsibility payment (ESRP) under Internal Revenue Code (IRC) § 4980H.

Background: Filing Season 2017 Overall Results

ACA was enacted by Congress in 2010 to provide affordable health care coverage for all Americans. To accomplish this goal, ACA provides targeted tax credits for low income individuals and for small businesses, while imposing a personal responsibility on individuals to have health coverage.³ During the 2017 filing season, eligible individual taxpayers claimed the PTC on tax year (TY) 2016 returns. Figure 3.11.1 provides preliminary data through April 27, 2017, regarding the extent to which individual taxpayers claimed the PTC on their TY 2016 returns.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Patient Protection and Affordable Care Act of 2009 (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act (HCERA) of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

3 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).

FIGURE 3.11.1, Reporting of the Premium Tax Credit on Forms 8962 for TY 2016 Returns Through April 27, 2017⁴

Returns Filed with Forms 8962, <i>Premium Tax Credit (PTC)</i>	5.1 million
Total PTC Amount Claimed	\$17.6 billion
Average PTC Amount Claimed Per Return	\$3,455
Returns Reporting Advanced PTC	4.9 million (96% of returns with Forms 8962)
Total Advanced PTC Reported	\$19.4 billion
Prepared Returns Filed with Forms 8962 (Paid or Volunteer)	3.2 million (63% of returns with Forms 8962)

Individual taxpayers who did not have minimum essential coverage (MEC) or qualify for an exemption were required to make an individual shared responsibility payment (ISRP) on their TY 2016 returns.⁵ Figure 3.11.2 provides preliminary data through April 27, 2017, on the reporting of ISRPs on TY 2016 returns.

FIGURE 3.11.2, Reporting of the Individual Shared Responsibility Payments on TY 2016 Returns Through April 27, 2017⁶

Returns with ISRP	4.0 million
Average ISRP	\$708
Prepared Returns Reporting ISRP (Paid or Volunteer)	2.6 million (65%)
Returns Filed with Forms 8965, Health Coverage Exemptions	10.7 million
Returns Filed with Forms 8965 Claiming Household Coverage Exemption (Form 8965 Part II)	3.9 million
Returns Filed with Forms 8965 Claiming Coverage Exemption (Form 8965 Part III)	8.0 million
Prepared Returns Filed with Forms 8965	5.8 million (54%)

The IRS Halted Plans to Reject Silent Returns in Response to Executive Order

On January 20, 2017, the President signed an executive order requiring all agencies in the executive branch with responsibilities under ACA to take actions to minimize the economic and regulatory burdens imposed by the Act. Specifically, the order stated that the agencies should exercise all authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any requirement of the Act that would impose burden.⁷

4 IRS, Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF) TY 2016 (May 2017). This preliminary data is based on returns that had posted as of April 27, 2017, and is subject to change as the IRS reviews the data, processes additional TY 2016 returns, and conducts compliance activities.

5 IRC § 5000A.

6 IRS, CDW, IRTF TY 2016 (May 2017). This preliminary data is based on returns that had posted as of April 27, 2017, and is subject to change as the IRS reviews the data, processes additional TY 2016 returns, and conducts compliance activities. Some returns indicated both coverage exemptions for household (Part II on Form 8965) and coverage exemptions for individuals (Part III on Form 8965). As a result, the combined volumes may exceed the total number of returns with Form 8965.

7 White House, Executive Order, *Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal* (Jan. 20, 2017); ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

In response to the executive order, the IRS announced on February 15, 2017, that it halted its plan to reject electronically filed “silent returns.”⁸ Silent returns are ones for which the taxpayer did not 1) check the box on the return to indicate the tax family had full-year health care coverage, 2) complete and attach Form 8965, *Health Coverage Exemptions*, to show tax family members had exemptions from health coverage requirements, or 3) self-assess an ISRP on the return.⁹

While other factors may have influenced filing behavior, Figure 3.11.3 compares the reporting of the ISRP during this filing season to the same period last filing season.

