

8-1-2011

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Jeffrey H. Kahn

*Florida State University College of Law*

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## Recommended Citation

Jeffrey H. Kahn, *The Operation of the Individual Mandate*, 132 *TAX NOTES* 521 (2011),

Available at: <https://ir.law.fsu.edu/articles/473>

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## The Operation of the Individual Mandate

By Jeffrey H. Kahn



Jeffrey H. Kahn

Jeffrey H. Kahn is the Larson Professor of Law at Florida State University College of Law.

In this article, Kahn describes the technical operation of important portions of the individual healthcare mandate, including the application of the penalty provision. Kahn finds that there

are problems with the technical drafting of that provision and that serious gaps and ambiguities abound.

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (P.L. 111-148) into law. A week later he signed the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152). Together, the two acts formed a historic overhaul of the U.S. healthcare system.<sup>1</sup> One of the most discussed provisions of the healthcare reform was the individual mandate, a provision that requires individuals to have healthcare insurance that provides minimal essential coverage.<sup>2</sup> Unless exempted, any individual who does not have health

insurance is subject to a penalty,<sup>3</sup> which is payable on the individual's income tax return.<sup>4</sup>

While some (including the attorneys general of several states) have argued that the healthcare act and the individual mandate provision in particular are unconstitutional,<sup>5</sup> this article does not discuss that issue.<sup>6</sup> Instead, this article details important portions of the individual mandate and explains how the provision operates. As will be shown, the technical drafting of the act is atrocious, and serious gaps and ambiguities abound. Regulations should be promulgated to fill those gaps and resolve the ambiguities.

Section 5000A requires that applicable individuals maintain minimum essential coverage (healthcare coverage) for each month after the close of 2013.<sup>7</sup> It

<sup>3</sup>The statute itself repeatedly refers to this imposition as a penalty rather than a tax. For convenience, I sometimes will refer to it as an "insurance penalty" and sometimes simply as "the penalty."

<sup>4</sup>Section 5000A(b). Because the penalty is set forth in the code, I sometimes refer to an individual who incurs the penalty as a "taxpayer." Indeed, the statute itself often refers to an applicable individual as the taxpayer.

<sup>5</sup>See, e.g., *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp.2d 768 (E.D. Va. 2010), Doc 2010-26522, 2010 TNT 239-8; *Florida ex rel. Bondi v. U.S. Dept. of Health & Human Serv.*, 2011 WL 285683 (N.D. Fla. 2011), Doc 2011-4650, 2011 TNT 44-18; *Thomas More Law Ctr. v. Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010), Doc 2010-22007, 2010 TNT 196-15; *Liberty Univ. Inc. v. Geithner*, 753 F. Supp.2d 611 (W.D. Va. 2010), Doc 2010-25502, 2010 TNT 231-12; *Mead v. Holder*, 2011 WL 611139 (D.D.C. 2011), Doc 2011-3924, 2011 TNT 38-18.

<sup>6</sup>See, e.g., Steven J. Ellis and Nakku Chung, "Constitutional Decapitation and Healthcare," *Tax Notes*, July 12, 2010, p. 169, Doc 2010-11669, or 2010 TNT 133-6; Randy E. Burnett, "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional," 5 *N.Y.U. J.L. & Liberty* 581 (2010) ("Such a claim of power has never before been asserted by Congress, much less validated by the Supreme Court. It is literally unprecedented."); Editorial, "Is Health Reform Legal? Some States Say the Federal Government Can't Make You Buy Health Insurance," *The Washington Post*, Mar. 25, 2010, at A20.

There have also been several articles arguing that the provision is constitutional. See, e.g., David B. Rivkin Jr. et al., "A Healthy Debate: The Constitutionality of an Individual Mandate," 158 *U. Pa. L. Rev.* 93 (2009); Brian D. Galle, "Conditional Taxation and the Constitutionality of Health Care Reform," *Yale L.J. Online* (Apr. 3, 2010).

<sup>7</sup>Section 5000A(a) and (d). Some individuals, such as non-U.S. citizens who are not lawfully present in the United States, are exempted from this requirement. Section 5000A(d).

