



PROPOSED ACTION
MEMORANDUM

Eliminating the “Failure to Reconcile” Penalty

Department of Health and Human Services
December 2020

I. Summary

The Affordable Care Act (ACA) makes health insurance more affordable by providing millions of low- and middle-income families with advance premium tax credit (APTC). However, to maintain access to these subsidies, taxpayers must file a tax return and “reconcile” the amount received in APTC. Under current regulations from the Department of Health and Human Services (HHS), a tax filer’s failure to reconcile (FTR) bars them from receiving APTC in the future, leaving them responsible for the full cost of premiums until they reconcile past APTC.

This memorandum proposes that HHS amend its current regulations via notice-and-comment rulemaking to no longer condition continued eligibility for APTC on whether an individual has reconciled APTC. The current FTR policy is not required by the statute and imposes an unnecessary and severe penalty on low-income consumers. The Internal Revenue Service (IRS) has sufficient alternative tools to promote compliance with its independent requirements to file a tax return and reconcile APTC, such that separate HHS enforcement is not needed.

II. Justification

The FTR policy results in the loss of APTC and, with it, the loss of coverage for enrollees who are unable to afford unsubsidized premiums. While enrollees who lose APTC can regain eligibility by reconciling APTC or appealing, doing so takes time and leaves low-income families without subsidies in the interim. Critics of FTR-related policies have noted that those who lose APTC “necessarily have limited incomes” and “many cannot afford the luxury of paying for a benefit until they can determine what next steps they need to take to maintain APTCs.”¹

Although limited data is available, HHS previously estimated that the FTR policy led to APTC discontinuation for 40% of households that were notified of the need to take action to maintain their eligibility.² And estimates from former Obama administration officials suggest that the FTR policy “could deprive up to 800,000 eligible individuals of their APTCs, leading to a significant rise in the number of uninsured Americans.”³

III. Current State

Under the ACA, the amount that a taxpayer received in APTC must be reconciled with the amount of premium tax credit allowed.⁴ The reconciliation process is used to determine whether the taxpayer owes excess APTC to the government (subject to repayment limits for some enrollees) or is owed additional premium tax credit by the government. Currently, this requirement has been implemented in regulations issued by both the IRS and HHS.

¹ National Health Law Program, Letter to CMS re: NPRM Notice of Benefit and Payment Parameters for 2019 (Nov. 27, 2017), <https://healthlaw.org/wp-content/uploads/2017/11/2019-NBPP-Comments-FINAL.pdf>.

² 82 Fed. Reg. 51052, 51086 (Nov. 2, 2017).

³ Amended Complaint at 33, *Columbus v. Trump*, No. 1:18-cv-02364 (D. Md. Jan. 25, 2019).

⁴ See I.R.C. § 36B(f); 26 C.F.R. § 1.36B-4.

In 2012, the IRS issued a regulation requiring every tax filer that receives APTC to file an income tax return.⁵ This requirement was amended in December 2016 to additionally require tax filers to “reconcile the advance credit payments” beginning with the 2017 tax year.⁶ The Exchange must provide information to the IRS and tax filers to enable APTC reconciliation.⁷

Separately, HHS adopted a 2012 regulation that bars the Exchange from determining a tax filer eligible for APTC if they failed to file a tax return and reconcile APTC.⁸ The Exchange discontinued APTC beginning with the 2016 plan year (for those who received APTC in 2014 but failed to file a tax return).⁹ In 2018, the Exchange additionally ended APTC for enrollees who filed a tax return but did not reconcile APTC.¹⁰

The APTC reconciliation and FTR notification process is complex.¹¹ It involves multiple notices,¹² applicant attestations, and FTR rechecks—and is complicated by IRS data processing and reporting delays. In response to concerns about challenges for consumers and Exchanges in implementing the FTR requirement,¹³ HHS prohibited Exchanges from denying APTC eligibility *unless* a tax filer is first sent a direct notification of the need to reconcile APTC.¹⁴ That change was adopted in December 2016, went into effect in January 2017, and was rolled back by the Trump administration in the Notice of Benefit and Payment Parameters for 2019.¹⁵

As noted above, enrollees who lose APTC as a result of FTR are responsible for the cost of full, unsubsidized premiums until they reconcile APTC. For those who remain enrolled in Exchange coverage, enrollees can regain APTC but must complete the IRS paperwork, return to the Exchange application, attest to filing and reconciling, receive a new eligibility determination, and will then receive APTC prospectively. Enrollees can also appeal the determination that they no longer qualify for APTC for FTR and request “eligibility pending appeal” to maintain APTC during the appeals process. This process can be burdensome, costly, and confusing.