FIGURE 3.11.3, Comparison of Reporting of the Individual Shared Responsibility Payments on TY 2016 Through April 27, 2017 to TY 2015 Through April 28, 2016¹⁰

	TY 2016 (Through April 27, 2017)	TY 2015 (Through April 28, 2016)
Returns With ISRP	4.0 mil	5.6 mil
Prepared Returns Reporting ISRP (Paid or Volunteer)	2.6 mil (65%)	3.6 mil (64%)
Returns Filed With Forms 8965, <i>Health Coverage Exemptions</i>	10.7 mil	11.0 mil
Returns Filed With Forms 8965 Claiming Household Coverage Exemption (Form 8965 Part II)	3.9 mil	3.2 mil
Returns Filed With Forms 8965 Claiming Coverage Exemption (Form 8965 Part III)	8.0 mil	7.8 mil
Prepared Returns Filed With Forms 8965	5.8 mil (54% of returns with Form 8965)	6.0 mil (54% of returns with Form 8965)

The most notable change is the 27 percent drop in returns filed reporting the ISRP. The remaining amounts appear fairly consistent with the previous filing season amounts. In addition, there were just over eight million TY 2016 silent returns filed through April 27, 2017, a slight increase over the number of TY 2015 silent returns filed through April 28, 2016.¹¹

As of the date of printing, the IRS is in the process of assessing various options to address silent returns filed in past as well as future filings, including the reinstatement of the plans to reject electronically filed silent returns, the issuance of educational or soft notices, and the issuance of penalty assessment notices. The National Taxpayer Advocate supports any efforts to reinstate plans to reject electronically filed silent returns as well as issue educational and soft notices. These options would help the taxpayer avoid future

8 IRS Statement on Silent Returns (Feb. 15, 2017); IRS, *Individual Shared Responsibility Payment Provision* (Feb. 15, 2017), <https://www.irs.gov/affordable-care-act/individuals-and-families/individual-shared-responsibility-provision>.

9 IRM 3.12.3.14.1, *Error Code 157 (CE) Shared Health Care Responsibility Payment and Checkbox Validation (SRP)* (Jan. 1, 2017).

10 IRS, CDW, IRTF TY 2016, through April 27, 2017 (May 2017); WISS, ACA Fact Sheet 05-31-2016; National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress 136–43. Note that some returns indicated both coverage exemptions for household (Part II on Form 8965) and coverage exemptions for individuals (Part III on Form 8965). As a result, the combined volumes may exceed the total number of returns with Form 8965.

11 IRS, CDW, IRTF TYs 2015 and 2016 (June 2017). This data is preliminary based on cycle 17 for tax years 2015 (returns processed through Apr. 28, 2016) and 2016 (returns processed through Apr. 27, 2017). TAS Research used the definition of silent returns from IRM 3.12.3.14.1, *Error Code 157 (CE) Shared Health Care Responsibility Payment and Checkbox Validation (SRP)* (Jan. 1, 2017). In some cases, taxpayers who filed apparent “silent returns” may have actually had their coverage substantiated by an information document, even though the return did not indicate minimum essential coverage; therefore, IRS compliance actions would not be necessary.

compliance problems. In addition, we have recommended that the IRS require commercial software vendors to program checks into their products to prevent the preparation of silent returns.¹²

TAS Premium Tax Credit (PTC) Case Receipts Decreased Significantly in FY 2017

After experiencing a sharp increase in PTC case receipts during FY 2016, TAS is seeing a significant decrease in these cases in FY 2017 through April 30, 2017. During FY 2016, PTC cases quickly became the fourth highest category of TAS cases. In FY 2017 through April 30, 2017, TAS received 3,104 cases with PTC issues, a 56 percent decrease from same period in FY 2016. This considerable decrease caused PTC cases to drop from being the fourth highest category of cases in FY 2016 to the sixth highest category in FY 2017 through April 7, 2017.¹³ In about 67 percent of the PTC cases, the tax return was in the Submission Processing Error Resolution (ERS)/Reject unit.¹⁴