<sup>1</sup>Sheryl Gay Stolberg and Robert Pear, "A Stroke of a Pen, Make That 20, and It's Official," *The New York Times*, Mar. 24, 2010, at A19 ("With the strokes of 20 pens, President Obama signed his landmark health care overhaul — the most expansive social legislation enacted in decades."); David Leonhardt, "Health Care Overhaul Becomes the Law of the Land: In the Process, Pushing Back At Inequality," *The New York Times*, Mar. 24, 2010, at A1 ("The bill that President Obama signed on Tuesday is the federal government's biggest attack on economic inequality since inequality began rising more than three decades ago.").

<sup>2</sup>Section 5000A(a).

appears that if an individual is not covered for any part of a month, the mandate will be violated for that month. Minimum essential coverage includes coverage under Medicare, Medicaid, plans purchased in the individual market, and employer-sponsored plans.<sup>8</sup> In any month in which minimum essential coverage is not maintained for a taxpayer who is an applicable individual or for his dependents who are applicable individuals, the taxpayer will be subject to a penalty. This imposition is described as a penalty throughout section 5000A.<sup>9</sup> A taxpayer with dependents is liable for any penalties imposed on those dependents if they are applicable individuals. The code does not specify whether the dependent is liable to pay the penalty if the taxpayer fails to do so.<sup>10</sup>

Interestingly, failure to pay this penalty is not subject to any criminal prosecution or penalty, and the IRS may not file a lien or levy on any property to collect it.<sup>11</sup> It appears that the sole way the IRS can collect the penalty from individuals who refuse to pay it is to withhold any tax refund to which they might be entitled.

As noted, the persons required to maintain essential coverage are referred to as “applicable individuals.”<sup>12</sup> The statute provides several exclusions from characterization as an applicable individual, and persons who qualify for those exclusions are not required to purchase minimum essential insurance coverage.<sup>13</sup> For example, most persons who are incarcerated and persons who adhere to a religion whose tenets or teachings cause them to conscientiously oppose the benefits of insurance are excluded.

In addition to the exclusion from characterization as an applicable individual, the statute exempts some applicable individuals from the penalty.<sup>14</sup> Along with four specific exemptions from the penalty, there is a general exemption for individuals for whom the government determines that their purchase of coverage would be a hardship.

To provide relief for short-term gaps in coverage, the code does not impose a penalty if a person fails to have the minimum essential coverage for a

continuous period of less than three months. That continuous period can fall within two different calendar years. If there is more than one such continuous period in a calendar year, only the first period qualifies for the exclusion.<sup>15</sup> If the continuous period lasts for three months or more, the coverage gap exception to the imposition of the penalty is inapplicable.<sup>16</sup>

Subject to a limitation described below, the annual amount of the insurance penalty is equal to the sum of the monthly penalty amounts that the taxpayer incurs for each month he or any of his dependents who are applicable individuals fail to maintain minimum coverage.<sup>17</sup> If the taxpayer files a joint return, he and his spouse are jointly liable for “such penalty.”<sup>18</sup> (As we will see, the statute is woefully unclear as to what “such penalty” refers.) The monthly penalty amount is one-twelfth of the greater of a flat dollar amount or a percentage of household income.<sup>19</sup> The definition of household income is described later in this article.

For each year, there is an “applicable dollar amount,” a portion of which is allocated to each month in which the insurance mandate is violated. The applicable dollar amount is one of the items that may be used in determining an individual’s monthly penalty amount. For each month in which the insurance mandate is violated, a monthly penalty amount is taken into account.<sup>20</sup>

The flat dollar amount for each applicable individual is equal to the sum of the applicable dollar amounts for that individual and for others who are not clearly identified in the statute. The statute describes the taxpayer’s flat dollar amount for a month as the “sum of the applicable dollar amounts for all individuals with respect to whom such

<sup>15</sup>For example, if a taxpayer did not have appropriate insurance coverage for January and December in one calendar year but had coverage for every other month of that year, this exception would apply only to exclude the penalty for January. The penalty would be imposed for December even though the total lack of coverage during the year was two months. Section 5000A(e)(4).

