



PROPOSED ACTION
MEMORANDUM

Temporarily Holding Consumers Harmless from Premium Tax Credit Reconciliation

Internal Revenue Service
December 2020

I. Summary

The COVID-19 pandemic has resulted in widespread financial instability and uncertainty as millions of low-income workers have been laid off, furloughed, or had their hours or shifts changed. These disruptions have made it far more challenging than normal for low- and middle-income workers to project their income accurately, even though doing so is critical for Exchange enrollees who receive advance premium tax credits (APTC). Under the Affordable Care Act (ACA), those who fail to project their household income accurately must repay excess APTC to the government. Requiring repayment for the 2020 tax year would create additional unexpected financial burdens at a time when Americans need economic support and stability.

This memorandum proposes that the Internal Revenue Service (IRS) issue a new notice to extend repayment relief to taxpayers who received excess APTC during the 2020 tax year. This one-time, temporary nonenforcement policy would keep billions of dollars in the hands of the American people and prevent families from being financially penalized for reasons outside of their control.

II. Justification

Income uncertainty has been the norm in 2020. Millions of jobs have been lost as businesses shuttered and laid off employees or temporarily furloughed workers.¹ In September, 19.4 million people were unable to work because their employer closed or lost business due to the pandemic.² Job loss and reduced incomes mean even less financial security for low- and middle-income families, many of whom were struggling to make ends meet before the pandemic.

For workers who kept their jobs, many faced unpredictable schedules as businesses closed and reopened, states and localities adopted new policies, or employers increased or cut shifts and hours.³ Many workers had little ability to control their work schedules and incomes *before* the pandemic,⁴ but the pandemic made work schedules and household income even more impossible to predict.

In the midst of this uncertainty, those whose income projections were too low could unknowingly owe significant amounts in excess APTC to the IRS. This was a particular concern for 2020 given the unique income changes that many may have faced. Taxpayer income projections could be too low for reasons that range from unexpected hazard pay for essential workers, extra shifts to cover for coworkers who were out sick or in quarantine, the need to cash out retirement, a second job, or even debt cancellation.⁵ Unemployment benefits (including the temporary federal increase in benefits of \$600 per week) are treated as income for purposes of premium tax credit eligibility.⁶ Exchange enrollees who did not realize they needed to report these payments as income may be receiving more generous APTC relative to their actual income,

¹ Kim Parker et al., Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest, Pew Research Center (Sep. 24, 2020), <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>.

² Bureau of Labor Statistics, The Employment Situation—September 2020 (Oct. 2, 2020) at 3, <https://www.bls.gov/news.release/pdf/empst.pdf>.

³ See Kim Parker et al., About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19, Pew Research Center (Apr. 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/>.

⁴ See, e.g., Stephanie Wykstra, “The Movement to Make Workers’ Schedules More Humane,” *Vox* (Nov. 5, 2019) (summarizing studies on unpredictable scheduling, including one study finding that, on average, low- and middle-income households made at least 25 percent above or below their average monthly income for five months out of the year).

⁵ See, e.g., Tara Straw, Threat of Tax Credit Repayment Would Reduce Coverage, Put Many Families at Financial Risk, Center for Budget and Policy Priorities (Nov. 14, 2017), <https://www.cbpp.org/research/health/threat-of-tax-credit-repayment-would-reduce-coverage-put-many-families-at-financial-risk>.

⁶ Congressional Research Service, CARES Act Income Support and Unemployment Compensation: Effect on Eligibility for Medicaid, CHIP, and ACA Premium Tax Credit (Jul. 2, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11448>.

leading to a significant surprise at tax time that families could not have budgeted for.⁷ These concerns about income fluctuations and inaccurate reporting are exacerbated by the fact that the Trump administration did not do as much outreach as in prior years to encourage enrollees to report income changes to the Exchange.