A Commercial Tax Preparation Software Program Incorrectly Calculated PTC or Failed to Submit Form 8962, Premium Tax Credit (PTC)

In March 2017, the TAS ACA Rapid Response Team received an issue elevated through the Systemic Advocacy Management System (SAMS) regarding tax preparation software errors in preparing PTC returns.¹⁵ Specifically, one TAS local office elevated an issue that impacted approximately 25 cases in that particular office, but which may potentially have wider nationwide impact.¹⁶ The commercial tax preparation software used by a Volunteer Income Tax Assistance (VITA) partner incorrectly calculated PTC or failed to submit Form 8962, *Premium Tax Credit (PTC)*. Both the Stakeholder Partnerships, Education and Communication organization in the IRS Wage and Investment Division and the software provider were aware of the issue. The software provider has claimed to have corrected the problem that it estimates could have impacted up to 2,279 returns. To reduce the burden on impacted taxpayers, TAS issued internal guidance to TAS case advocates.¹⁷

Taxpayers Had Difficulty Receiving Advanced PTC (APTC) Due to “Failure to Reconcile” Flags

Taxpayers who receive advanced PTC (APTC) are required to reconcile the amount of the APTC received with the amount of PTC to which they are entitled on Form 8962, *Premium Tax Credit (PTC)*. Failure to reconcile renders a taxpayer ineligible to receive additional APTC in subsequent years.¹⁸ The IRS provides “flags” to the marketplace informing them of taxpayers who have failed to reconcile. These flags are eliminated once the taxpayer files either an original or amended return with Form 8962. However, there may be a delay between the posting of the Form 8962 and when it is available for the

12 Email from Wage & Investment Division (W&I) to TAS (June 2, 2017); Meeting between W&I and TAS (June 7, 2017).

13 In FY 2016, TAS received 10,910 cases with PTC issues. In comparison, TAS received 3,318 PTC cases in FY 2015 – an approximately 229 percent increase over a one-year period. National Taxpayer Advocate 2016 Annual Report to Congress 522 (TAS Case Advocacy, *Figure 4.1.4, Top 10 Issues for Cases Received in TAS, FYs 2015-2016*); Business Performance Management System (BPMS), Receipts - Core Issues by Business Operating Division (BOD) & Criteria – Cumulative, FY 2016: 1- October through 12- September (Oct. 1, 2016); Business Performance Management System (BPMS), Receipts - Core Issues by BOD & Criteria – Cumulative, FY 2015: 1- October through 12- September (Oct. 1, 2015); National Taxpayer Advocate 2016 Annual Report to Congress 266-76 (Most Serious Problem: Affordable Care Act (ACA): The IRS Has Made Progress in Implementing the Individual and Employer Provisions of the ACA But Challenges Remain).

14 Business Performance Management System (BPMS), Receipts - Core Issues by Business Operating Division (BOD) & Criteria – Cumulative, FY 2017: 1–October through 7–April (May 1, 2017).

15 Systemic Advocacy Management System (SAMS) issue 35850.

16 Taxpayer Advocacy Management Information System (TAMIS) case numbers for the approximate 25 cases are on file with TAS.

17 SAMS 35850; TAS ACA Rapid Response Team, *ACA Related Issues and Concerns, Week Ending March 24, 2017*.

18 IRM 21.6.3.4.2.13, *Premium Tax Credit* (Feb. 15, 2017).

system issuing the flags to the marketplace. Because of these timing differences, some marketplaces are allowing taxpayers to attest to filing a reconciling tax return and then subsequently verifying the attestation. The Centers for Medicare and Medicaid Services and one state marketplace contacted the IRS about this issue and, as a result, Accounts Management issued guidance to customer service representatives (CSRs) on how to assist impacted taxpayers. For those taxpayers who reconciled but are caught in a timing window, CSRs are told to inform the taxpayer of when the data posted and provide an estimate of when the information will be sent to the marketplace. Taxpayers are advised to order a return transcript as proof, but this will only help those taxpayers who reconciled on an original return, because amended return data is not populated on transcripts.¹⁹

There Is Uncertainty Regarding the Assessment of the Employer Shared Responsibility Payment Under Code Section 4980H

In addition to the existing provisions impacting individuals, some provisions of the ACA impacting employers became effective in TY 2015. For example, certain employers, referred to as Applicable Large Employers (ALEs), are subject to the ESRP provisions in IRC § 4980H.