<sup>16</sup>Section 5000A(e)(4). Thus, if the non-coverage period equals or exceeds three months, no exemption is provided for any month during the period. That is, once the gap reaches three months, the penalty applies to all those months, not just the months in excess of three. Section 5000A(e)(4)(B). Also note that Congress delegated authority to Treasury to issue regulations on how to collect the penalty when the continuous period includes months in more than one tax year. Section 5000A(e)(4).

<sup>17</sup>Section 5000A(c). A dependent of a taxpayer is a person who comes within the definition set forth in section 152.

<sup>18</sup>Section 5000A(b)(3)(B).

<sup>19</sup>Section 5000A(c)(2).

<sup>20</sup>*Id.* As noted above, the monthly penalty amount is the greater of a dollar amount or a figure based on a percentage of the individual’s household income.

<sup>8</sup>Section 5000A(f).

<sup>9</sup>*E.g.*, section 5000A(b), (c), and (e).

<sup>10</sup>Section 5000A(b)(3)(A). One ground for finding that a dependent is relieved of liability is the contrast between the statutory provision dealing with dependents and the provision dealing with spouses. Section 5000A(b)(3)(A) and (B). The dependent provision makes no mention of joint liability, whereas the provision for spouses who file a joint return expressly provides for joint liability. The answer is far from clear.

<sup>11</sup>Section 5000A(g)(2).

<sup>12</sup>Section 5000A(a) and (d).

<sup>13</sup>Section 5000A(d)(2)-(5) and (e).

<sup>14</sup>Section 5000A(e).

failure occurred during such month.”<sup>21</sup> Obviously, there should be a modifying limitation on the word “individuals” in that provision. Which individuals have their applicable dollar amounts added to the taxpayer’s? Other subsections of section 5000A make it clear that the reference to individuals is to dependents of the taxpayer who are applicable individuals.<sup>22</sup> It seems reasonably certain that only a portion of a dependent’s applicable dollar amount for the months in which that dependent failed to comply with the insurance mandate is taken into account.<sup>23</sup> But even those modifications leave open a difficult question. You will recall that section 5000A(e) exempts some applicable individuals from the insurance penalty. Should the applicable dollar amounts of all the individual’s dependents who are applicable individuals who violated the mandate be added, or should only the applicable dollar amounts of those dependents who incur a penalty for that month be added? Either construction is possible,<sup>24</sup> but I believe the more likely intention is to include only the applicable dollar amounts of dependents who incur the penalty.

For 2016, the applicable dollar amount will be \$695.<sup>25</sup> If an individual is under 18 at the beginning of a month, his applicable dollar amount for that month will be reduced by 50 percent.<sup>26</sup>

For 2016, an applicable individual who has no dependents and does not file a joint return will have a monthly flat dollar amount of \$57.92. After 2016, that amount will be adjusted for the cost of living.<sup>27</sup>

As previously noted, an individual’s monthly flat dollar amount includes the applicable dollar amounts of other persons who are not expressly identified by the statute. I have construed that provision to include only the monthly portion of the applicable dollar amounts of a taxpayer’s dependents who incur a penalty for that month.

<sup>21</sup>Section 5000A(c)(2)(A)(i).

<sup>22</sup>*E.g.*, section 5000A(a) and (b)(3)(A).

<sup>23</sup>Section 5000A(c)(1)(A).

<sup>24</sup>As we will see, the household income of a taxpayer includes the income of all dependents who are required to file an income tax return, regardless of whether they are applicable individuals who are not in compliance with the mandate. It is conceivable that Congress similarly intended that the applicable dollar amounts of all of a taxpayer’s dependents be included.

<sup>25</sup>Section 5000A(c)(3)(A). Although \$695 is the applicable dollar amount, it is not fully phased in until 2016. The applicable dollar amount for 2014 is \$95, and the amount for 2015 is \$325. The flat dollar amount can be greater than the \$695 applicable dollar amount for 2016 because it will include the applicable dollar amount for each of the taxpayer’s dependents who are subject to the penalty. *See* section 5000A(c)(2)(A) and (c)(3)(C). For years after 2016, the applicable amount will be adjusted for changes in the cost of living. Section 5000A(c)(3)(D).

