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Inviting Everyone to the (Risk) Pool Party: Reforming the Premium Tax Credit to Boost Participation

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INVITING EVERYONE TO THE (RISK) POOL PARTY: REFORMING THE PREMIUM TAX CREDIT TO BOOST PARTICIPATION

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I. INTRODUCTION

The year 2014 marked the first opportunity for American taxpayers to receive subsidized health care through the Affordable Care Act's ("ACA")[1] new Premium Tax Credit ("PTC"). The IRS estimates that about 4.8 million people who were enrolled in a Marketplace[2] plan in 2014 were eligible for a PTC and that 97% of the taxpayers[3] who filed a timely 2014 return claiming a PTC received an advance payment of the credit.[4] One year

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[1] What is commonly referred to as the Affordable Care Act is actually the compilation of two different bills: Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). This Article uses the term "ACA" to refer to the compilation of both acts.

[2] See *supra* Section II.B.6. for a description of the Marketplaces.

[3] The term taxpayer is used because the claimant must file a federal tax return to receive a PTC and it is the term used in the statute. However, the term includes individuals who may not pay any federal income taxes, either because they have income too low to trigger the income tax or because their income tax liability is fully reduced by available credits, such as the Earned Income Tax Credit or the Child Tax Credit.

[4] Letter from John Koskinen, IRS Commissioner, to Members of Congress (Jan. 8, 2016), https://www.irs.gov/pub/newsroom/irs_letter_aca_stats_010816.pdf. Preliminary data for tax year 2015, the second year of the PTC, indicates that about 94% of PTC claimants so far have opted for APTC payments. NAT'L TAXPAYER ADVOCATE, I.R.S., FISCAL YEAR 2017 OBJECTIVES REPORT TO CONGRESS — VOLUME ONE 77, http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/2016_filing_season_review.pdf (data includes returns posted through April 30, 2016, past the due date for 2015 returns, but not past the due date for taxpayers who requested an automatic extension).

later, 2015 marked the first tax filing season where taxpayers received the unpleasant surprise that they must repay excess credits due to a process called reconciliation. The advance credit estimates were very inaccurate. The IRS reported that 51% of PTC claimants in 2014 faced a repayment obligation, 41% received a PTC on their return higher than the advance payments, and only 8% claimed a PTC equal to the advance payments received.[5]

When a taxpayer enrolls in a Marketplace plan, he or she may elect advance payments of the PTC. The advance payments are based on the Marketplace's credit estimate, which in turn is based on an estimate of the taxpayer's prospective credit-year income and household composition. When the taxpayer files a return the next year, he or she may discover that the estimate was not on target and that the taxpayer in fact was eligible for a lower (or higher) PTC amount. As 2014's tax statistics demonstrate, it is difficult to estimate the PTC amount in advance accurately. This Article illustrates some of the reasons why this is so.

Because of reconciliation, the payment of an advance PTC operates much more like a loan from the government to the taxpayer than a benefit payment. This loan-style benefit creates financial risk and uncertainty for the taxpayers. To the extent that reconciliation creates a tax due that must be paid, this wreaks havoc on the budgets of lower-income people who commonly have difficulty weathering even relatively small unexpected expenses.[6] To the extent reconciliation reduces tax refunds generated by programs like the Earned Income Tax Credit or the Child Tax Credit, the PTC is parasitic on those programs, reducing their effectiveness. Even if reconciliation results in an additional credit amount in favor of the taxpayer, that credit amount is mismatched to the health insurance spending the PTC is intended to incentivize; the additional PTC amount did not in the past impact the health insurance purchasing decision and is unlikely to be sufficiently large to impact future purchasing decisions.

The PTC is a critical component of the ACA's goal of achieving near universal health coverage. Without the PTC, large groups of lower-income people would likely engage in adverse selection, opting to remain uninsured until an actual health issue makes purchasing insurance financially attractive. This adverse selection, in turn, would raise Marketplace plan premiums for those who elect to buy coverage. It is critical for the success of the ACA that the PTC be able to do its job of enticing healthy individuals into the markets (and their corresponding risk pools). Unfortunately, the PTC reconciliation process may well drive people away from the Marketplaces,

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[5] Letter from John Koskinen to Members of Congress, *supra* note 4.