III. Current State

The ACA extends premium tax credits to qualifying individuals and families whose household income is between 100% and 400% of the federal poverty level (FPL), which ranges from \$12,760 to \$51,040 for an individual, or \$21,720 to \$86,880 for a family of three.⁸ To make Exchange coverage more affordable, the vast majority of enrollees choose to take APTC to lower their monthly premiums.⁹ The amount of APTC is based on an individual's projected income for the year at the time that they apply for coverage.

I.R.C. § 36B(f) requires the IRS to reconcile the amount received in APTC (based on projected income at the time of the application) with the amount of premium tax credit allowed (based on actual income at tax time).¹⁰ To reconcile APTC, taxpayers complete IRS Form 8962 using information provided by the Exchange on Form 1095-A and attach Form 8962 to their tax return.

Taxpayers who received *more* in APTC than they are ultimately entitled to (because they underestimated their income) must repay the amount received in excess APTC. This results in a smaller tax refund or a larger balance owed to the IRS. Taxpayers who received *less* in APTC than they are ultimately entitled to (because they overestimated their income) are made whole during the reconciliation process and receive a higher tax refund or lower tax liability.

Liability for excess APTC is capped for enrollees who earn between 100% and 400% of the FPL.¹¹ For 2020, those who earn less than 200% of the FPL repay no more than \$650 even if they received more in excess APTC.¹² This amount increases to no more than \$2,700 for those whose income is between 300% and 400% of the FPL.¹³ These repayment limits help insulate low-income enrollees from being forced to pay back even higher excess APTC, but a liability of \$650 or \$2,700 is not insignificant and could be the difference between being evicted or paying one's rent or mortgage.

Repayment limits do not apply to those who received APTC because they expected their income to be lower but who ultimately earned more than 400% of the FPL. These enrollees must repay *all* APTC received in the prior year. This can leave those who earn 405% of the FPL in debt of many thousands of dollars to the IRS for full APTC, while those who earn 395% of the FPL are protected by repayment limits.¹⁴

⁷ See Sarah O'Brien, "If You're Making More on Unemployment Than Working It May Mean Less Help with Health Insurance Premiums—And a Tax Bill," *CNBC* (May 26, 2020).

⁸ I.R.C. § 36B. The poverty guidelines for 2020 were retrieved from the Office of the Assistant Secretary for Planning and Evaluation, <https://aspe.hhs.gov/poverty-guidelines>.

⁹ In the 2019 and 2020 open enrollment periods, 87 percent of consumers had premiums reduced by APTC. Centers for Medicare and Medicaid Services ("CMS"), Health Insurance Exchanges 2020 Open Enrollment Report (Apr. 1, 2020), <https://www.cms.gov/files/document/4120-health-insurance-exchanges-2020-open-enrollment-report-final.pdf>.

¹⁰ I.R.C. § 36B(f)(2); see also 26 C.F.R. § 1.36B-4. As enacted, the ACA capped repayment of excess APTC for taxpayers whose income was under 400 percent FPL to no more than \$400. Higher repayment limits were adopted in subsequent legislation. See Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, § 208, 124 Stat. 3285, 3291-92 (2010) (adopting sliding scale repayment limits for taxpayers whose income was up to 500 percent FPL). The current requirements were adopted in 2011 in the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011. See Pub. L. No. 112-9, § 4, 125 Stat. 36, 36-37 (2011).

¹¹ I.R.C. § 36B(f)(2)(B)(i). Liability is also capped for those whose income is below 100 percent FPL under certain circumstances.

¹² See IRS, Rev. Proc. 2019-44, at 10-11 (Oct. 28, 2019), <https://www.irs.gov/pub/irs-drop/rp-19-44.pdf>.

¹³ I.R.C. § 36B(f)(2)(B)(i).

¹⁴ See Darla Mercado, "If You Got a Subsidy to Buy Health Insurance, It Could Cost You at Tax Time," *CNBC* (Oct. 4, 2020) (citing the story of a taxpayer who sold their home which caused their income to exceed 400 percent FPL and required them to repay \$17,000 since the family received close to \$1,500 per month in APTC).