<sup>26</sup>Section 5000A(c)(3)(C).

<sup>27</sup>Section 5000A(c)(3)(D).

While the flat dollar amount of a taxpayer who has such dependents is the cumulative total of the applicable dollar amounts of all of them, there is a ceiling on the size of the taxpayer’s total flat dollar amount for the year; it cannot exceed three times the amount of the applicable dollar amount.<sup>28</sup> Consequently, a taxpayer’s cumulative flat dollar amount for 2016 cannot exceed \$2,085.<sup>29</sup>

To calculate the percentage of income variable in 2016 (recall that the penalty is the greater of two figures, one of which is based on a percentage of income), an applicable individual multiplies an amount calculated by using a modified family income figure by 2.51 percent.<sup>30</sup> The modified family income is the excess of the taxpayer’s household income over “the amount of gross income specified in section 6012(a)(1)”<sup>31</sup> — that is, the minimum amount of income that requires a taxpayer to file a tax return. Household income is the sum of a modified amount of the adjusted gross income<sup>32</sup> of the taxpayer<sup>33</sup> and each of his dependents who qualifies him for an exemption deduction under section 151 and who is required to file a tax return.<sup>34</sup> Section 6012 is the provision that requires taxpayers to file a tax return unless their gross income does not exceed a specified amount.<sup>35</sup> For example, for joint filing taxpayers, that amount is equal to twice the personal exemption amount listed in section 151(d), plus their standard deduction.<sup>36</sup>

Thus, the monthly penalty amount will be one-twelfth of the greater of the flat dollar amount or the percentage of modified family income amount. An example may help illustrate both this calculation

<sup>28</sup>Section 5000A(c)(2)(A)(ii).

<sup>29</sup>Of course, the taxpayer’s actual penalty could be higher because the percentage of income variable could be greater than this maximum flat dollar amount.

<sup>30</sup>Section 5000A(c)(2)(B). Similar to the flat dollar amount, this tax rate is not fully phased in until 2016. For 2014, the tax rate will be 1 percent, and for 2015, it will be 2 percent. Section 5000A(c)(2)(B)(i) and (ii).

<sup>31</sup>Section 5000A(c)(2)(B).

<sup>32</sup>It is “modified” AGI because it takes the taxpayer’s AGI and adds any tax-exempt interest and any foreign income that was exempted under section 911. Section 5000A(c)(4)(C).

<sup>33</sup>As discussed later in the article, there is some ambiguity about whether a taxpayer who files jointly includes the entire amount of gross income reported on the joint return or whether some allocation is required.

<sup>34</sup>Section 5000A(c)(4)(A) and (B). A taxpayer can qualify for an exemption deduction for his spouse if a joint return is not filed and the spouse has no gross income and is not the dependent of another person. Section 151(b). Note that an applicable individual whose household income is less than the amount required to file a return is not subject to a penalty. Section 5000A(e)(2).

<sup>35</sup>Section 6012(a).

<sup>36</sup>Section 6012(a)(1)(A)(iv).

and the many ambiguities that currently exist because of inadequate drafting of the statute. Note that there is a ceiling or overall limitation on the amount of the insurance penalty that an individual can occur in a tax year. That ceiling is discussed later.

#### Example: Single Taxpayer With Dependent

M is an unmarried individual with a 16-year-old daughter, D. In 2016 M's sole income is \$60,000 from her employment. D's sole income is the \$10,000 she earned from her summer job. For simplicity's sake, assume that neither individual has any non-itemized or itemized deductions. M provides more than half of D's support, and M qualifies for head of household treatment. Since D is a dependent of M, M is liable for any insurance penalty that D may incur.<sup>37</sup> Because there will be inflation adjustments to the amount of a taxpayer's standard deduction and exemption amount, we do not know the standard deduction and exemption amounts that will apply in 2016. For convenience, in this example I will use the current figures so that the standard deduction plus exemption amount for a taxpayer who is a head of household is \$15,700 and the amount for a single taxpayer is \$9,350.