⁵ 77 Fed. Reg. 30377, 30400 (May 23, 2012) (adopting 26 C.F.R. § 1.6011-8 to state that “[a] taxpayer who receives advance payments of the premium tax credit under section 36B must file an income tax return for that taxable year”). Slight changes were made in 2015. *See* 80 Fed. Reg. 78971, 78977 (Dec. 18, 2015). *See also* 26 C.F.R. § 1.6012-1(a)(2)(viii).

⁶ 81 Fed. Reg. 91755, 91768 (Dec. 19, 2016).

⁷ I.R.C. § 36B(f)(3); 45 C.F.R. § 155.340(c) (requiring the Exchange to comply with 26 C.F.R. § 1.36B-5).

⁸ *See* 45 C.F.R. § 155.305(f)(4).

⁹ *See* Centers for Medicare and Medicaid Services (“CMS”), Guidance on Annual Eligibility Redeterminations and Re-enrollments for Marketplace Coverage for 2016 (Apr. 22, 2015), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/annual-redeterminations-for-coverage-42215.pdf>. The U.S. Government Accountability Office (“GAO”) identified gaps in 2016 Exchange enforcement of the tax filing requirement, finding that four fictitious applicants were deemed eligible for APTC for 2016 even though they received past APTC and failed to file a tax return. GAO, Results of Undercover Enrollment Testing for the Federal Marketplace and a Selected State Marketplace for the 2016 Coverage Year, GAO-16-784 (Sep. 2016), <https://www.gao.gov/assets/680/679671.pdf>.

¹⁰ CMS, Guidance on Annual Eligibility Redetermination and Re-enrollment for Exchange Coverage for 2018 (Jul. 13, 2017), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-Redetermination-Exchange-2018.pdf>.

¹¹ *See, e.g.*, CMS, Reconciling Advance Payments of the Premium Tax Credit (APTC) and Failure to File and Reconcile (FTR) at 11 (Jan. 22, 2020), <https://marketplace.cms.gov/technical-assistance-resources/overview-of-ftr-recheck-process.pdf>; 45 C.F.R. 155.330(e).

¹² These notices have been criticized as failing to provide proper notice because they do not include the specific reasons for potential APTC loss, legal support for that action, an explanation of rights, or the rights to representation and continued benefits. *See, e.g.*, National Health Law Program, *supra* note 1 (citing 42 C.F.R. §§ 431.206, .210).

¹³ *See* 81 Fed. Reg. 94058, 94124 (Dec. 22, 2016) (“The commenters stressed the importance of Exchanges implementing the requirement in a manner that clearly notifies tax filers regarding possible risk to their eligibility for APTC.”).

¹⁴ *Id.* (“We agree that targeted and detailed messaging to tax filers that highlights the specific requirement to file an income tax return and reconcile APTC paid on their behalf—and the potential adverse impact on APTC eligibility for future coverage years—is essential.”). HHS also authorized the Exchange to determine a tax filer eligible for APTC based on other information, including consumer attestations or documentation to that effect.

¹⁵ *See* 83 Fed. Reg. 16930, 16982-85 (Apr. 17, 2018). The Trump administration’s rule, which went into effect in June 2018, generally returned to the prior provision that had been in place since 2012. This change was challenged in *Columbus v. Trump*, a global challenge to the Trump administration’s efforts to undermine the ACA.