Enrollees are directed to regularly report income and other household changes to the Exchange to safeguard against major surprises in APTC liability at tax time. But many do not understand the need to do so, resulting in significant tax liability even in prior years when work schedules and income were more predictable. In the 2019 tax filing season, Exchange enrollees on 2.6 million tax returns *owed* a total of \$4.5 billion in excess APTC.¹⁵ Of this \$4.5 billion, \$3.2 billion was paid back to the government because it was below the repayment limit.¹⁶ Exchange enrollees on another 1.8 million tax returns *were owed* about \$1.3 billion from the government in premium tax credits.¹⁷

IV. Proposed Action

The IRS should extend temporary relief from I.R.C. § 36B(f) and 26 C.F.R. § 1.36B-4 to taxpayers who owe excess APTC for the 2020 tax year. This relief should be extended to those whose income is between 100% and 600% of the FPL,¹⁸ and announced in a formal, publicly available notice.

Taxpayers should still be directed to reconcile APTC during the 2020 tax filing season. Doing so is important for continued tracking by the government and to enable taxpayers who are owed premium tax credits to receive those additional funds from the government. But the IRS would waive *collection* of excess APTC for 2020 by disregarding this amount in Schedule 2 of Form 1040. This relief should also extend to any penalties under I.R.C. § 6651 and 6654 that would otherwise be assessed.

This policy may require some tax returns to be recalculated, burdening some IRS staff and delaying some tax refunds. However, the number of returns is limited: there have consistently been fewer than 3 million tax returns with excess APTC, including only 2.6 million returns during the 2019 filing season.¹⁹ Though this number could be higher for 2020 given anticipated job-based coverage losses, most states have not reported dramatic increases in Exchange enrollment.²⁰

While this recalculation would result in a refund that differs from the amount on the taxpayer-filed return, the refund would be higher than expected and thus a pleasant surprise. And it is common for refunds to vary from tax returns since the IRS can adjust refunds to offset debts such as past-due taxes, child or spousal support, and other federal nontax debts, such as student loans.

¹⁵ Treasury Inspector General for Tax Administration, Results of the 2019 Filing Season, No. 2020-44-007 at 25 (Jan. 22, 2020), <https://www.treasury.gov/tigta/auditreports/2020reports/202044007fr.pdf>. This is out of a total of 4.8 million tax returns with about \$37.7 billion in premium tax credits.

¹⁶ The remaining \$1.3 billion in excess APTC was not required to be repaid because it was above the repayment limit. *Id.*

¹⁷ *Id.*

¹⁸ Alternatively, the IRS could extend relief to all taxpayers (regardless of income), only to those with incomes *below* 400 percent FPL, or only to those with incomes *above* 400 percent FPL. The income range of 100 to 600 percent FPL was selected to be consistent with the Heroes Act, which would extend repayment relief to those whose income ranges from 100 to 600 percent FPL for the 2020 and 2021 tax years.

¹⁹ Treasury Inspector General for Tax Administration, *supra* note 15.

²⁰ Some State-Based Exchanges, such as Covered California, have noted record-high enrollment during 2020, but enrollment through HealthCare.gov had increased by only 188,000 people as of May 2020. *See* Katie Keith, Tracking the Uninsured Rate in 2019 and 2020, Health Affairs Blog (Oct. 7, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20201007.502559/full/>; CMS, Special Trends Report: Enrollment Data and Coverage Options for Consumers During the COVID-19 Public Health Emergency (Jun. 2020), <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/SEP-Report-June-2020.pdf>.

Authority to Provide Temporary Relief to Taxpayers

The IRS's broad enforcement discretion and authority under Section 36B(g), coupled with emergency authority and recent precedent, suggests that the agency could provide temporarily relief to taxpayers who owe excess APTC for the 2020 tax year.