During the first nine months of the year, neither M nor D is enrolled in any health insurance program. On October 1, 2016, both M and D enroll in a health insurance program that satisfies the minimum essential coverage requirement. Assuming no exception applies, M and D are subject to the insurance penalty for the first nine months of the year during which they have failed to have adequate health insurance coverage, but M is the one required to pay that penalty.<sup>38</sup>

Although, as discussed below, the statute is less than clear on the issue, it appears that M and D each must calculate the penalty amount under both the flat dollar amount system and the percentage of income method; and the penalty amount for each, subject to an overall limitation,<sup>39</sup> will be the greater of those two calculations. First, let's calculate the flat dollar amount for M. Since it is 2016 in the hypothetical, we use \$695 as the annual applicable dollar amount.<sup>40</sup> M did not have the appropriate health insurance coverage for nine months of the year, so before taking into account D's applicable dollar amount, M's flat dollar amount for the nine months is \$521.25 ( $(\$695/12) \times 9$ ).

It appears that M's flat dollar amount will include the flat dollar amount that applies to D as well. The statute says that the flat dollar amount is "the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month."<sup>41</sup> As previously noted, the statute does not specify which individuals have their applicable dollar amounts aggregated with the taxpayer's, and I have assumed that the statutory reference is to dependents to whom a penalty applies for which the taxpayer is liable under section 5000A(b)(3). Accordingly, D's applicable dollar amount should be added to determine M's total flat dollar amount since D is a dependent who failed to have adequate health insurance coverage for nine months of the year.

D's flat dollar amount is calculated in the same manner as M's. However, for individuals under 18, the applicable dollar amount is half the regular amount used.<sup>42</sup> Thus, for D, the calculation of the flat dollar amount is  $(\$347.50/12) \times 9 = \$260.63$ . This figure is added to M's applicable dollar amount to determine M's flat dollar amount; so M's flat dollar amount is \$781.88 ( $\$521.25 + \$260.63$ ).

Next, we determine the percentage of income amount for each individual. The penalty, subject to the national average bronze-level premium limitation (discussed below), is the greater of the two calculations. Recall that the percentage of income penalty amount is an amount equal to a percentage of the "excess of the taxpayer's household income over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year."<sup>43</sup> A taxpayer's household income is the sum of the taxpayer's modified AGI plus the aggregate modified AGIs of all individuals who must file a federal income tax return and for whom the taxpayer can claim a dependent exemption deduction.

M's modified AGI is \$60,000. M must also include D's \$10,000 of modified AGI since M can claim a dependent exemption deduction for D, who has earned enough gross income to be required to file a return. Thus, M's total household income is \$70,000. As shown below, D's income is included in the calculation of M's household income whether or not D failed to have adequate health insurance.

<sup>41</sup>Section 5000A(c)(2)(A)(i). The statute also has a flat dollar amount limitation that is equal to 300 percent of the applicable dollar amount without taking into account the 50 percent reduction for individuals under age 18. Section 5000A(c)(2)(A)(ii). Obviously, this limitation would be meaningless if only one applicable dollar amount could apply to each taxpayer.

<sup>42</sup>Section 5000A(c)(3)(C). Thus, for 2016, the under-18 applicable dollar amount is \$347.50.

<sup>43</sup>Section 5000A(c)(2)(B).

<sup>37</sup>Section 5000A(b)(3)(A).

<sup>38</sup>*Id.*

<sup>39</sup>The overall limitation is that the penalty cannot exceed the national average premium for specified qualified health plans. Section 5000A(c)(1)(B).

<sup>40</sup>Section 5000A(c)(3)(A).

Section 5000A(c)(4)(B) defines household income as the modified AGI of the taxpayer plus all other individuals who “were taken into account in determining taxpayer’s family size under paragraph (1).”<sup>44</sup> Section 5000A(c)(4)(A) defines family size as follows: “The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to the allowance of deduction for personal exemptions) for the taxable year.” This definition requires that the income of all dependents who are required to file a tax return and for whom the taxpayer is allowed an exemption deduction be aggregated with the taxpayer’s income, not just the income of those dependents who failed to have adequate health insurance.