IV. Proposed Action

HHS should amend its current regulations to no longer condition eligibility for APTC based on whether an enrollee has filed a tax return and reconciled APTC. In particular, HHS should eliminate 45 C.F.R. § 155.305(f)(4), which currently states:

(f) Eligibility for advance payments of the premium tax credit - ... ~~(4) Compliance with filing requirement.~~ ~~The Exchange may not determine a tax filer eligible for APTC if HHS notifies the Exchange as part of the process described in § 155.320(c)(3) that APTC were made on behalf of the tax filer or either spouse if the tax filer is a married couple for a year for which tax data would be utilized for verification of household income and family size in accordance with § 155.320(c)(1)(i), and the tax filer or his or her spouse did not comply with the requirement to file an income tax return for that year as required by 26 U.S.C. 6011, 6012, and implementing regulations and reconcile the advance payments of the premium tax credit for that period.~~

This change should be adopted using traditional notice-and-comment rulemaking through the “market modernization” rule (addressed in a separate memorandum). Inclusion in the market modernization rule would eliminate the FTR policy ahead of, or at least during, the 2022 plan year. Alternatively, this policy should be included in HHS’s next opportunity to issue a Notice of Benefit and Payment Parameters.

Legal and Policy Justifications for Eliminating the FTR Policy

HHS has the authority to eliminate the FTR policy, which is not mandated by the ACA. Even if the FTR policy could be justified under HHS’s discretion to establish a program for determining eligibility for APTC and set standards for the operation of the Exchanges,¹⁶ eliminating the FTR policy would undoubtedly be permissible, is more faithful to the statute, and is more consistent with the text, structure, and goals of the ACA. In eliminating the FTR policy, HHS must explicitly acknowledge its change in position, offer a reasoned explanation that directly addresses why it is changing its interpretation, and consider alternatives (including maintaining the current interpretation).¹⁷

First, HHS’s FTR policy is not mandated by the ACA and acts as a heightened APTC eligibility requirement. Congress did not include APTC reconciliation as a factor for HHS to consider in determining eligibility for APTC, and this list of eligibility factors is best read as exclusive.¹⁸

Access to premium tax credit is guaranteed so long as an individual qualifies as an “applicable taxpayer.”¹⁹ Whether an individual has reconciled her APTC has no bearing on whether she is an “applicable taxpayer” under I.R.C. § 36B and should not restrict eligibility for future APTC. Although the Trump administration has argued that the FTR requirement only affects eligibility for *advance* premium tax credit (meaning eligible taxpayers can still claim premium tax credit on federal income tax returns),²⁰ any ambiguity in the statute should be resolved in favor of the goals of the ACA to expand access to affordable, quality coverage.

¹⁶ See 42 U.S.C. §§ 18081, 18082, 18041(a).

¹⁷ See *Dep’t of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2575-76 (2019); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (1999) (*Fox*).

¹⁸ See 42 U.S.C. §§ 18081(a), (b), 18082.

¹⁹ See I.R.C. § 36B(a), (c). The definition refers to income levels, immigration status, tax-specific restrictions (such as not being claimed as a dependent by another person) and coverage restrictions (such as enrolling in Exchange coverage and not being eligible for other minimum essential coverage). See also 42 U.S.C. § 18071(b) (defining an “eligible insured” for purposes of eligibility for cost-sharing reductions).

²⁰ Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment at 9-16, *Columbus v. Trump*, No. 1:18-cv-02364 (D. Md. Sep. 28, 2020).

I.R.C. § 36B(f) includes an APTC reconciliation requirement, but this provision is directed to the IRS, not HHS, and is separate and distinct from the statute's APTC eligibility requirements. Though the IRS interpreted § 36B(f) to require taxpayers to file a tax return and reconcile APTC, that interpretation has no bearing on HHS's *eligibility* determinations which are entirely separate. The IRS has acknowledged as much: although the IRS views FTR as a bar to continued APTC eligibility, agency officials acknowledge that HHS "has the decision-making authority in the matter."²¹ The Department of the Treasury is directed to make APTC payments upon notification by HHS.²²

Concerns about the FTR policy were magnified when the Trump administration rolled back a regulatory provision that prevented Exchanges from denying APTC eligibility *unless* a tax filer was first sent a direct notification of the need to reconcile APTC. Though comments focused largely on the elimination of the direct notification requirement (as opposed to the underlying FTR policy), many asserted that taxpayers have a property interest in receiving APTC, and that denying APTC without sufficient notice violates federal regulations and constitutional due process.²³ Elimination of the direct notification requirement is among the array of Trump administration policies being challenged in ongoing litigation in *Columbus v. Trump* where the challengers have argued that the entire FTR policy conflicts with the ACA and is contrary to law.²⁴

