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ALERT

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Circuits Split Over Legality of IRS Rule Mandating Tax Credits for Individuals Covered Through Federal Exchanges under the Affordable Care Act

Today, the U.S. Court of Appeals for the D.C. Circuit, in a 2-to-1 decision, written by Judge Griffith, overturned Internal Revenue Service (IRS) regulations issued under the Affordable Care Act (ACA) requiring tax credits be made available to otherwise eligible individuals who purchase health insurance coverage through the Federal Exchanges. *Halbig, et al. v. Sylvia Mathews Burwell, et al.*, No. 14-5018. The Court concluded that the regulations are not supported by the statutory language of the ACA. Within a few hours, the Fourth Circuit in *King v. Burwell*, No. 14-1158, reached the opposite conclusion.

In May 2012, the IRS issued a final rule implementing one of the key provisions of the ACA, providing that premium tax credits must be available to all otherwise eligible taxpayers, regardless of whether they purchase coverage under a Qualified Health Plan (QHP) through a State-based Exchange or a Federally Facilitated Exchange (FFE). *See* 77 Fed. Reg. 30,377 (May 23, 2012). Today, only 15 States and the District of Columbia have established State-based Exchanges (two additional States have established State-based SHOP Exchanges); 36 States have had individual market FFEs implemented by the federal government, including those States that have what are considered "Partnership" Model Exchanges.

Various groups of plaintiffs have sued under these regulations. Plaintiffs in both of the cases decided today are individuals and, in D.C., employers residing in states that have had FFEs established by the federal government in lieu of State-based Exchanges established by their respective States.

Plaintiffs in both cases argued that the ACA does not permit premium tax credits to be made available to taxpayers who purchase health insurance coverage through one of the FFEs. Instead, the plaintiffs argued that the ACA provides such tax credits only for taxpayers with health plans that they "enrolled in through

an Exchange established by the State under 1311 of the [ACA]." ACA §1401(a) (establishing section 36B of the Internal Revenue Code of 1986).

The IRS, in its final rule, argued that "[t]he statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges." 77 Fed. Reg. at 30,378.

The D.C. Court concluded that the meaning of the phrase "Exchanges established by the State" is plain and is not inconsistent with remainder of the statute and would not lead to absurd results, as argued by the Government.

In the end, the Court announced: "[w]e reach this conclusion, frankly, with reluctance. At least until states that wish to can set up Exchanges, our ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly. But, high as those stakes are, the principle of legislative supremacy that guides us is higher still. Within constitutional limits, Congress is supreme in matters of policy, and the consequence of that supremacy is that our duty when interpreting a statute is to ascertain the meaning of the words of the statute duly enacted through the formal legislative process. This limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges."

The Fourth Circuit took the opposite position, concluding that the phrases were ambiguous and that the IRS's interpretation was not unreasonable.

The Government has already announced that it intends to seek a rehearing before the full D.C. Circuit.

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