First, the IRS has discretion to make enforcement decisions. Under I.R.C. § 7803(a)(2), the Commissioner has broad authority “to administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes.” The authority to enforce a law includes the authority to refrain from taking enforcement action, and courts have recognized that agencies must set enforcement priorities that account for finite resources and agency priorities.²¹ As such, the IRS can opt not to enforce penalties against a certain class of taxpayers.

This enforcement discretion extends to I.R.C. § 36B(f). Critics will argue that I.R.C. § 36B does not provide the IRS with specific authority to waive or otherwise not enforce the premium tax credit reconciliation process. And, to date, the IRS has interpreted its authority narrowly in implementing Section 36B(f).²² However, I.R.C. § 36B provides broad rulemaking authority to implement the ACA's premium tax credit requirements, including reconciliation requirements.²³ I.R.C. § 36B(f) also imposes a *ceiling* that taxpayers can be required to repay in excess APTC, but does not impose a minimum payment, at least for taxpayers whose income is below 400% of the FPL.²⁴

Second, the IRS could cite I.R.C. § 7508A to bolster its decision to extend temporary relief from the repayment of excess APTC for the 2020 tax year. Under I.R.C. § 7508A, the Secretary can disregard certain tax liabilities—including any interest, penalties, or the amount of any credit or refund—for up to one year if a taxpayer is affected by a federally declared disaster under the Stafford Act. The COVID-19 pandemic has been declared an emergency under the Stafford Act since March 13, 2020 for all states, tribes, territories, and D.C.²⁵ I.R.C. § 7508A was invoked in a recent Executive Order directing the Secretary to temporarily “defer the withholding, deposit, and payment” of payroll taxes.²⁶ While this memorandum advocates for full relief from the repayment of excess APTC (rather than a temporary deferral to a future tax year), deferral could be an alternative option.

Third, there is precedent to adopt the proposed policy. Under both the Obama and Trump administrations, the IRS has adopted ACA-related nonenforcement policies even though the ACA provided no specific or explicit authority to grant such relief.

The most high-profile example is the IRS's decision to provide “transition relief” from the ACA's employer shared responsibility provisions (the “employer mandate”) and associated reporting requirements that were set to go into effect beginning in 2014. This policy was announced in a formal, publicly available 2013 notice

²¹ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.”).

²² In a final rule from 2012, the IRS rejected commenter suggestions to help mitigate the effects of the requirement to repay excess APTC. Commenters had recommended various safe harbors, prorated repayment limits, hardship exemptions, and exemptions for American Indians and Alaska Natives. 77 Fed. Reg. 30377, 30384-85 (May 23, 2012) (“The statute sets forth clear rules for reconciling advance credit payments, which are not consistent with the suggestions made by the commentators. Accordingly, the final regulations do not adopt these comments.”).

²³ I.R.C. § 36B(g) (directing the Secretary to “prescribe such regulations as may be necessary to carry out the provisions of this section, *including* regulations which provide for ... the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit”) (emphasis added).

²⁴ I.R.C. § 36B(f)(2)(B)(i) (noting that the amount in excess APTC that must be paid back for taxpayers whose household income is less than 400 percent FPL “shall in no event *exceed*” the amount in the table) (emphasis added).

²⁵ FEMA, COVID-19 Emergency Declaration (Mar. 13, 2020), <https://www.fema.gov/news-release/20200726/covid-19-emergency-declaration>.

²⁶ The White House acknowledged that individuals may have to pay back the tax after the period of temporary relief. White House, Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (Aug. 8, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>.

and applied to all employers.²⁷ The IRS later extended this relief for a subset of employers for another year, meaning the employer mandate did not go into effect for all statutorily defined employers until 2016.²⁸ According to the Congressional Budget Office, delayed enforcement in 2014 resulted in \$12 billion in lost tax revenue and additional costs over the next decade.²⁹ IRS officials argued that the administration had the legal authority to issue this policy despite claims that nonenforcement conflicted with the statute.³⁰ The policy was challenged on these grounds in multiple courts, but all were dismissed for lack of standing.³¹

The IRS also extended relief to those who owed excess APTC for the 2014 tax year by waiving penalties under I.R.C. § 6651(a)(2) (for late payment of a balance due) and 6654(a) (for underpayment of the estimated tax).³² That policy was announced on February 9, 2015, just ahead of the 2015 tax filing season deadline. This relief was more limited than what is urged in this memorandum but shows that the IRS has previously exercised discretion in enforcing requirements related to the repayment of excess APTC.