Returning to the hypothetical, to determine the percentage of income annual amount, we take 2.51 percent (the applicable percentage amount for 2016) of M’s household income (\$70,000) over the section 6012(a) amount for M (as a head of household, M’s section 6012(a) amount is \$15,700<sup>45</sup>). Thus, M’s annualized percentage of income is \$1,362.93. M failed to have adequate coverage for nine months, so M’s actual percentage of income amount is \$1,022.20 ( $(\$1,362.93/12) \times 9$ ). Because this amount is greater than M’s flat dollar amount (\$781.88), it will be the penalty amount for M.<sup>46</sup>

One ambiguity in the statute is whether we then calculate a separate penalty for D (although, again, M would be the individual responsible for the penalty). On the one hand, it appears that we already accounted for D in determining M’s penalty amount. For example, in the flat dollar amount calculation, D’s applicable dollar amount was included in determining M’s flat dollar penalty amount. So allocating another amount to D alone, for which M would be liable, would be double counting. Also, for the percentage of income amount, recall that M’s penalty liability was calculated by including D’s modified AGI when determining M’s household income. It would appear unreasonable to impose a separate penalty on D individually. Thus, one construction is that the allocation of those items to M satisfies the requirement in section 5000A(b)(3)(A) that M is liable for D’s penalty. If so, as calculated above, M should

incur a penalty of \$1,022.20, and no additional penalty should be imposed on either M or D.

On the other hand, reading the statute literally, D is a person who is an “applicable individual” as that term is defined in section 5000A(d) and is not exempted from the penalty. Also, since M’s household income calculation includes D’s modified AGI whether or not D had health insurance coverage, if we don’t have a separate penalty for D individually, in cases in which the percentage of income amount is the greater figure, the total penalty amount (for D and M collectively) would be the same whether or not D had health insurance coverage. This would conflict with the purpose of the provision (inducing individuals to purchase adequate health insurance); thus, one could surmise that a separate penalty must be calculated for D to penalize the family for failing to have adequate health insurance for her.

If a separate penalty for D is required, the following illustrates the calculation. Calculating a separate flat dollar amount for D would involve the same calculation of D’s applicable dollar amount that we used above, which yields a penalty of \$260.63.

To calculate the percentage of income amount, D’s household income is only the \$10,000 that she earns. Since D cannot claim M as a dependent, she is not required to include M’s modified AGI in her calculation. Thus, to determine D’s annualized percentage of income amount, we take 2.51 percent of D’s household income (\$10,000) over the section 6012(a) amount for D. A single taxpayer’s section 6012(a) amount would normally be \$9,350.<sup>47</sup> However, it appears that D should not include a personal exemption deduction in determining her section 6012(a) amount. Since M can claim D as a dependent, D is not allowed her own personal exemption when determining whether she needs to file a return.<sup>48</sup> Thus, D must file a return only if her gross income at least equals the standard deduction amount (\$5,700).<sup>49</sup>

<sup>47</sup>*Supra* note 45.

<sup>48</sup>Section 151(d)(2).

<sup>49</sup>IRS Publication 17, *Your Federal Income Tax* (2010). The literal terms of section 6012(a) refer to “the exemption amount” but do not specify that the amount must be available as a deduction for the individual. A reasonable construction would require that the exemption amount is taken into account only if available to the individual as a deduction. The obvious purpose of permitting a taxpayer to not file a return in these circumstances is to avoid unnecessary paperwork when the taxpayer owes no tax (and thus, as a side note, section 6012(a) should state that gross income *exceeds* the applicable amounts rather than “at least equal to,” because if the amount is exactly equal, the taxpayer will not owe any tax). As shown in Publication 17, that is how the IRS has construed that provision, and that construction is reasonable.

<sup>44</sup>Although the statute refers to paragraph “(1),” this is likely a typo and should read paragraph “A.”

<sup>45</sup>As noted earlier, the actual standard deduction and exemption amounts for 2016 are unknown at the time of this writing, so I am using current figures.

<sup>46</sup>Assuming that it does not exceed the national average premium for bronze-level healthcare plans. Section 5000A(c)(1)(B). This average has yet to be published.