ESRP under IRC § 4980H(a) will be assessed if an ALE did not offer MEC to at least 95 percent of its full-time employees (and their dependents) and at least one of its full-time employees was allowed a PTC. The amount of the ESRP under IRC § 4980H(c) is \$2,000 per full-time employee per year (determined on a monthly basis).²⁰

Even if an ALE did offer MEC to at least 95 percent of its full-time employees (and their dependents), ESRP under IRC § 4980H(b) will be assessed if one or more of its full-time employees was allowed PTC. The amount of the ESRP under IRC § 4980H(b) is \$3,000 per employee who was allowed a PTC (determined on a monthly basis).²¹ For any month, the amount of the ESRP under IRC § 4980H(b) may not exceed an amount equal to what the ALE would have been liable for under IRC § 4980H(a), if the ALE had been liable for such a payment for the month.

The IRS relies on information reports to verify data relevant to the ESRP liability. For example, ALEs must furnish Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage Insurance*, by February 28 (March 31 if filing electronically). If the IRS receives incomplete or inaccurate data, it may erroneously assess ESRPs on ALEs, which can be costly and time-consuming for both employers and the IRS to rectify. It appears the IRS has addressed some of the glitches from the first year processing such information returns — the average rejection rate for ACA information reporting forms significantly declined from 5.6 percent in TY 2015 to 1.1 percent in TY 2016.²²

Even though these provisions became effective in TY 2015, the IRS has yet to set forth procedures it will use to propose and assess the ESRP under IRC § 4980H. Employers need to know how they will be notified of any proposed ESRP, how long they will have to respond, and whether they may

19 Email from Wage & Investment Division to TAS (Dec. 23, 2016); SERP Alert IPU 16U1764 (Dec. 19, 2016); IRM 21.6.3.4.2.13.8, *Failure to Reconcile Advanced Payment of the Premium Tax Credit* (Dec. 19, 2016).

20 IRC § 4980H(c)(1). The ESRP provisions provide an inflation adjustment mechanism beginning in years after 2014. IRC § 4980H(c)(5).

21 IRC § 4980H(b)(1).

22 IRS response to TAS information request (June 8, 2017).

request a pre-assessment appeal. However, with the President's Executive Order²³ that directs agencies to minimize the burdens imposed by the ACA, it is unclear whether the IRS will set forth procedures related to the ESRP.

CONCLUSION

As the IRS continues to make significant progress on the implementation of both the individual and business provisions of the ACA, the National Taxpayer Advocate will ensure that taxpayer rights are protected. TAS will address ACA-related issues as they arise and identify systemic issues. We commit to immediately assign any systemic issues that arise to the TAS ACA Rapid Response Team. We encourage both internal and external stakeholders to report any suspected ACA systemic issues on SAMS.

FOCUS FOR FISCAL YEAR 2018

In Fiscal Year 2018, TAS will:

- Advocate for taxpayer rights for any actions or inactions the IRS plans to take in response to the ACA executive order issued on January 20, 2017;
- Elevate and address ACA issues to the TAS ACA Rapid Response Team;
- Evaluate PTC cases to determine why it continues to be a top ten issue for TAS case receipts; and
- Review any procedures the IRS sets forth for assessing the ESRP.

23 Executive Order 13765, *Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal* (Jan. 20, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/20/executive-order-minimizing-economic-burden-patient-protection-and>.