More recently, the IRS continues to waive ACA-related reporting requirements, arguing that relief from penalties for failure to report are “in the interest of sound tax administration” and “a matter of enforcement priorities.”³³ Another significant ACA-related nonenforcement policy was the decision by the Department of Health and Human Services not to enforce the ACA’s market reforms against certain policies already in existence in 2013 (leading to the creation of so-called “transitional” or “grandmothered” policies).³⁴ This policy too was unsuccessfully challenged in court, with the principal challenges dismissed for lack of standing.³⁵

Third, as a policy matter, this one-time, temporary nonenforcement policy would keep money in the hands of low-income families and prevent Exchange enrollees from facing financial penalties for circumstances outside of their control. The challenge of estimating projected income in 2020—combined with the fact that updating income estimates on HealthCare.gov was likely not a top-of-mind issue for millions of workers struggling through the pandemic—suggests that temporary relief is warranted. Given changes made to tax law under federal COVID-19 relief legislation, the IRS may truly have competing enforcement priorities for the 2020 tax year such that recouping excess APTC is a lower enforcement priority.

²⁷ IRS, Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions), Notice 2013-45 (2013), <https://www.irs.gov/pub/irs-drop/n-13-45.pdf>. The notice made clear that it had no effect on the effective date or application of other ACA provisions.

²⁸ 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

²⁹ Congressional Budget Office, Letter Re: Analysis of the Administration’s Announced Delay of Certain Requirements Under the Affordable Care Act (Jul. 30, 2013), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/44465-ACA.pdf>.

³⁰ David Nather & Brett Norman, “ACA Delay Sparks New Mandate Fight,” *Politico* (Feb. 10, 2014) (“In the tax code, the secretary has very broad authority to implement tax law in a way that benefits the tax administration and we think phase-in approach really is a way to administer the law better,” another administration official said.”); see also Simon Lazarus, “Delaying Parts of Obamacare: ‘Blatantly Illegal’ or Routine Adjustment?” *The Atlantic* (Jul. 17, 2013).

³¹ *House v. Burwell*, 130 F. Supp. 3d 53, 58 (D.D.C. 2015); *Kawa Orthodontics, LLP v. Sec’y, U.S. Dep’t of Treasury*, 773 F.3d 243, 248 (11th Cir. 2014); *Ass’n of Am. Physicians & Surgeons v. Koskinen*, 768 F.3d 640, 641–43 (7th Cir. 2014).

³² IRS, Penalty Relief Related to Advance Payments of the Premium Tax Credit for 2014, Notice 2015-9 (2015), <https://perma.cc/B8ZL-PVA7>. The notice required taxpayers to meet certain requirements to qualify for the relief and outlined the procedures that a taxpayer must follow to request relief.

³³ IRS, Transition Relief Related to Health Coverage Reporting Required by I.R.C. Sections 6055 and 6056 for 2019, Notice 2019-63 (2019), <https://www.irs.gov/pub/irs-drop/n-19-63.pdf>.

³⁴ See CMS, Letter to State Insurance Commissioners (Nov. 14, 2013), <https://www.cms.gov/ciiio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf>. This policy technically sunsets each year but has been extended by the Obama and Trump administrations every year since 2013.

³⁵ See *West Virginia ex rel. Morrissey v. U.S. Dep’t of Health & Human Servs.*, 827 F.3d 81 (D.C. Cir. 2016); *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44 (D.C. Cir. 2016).