For my calculation, I will assume that \$5,700 is the correct amount. Thus, D's annualized percentage of income penalty is calculated as  $(\$10,000 - \$5,700) \times 2.51$  percent = \$107.93. D failed to have adequate coverage for nine months, and her actual percentage of income tax penalty is therefore \$80.95  $(\$107.93/12 \times 9)$ . For D individually, the penalty amount is the greater of the two calculations, so D's individual penalty amount would be \$260.63. If that scenario applies, the total tax penalty for M and D would be \$1,282.83, and M is the person who must pay that tax.

One purpose of this illustration is to highlight the ambiguities caused by the poor drafting of section 5000A. Although it is perhaps unlikely for a technical correction to be adopted in the current political climate, Congress should attempt to clarify many of these issues by improving the statute's language. Congress should decide whether a dependent who failed to comply with the mandate should have a separate penalty for which the taxpayer is liable, or whether the taxpayer's penalty is sufficient because it is based on a figure that includes either the dependent's flat dollar amount or percentage of income amount. In the absence of legislation, Treasury should promulgate clarifying regulations.

#### More Confusion: Married Taxpayers

Difficult issues also arise when taxpayers who are subject to the penalty file a joint return. Assume a married couple files a joint return and neither individual has adequate health insurance for the entire tax year. The first question is whether to treat the two spouses as a single individual and calculate one penalty for their joint income, or to disengage each spouse's separate income and deductions and calculate a separate penalty for each. In this connection, note that section 5000A(b)(3)(B) makes spouses "jointly liable for such penalty." The use of the singular "penalty" suggests that only one penalty is applied, but it is far from conclusive.

If a penalty is imposed on each spouse, how should the flat dollar amount be calculated? Again, the language in section 5000A(c)(2)(A) is far from clear, but it appears that each spouse calculates a separate flat dollar amount. The provision states that the flat dollar amount "is the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month."<sup>50</sup> It is unclear whether the reference to "all individuals" includes a taxpayer's spouse or includes only dependents of the taxpayer.

Determining the percentage of income amount is even less clear. As noted above, the percentage of

income amount is calculated by taking a percentage of the taxpayer's household income over the appropriate amount specified in section 6012(a).<sup>51</sup> Household income means the sum of "the modified adjusted gross income of the taxpayer"<sup>52</sup> plus "the aggregate modified adjusted gross incomes of all other individuals who were taken into account in determining the taxpayer's family size" and were required to file a tax return.<sup>53</sup>

A taxpayer's spouse is not usually included in the definition of family size under the statute. The statute says that "the family size . . . shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the tax year."<sup>54</sup> With one minor exception, a taxpayer is not allowed an exemption deduction for his spouse.<sup>55</sup> Instead, the spouse is allowed an exemption for himself. Thus, it appears that the spouse would not be included as part of the taxpayer's "family size." While personal exemption deductions for both spouses are allowed on a joint return, neither spouse is allowed a deduction for the other; rather, each spouse takes his own exemption deduction and the two are combined on the joint return.<sup>56</sup>

That leads to the question of what is the "modified adjusted gross income of the taxpayer" when spouses file a joint return. This raises troublesome issues. For example, assume that the term includes all the income reported on the joint return. This approach appears to be consistent with the idea that the taxpayer includes the income of dependents whether or not the dependents had adequate health insurance coverage.

The difficulty with this approach is the same as in the dependent situation. That is, what should the result be when both the taxpayer and his spouse failed to have adequate health insurance? If both the taxpayer and the spouse are required to determine percentage of income penalties and both must use the full AGI reported on the joint return, it would be double counting each spouse's income for penalty purposes. If the penalty were large enough,

<sup>51</sup>Section 5000A(c)(2)(B).

<sup>52</sup>Section 5000A(c)(4)(B)(i).

<sup>53</sup>Section 5000A(c)(4)(B)(ii)(I).

<sup>54</sup>Section 5000A(c)(4)(A).

<sup>55</sup>The one exception, found in section 151(b), is when the taxpayer and the spouse do not file a joint return and the spouse earns no income and cannot be claimed as a dependent of someone else.

<sup>56</sup>This raises other troublesome issues. For example, the term "family size" is also used in section 5000A(c)(1)(B), which describes the overall limitation based on the national average premiums for a bronze-level health plan for the "applicable family size involved."