Second, where Congress has wanted to restrict eligibility for other federal tax credits, it has done so explicitly. For instance, the since-repealed advance earned income tax credit (AEITC) included a reconciliation requirement that is similar to the I.R.C. § 36B(f).²⁵ But that statute included an additional, specific limitation that "no credit shall be allowed" for any subsequent tax year unless the taxpayer "provides such information as the Secretary may require to demonstrate eligibility for such credit."²⁶ Similar language is used in other statutes governing federal tax credits—including the child tax credit and the lifetime learning tax credit—to bar taxpayers from receiving future credits without first demonstrating their eligibility.²⁷

Congress used no such language in I.R.C. § 36B. If Congress truly intended to bar APTC eligibility for FTR, it could have done so with specific language. Here, it did not. To the extent that the FTR policy is a permissible interpretation, it is far from mandated by the ACA. By eliminating the FTR requirement, HHS would better align its regulations with the statutory text.

Third, HHS's adoption of the FTR policy is unnecessary in light of the IRS's role in enforcing the reconciliation requirements. While imperfect, the IRS has tools to promote compliance with its own requirements and has previously highlighted its "multifaceted post-filing compliance strategy" for promoting compliance with these requirements.²⁸ Given the IRS's role in compliance, there is no need for HHS to additionally penalize taxpayers through the FTR policy.

HHS's justifications for the FTR policy are also lacking. As an initial matter, the FTR policy was not included in HHS's proposed rule in 2011. That rule only required filing a tax return as a condition of APTC eligibility,²⁹ which HHS justified on the grounds of bolstering IRS enforcement. The tax filing provision aligned with IRS regulations in 26 C.F.R. § 1.6011-8 and was "intended to prevent a primary taxpayer or spouse who has failed

²¹ GAO, *supra* note 9 at 19.

²² 42 U.S.C. § 18082(c).

²³ See, e.g., National Health Law Program, *supra* note 1. HHS responded that enrollees have adequate existing due process rights and can appeal the discontinuation of APTC. 83 Fed. Reg. at 16983.

²⁴ See Plaintiffs' Consolidated Reply in Support of Their Motion for Summary Judgment and Brief in Opposition to Defendants' Cross-Motion for Summary Judgment at 3-8, *Columbus v. Trump*, No. 1:18-cv-02364.

²⁵ See I.R.C. § 32(g) (repealed Pub. L. 111-226, tit. II, § 219(A)(2), Aug. 10, 2010, 124 Stat. 2403); 26 C.F.R. § 1.32-2(e).

²⁶ *Id.* at § 32(k)(2).

²⁷ See, e.g., I.R.C. § 25A(b)(4)(B) ("[N]o American Opportunity Tax Credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit."); § 24(g)(2) ("[N]o credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit").

²⁸ See IRS Comm. John Koskinen, Letter to Congress (Jan. 8, 2016), https://www.irs.gov/pub/newsroom/irs_letter_aca_stats_010816.pdf.

²⁹ Compare 77 Fed. Reg. 18310, 18453 (Mar. 27, 2012) with 76 Fed. Reg. 51202, 51230 (Aug. 17, 2011). Although commenters did not have notice of the FTR policy, the final rule nevertheless included FTR as a condition of eligibility.

to comply with tax filing rules from accumulating additional Federal tax liabilities due to advance payments of the premium tax credit.”³⁰ But there are two weaknesses to this argument: (i) it is not HHS’s role to address tax liabilities,³¹ and (ii) § 1.6011-8 is silent as to APTC *eligibility* and simply requires taxpayers who receive APTC to file a tax return and reconcile APTC. HHS later justified the FTR policy by generally citing “program integrity.”³²

HHS adopted the heightened FTR requirement even though (i) various ACA provisions direct the Secretary to adopt policies that *minimize* burdens on Exchange enrollees,³³ and (ii) HHS has other tools to support program integrity. These tools include detailed verification procedures, regular data matching, and civil monetary penalties for those who provide false or fraudulent information to the Exchange.³⁴ Each of these tools is authorized in statute and can help ensure ongoing APTC eligibility in a way that is more consistent with the text and purpose of the ACA. Between the IRS’s enforcement role and HHS’s existing tools, the FTR requirement is unnecessary.