<sup>50</sup>Section 5000A(c)(2)(A)(i).

this could encourage some taxpayers to file separately to avoid the double counting.<sup>57</sup>

There are several possible solutions to this problem. The first is to treat the spouses as a single taxpayer and apply only one penalty on the joint return, counting all the joint income as part of the household income that is subject to the penalty. The problem with this approach is that the penalty amount would thereby be the same whether both spouses failed to have adequate insurance or only one did. That result would be inconsistent with the purpose of the mandate, to induce individuals to obtain health insurance coverage.

An alternative method, which avoids both the double counting problem and the policy problem of having the same penalty whether one spouse or both spouses failed to have health insurance coverage, is to require an allocation of income and deductions between the spouses and impose a penalty on each. While this avoids the problems mentioned above, it creates administrative headaches of its own. Salary income would be simple to allocate, but other types may be complicated. Also, the allocation of deductions (for example, deductions for jointly owned rental property) can be difficult. Although those allocations can be made, they would add considerably to the burden of the calculations.

The correct interpretation with these issues is much more difficult to determine than in the dependent situation. I believe the simplest answer would be to split the modified AGI of married couples in half and require each spouse who is subject to a penalty to determine his penalty separately. While this allocation is arbitrary, the administrative relief it provides might be worthwhile. No matter what the resolution should be, either legislative revision or regulatory clarification is needed to eliminate the ambiguities produced by the current statute.

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<sup>57</sup>Married couples filing separately have another administrative issue in determining the appropriate percentage of income amount. Recall that to determine the penalty, you take 2.51 percent of the taxpayer's household income over the "amount of gross income specified in section 6012(a)(1)." The difficulty is that there is no listing for married filing separately in section 6012(a). In *Your Federal Income Tax*, *supra* note 49, the IRS lists the amount as \$3,650 (the amount of one personal exemption). Normally, taxpayers calculating the percentage of income penalty would be able to use both a personal exemption and the amount of the standard deduction applicable to their filing status. The reason the filing requirement for married filing separately does not also allow the standard deduction is that a married filing separately taxpayer may not use the standard deduction if married to a taxpayer who itemizes on his separate return. Because some taxpayers filing separately will be in that position and some will not, the IRS opted to ignore the standard deduction in determining whether a return must be filed.

### Final Limitation

There is one final limitation on the amount of the penalty. The amount of penalty paid in a tax year cannot exceed "the national average premium for qualified health plans which have a bronze level of coverage" for the taxpayer's family size offered through a health insurance exchange program.<sup>58</sup> It is unclear whether this limitation is applied monthly or annually. If the penalty amount cannot exceed the annual average premium, it would appear that the limitation would not apply pro rata. That is, the limitation would be that the penalty could not exceed the annual premium amount no matter how many months the taxpayer was not covered by an adequate health insurance plan. So the limitation would be the full year's average premium (rather than just a portion of that amount) even though the taxpayer may have been subject to a penalty (for failure to maintain adequate health insurance) for only a portion of the year. It is unclear exactly how that average will be determined. In a letter to Senate Finance Committee member Olympia J. Snowe, R-Maine, Douglas Elmendorf (director of the Congressional Budget Office) said the CBO estimates that in 2016 annual premiums for bronze-level plans will average between \$4,500 and \$5,000 for an individual, and between \$12,000 and \$12,500 for a family policy.<sup>59</sup> A monthly application appears more appropriate, and the provision should be so revised.

In conclusion, the technical statutory language of the individual mandate provision is subject to a multitude of ambiguities likely produced by the manner in which the act was passed. If the individual mandate is deemed constitutional, Congress or Treasury should clean up the issues addressed in this article before the provision becomes operational.

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<sup>58</sup>Section 5000A(c)(1)(B). The act defines a bronze plan as one that provides "a level of coverage that is designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan." Section 1301 of the Patient Protection and Affordable Care Act, 124 Stat. 119, 163-168 (Mar. 23, 2010), codified at 42 U.S.C. 18022.

<sup>59</sup>The CBO letter is available at [http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums\\_for\\_Bronze\\_Plan.pdf](http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums_for_Bronze_Plan.pdf).