Finally, HHS’s experience since 2016 has demonstrated that the FTR requirement poses a barrier to maintaining affordable coverage and leads to coverage losses. In addition to the data cited above in the justification section, HHS should reassess the impact of the FTR policy. In 2018, HHS reported that its prior notification process resulted in 60% of households taking action to file a tax return and reconcile APTC.³⁵ But instead of concluding that a 40% failure rate means that current notices were *ineffective* at conveying the importance of reconciling APTC to enrollees, HHS reasoned that this high failure rate demonstrated the need to discontinue APTC.³⁶ HHS should analyze its more recent data to determine (i) whether compliance with the FTR requirement even improved, and (ii) how many households had their APTC discontinued as a result of the policy. This data should be cited as evidence that the FTR policy is a burden to maintaining ACA coverage.

This analysis should account for recent anecdotal evidence that suggests that the FTR policy—coupled with IRS processing delays of 2019 tax returns due to the pandemic—is preventing eligible individuals from accessing APTC for 2021. Media outlets have highlighted stories of families at risk of losing APTC because the IRS had not yet processed their tax return or updated its records.³⁷ While the Exchange allowed applicants to attest to filing a 2019 tax return and reconciling APTC, the FTR policy has undoubtedly sowed confusion and served as a barrier to coverage. These concerns have led to calls for HHS to suspend the termination of APTC for the 2021 plan year and extend the enrollment deadline for those wrongfully denied APTC.³⁸ This outcry led HHS to temporarily delay enforcement of the FTR policy for those who are automatically reenrolled into Exchange plans.³⁹ These experiences, and the burdens they impose on enrollees, underscore the need to permanently eliminate the FTR policy.

³⁰ 76 Fed. Reg. at 51208.

³¹ Some commenters raised this point regarding the proposed tax filing requirement. *See, e.g.*, State of Tennessee, Comment Letter (Oct. 31, 2010), <https://www.regulations.gov/document?D=HHS-OS-2011-0024-0090> (“[T]ax enforcement is outside of and inconsistent with the scope of insurance exchanges.”).

³² 83 Fed. Reg. at 16983-84.

³³ *See, e.g.*, 42 U.S.C. § 18081(c)(4)(B) (granting the Secretary of HHS with discretion to “modify the methods” for verifying applicant information if doing so “would reduce the administrative costs and burdens on the applicant”); 42 U.S.C. § 18071(e)(3) (directing HHS, in consultation with Treasury, to design its methodology for calculating household income and family size for certain individuals in a way that “ensure[s] that the least burden is placed on individuals”).

³⁴ *See* 42 U.S.C. §§ 18081(c)(4)(B)(ii), (h)(1). HHS cited these and other existing protections for Exchange program integrity in response to the 2016 report from the GAO. GAO, *supra* note 9 at 44-48.

³⁵ 82 Fed. Reg. at 51086.

³⁶ 83 Fed. Reg. at 16983.

³⁷ *See, e.g.*, Michelle Andrews, “Were You Notified About Missing Tax Forms for Your ACA Subsidy? Blame COVID,” *Kaiser Health News* (Nov. 23, 2020); Dan Casey, “Catch-22 Thwarts Roanoke County Woman’s Health Insurance Renewal,” *Roanoke Times* (Nov. 21, 2020).

³⁸ *See* Sen. Mark R. Warner, Letter to Comm. Rettig and Adm. Verma (Nov. 23, 2020), https://www.warner.senate.gov/public/_cache/files/3/e/3e4471c0-9754-47ff-b2a0-3130243aef52/0F2546722DFE79C5C92BF1BE917C6277.11.23.2020-failure-to-reconcile-letter.pdf; *see also* Rep. Linda T. Sánchez, Letter to Adm. Verma and Comm. Rettig (Dec. 11, 2020), <https://aboutblaw.com/Uzm>.

³⁹ *See* Allyson Versprille & Sara Hansard, “Health Agency Acts as IRS Backlog Threatens Obamacare Subsidies,” *Bloomberg Law* (Dec. 11, 2020).