[6] Aimee Picchi, *Most Americans Can't Handle a $500 Surprise Bill*, CBS MONEYWATCH (Jan. 6, 2016), http://www.cbsnews.com/news/most-americans-cant-handle-a-500-surprise-bill.

especially if the obligation to repay excess credits is perceived to be unfair or punitive.[7]

It is a bit like putting a shark in the (risk) pool and then trying to persuade someone to dive in. The fact that the IRS will be imposing tax penalties on certain reconciliation obligations starting in tax year 2015 demonstrates that the government considers reconciliation payments as blameworthy, despite the fact that the income misestimates are easily made and that the Marketplace is responsible for approving all estimates.[8] The option of going without coverage to avoid a reconciliation repayment (plus penalties and interest) will be attractive for individuals for whom the individual mandate penalty is low or zero and for individuals who are relatively healthy. This type of adverse selection could prove fatal to the ACA's individual policy market.

Part II of this Article examines the PTC's eligibility and reconciliation provisions in detail, including an examination of the roles of the IRS and the U.S. Department of Health and Human Services ("HHS") in administering PTC payments. Part III of this Article compares the PTC with selected social welfare benefits (TANF, SNAP, the EITC, the Health Coverage Tax Credit, and the ACA's Cost Sharing Reduction subsidies) that have salient comparisons to be drawn, focusing on the lessons that can be learned from the successes and failures of these programs. Part IV of this Article articulates design goals for making the PTC an effective public policy tool. Part V of this Article provides concrete proposals for Congress to reform the PTC to better meet the goals of the program, drawing on the lessons learned from other programs and the design goals articulated in Part IV. Anticipating the potential difficulty of obtaining Congressional action on reform, Part VI of this Article makes a concrete proposal for the IRS to adopt an administrative exception that would allow a taxpayer to reasonably rely on a Marketplace's estimate of the taxpayer's PTC and avoid reconciliation. This Article is relevant to those interested in improving the function of the PTC. This Article has broader relevance to any future proposals that utilize tax credits payable in advance to deliver benefits.[9]

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[7] *See* Kelli Kennedy, *Varying Health Premium Subsidies Worry Consumers*, ALBUQUERQUE J. (July 24, 2014), http://www.abqjournal.com/434642/varying-health-premium-subsidies-worry-consumers.html (noting that in the face of receiving varying APTC estimates, "some have decided to go without health insurance because of the uncertainty while others who went ahead with policies purchased through the exchanges worry they are going to owe the government money next tax season.").

[8] *See infra* notes 43 and 44 and accompanying text.

[9] For example, Representative Paul Ryan (R) sponsored the Patients' Choice Act in the 2009-2010 Congressional session. That act relies in part on a refundable tax credit that is payable in advance to make insurance affordable for lower-income Americans. Patient's Choice Act, H.R. 2520, 111th Cong. § 301, (2009), https://www.congress.gov/bill/111th-congress/house-bill/2520/text. More recently, a task force of House Republicans released a report outlining its vision of what health reform should look like, and it relies in part on a "universal advanceable, refundable tax credit" to help make insurance affordable. House Republican Health Care Reform Task Force, *A Better Way: Our Vision for a Confident*

II. THE PREMIUM TAX CREDIT: FUNCTION AND DESIGN

A. Function of the PTC in the ACA Health Reform

One of the primary goals of the ACA was to expand health care coverage to a near-universal level.[10] The ACA relies on interlocking reforms to advance this lofty goal.[11] Because the goal is near-universal coverage, the ACA mandates that almost all individuals have health care coverage or pay a tax penalty.[12] The ACA expanded Medicaid to ensure that the lowest-income people have access to coverage without premiums or cost sharing, with the federal government picking up no less than 90% of the cost of covering the expansion population.[13] The ACA mandated that larger employers provide affordable, quality health coverage to their employees or face tax penalties.[14] For those individuals who are not eligible for Medicaid and who do not have access to affordable employer coverage, the ACA created an online platform to make shopping for individual health coverage easier: the exchange or health insurance marketplace ("Marketplace").[15] For lower-income people

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America: Health Care 14 (June 22, 2016), http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf.

[10] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2580 (2012) ("The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care.").

[11] *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) ("The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.").

[12] Code § 5000A. For a detailed analysis of the shared responsibility payment provisions, see Francine J. Lipman & James Owens, *Irresponsibly Taxing Irresponsibility: The Individual Tax Penalty under the Affordable Care Act*, 23 GEO. J. ON POVERTY L. & POL'Y 463 (2016).

[13] 42 U.S.C. §§ 1396a(10)(VIII), 1396d(y). While the ACA originally conditioned the receipt of any federal funding for Medicaid on a state's implementation of this expansion, the United States Supreme Court found that to be an unconstitutional condition on the receipt of Medicaid money, with the result that the Medicaid expansion became voluntary for states. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-08 (2012). To date, 32 states have accepted the Medicaid expansion, while 19 states have not. THE HENRY J. KAISER FOUND., CURRENT STATUS OF STATE MEDICAID EXPANSION DECISIONS, http://kff.org/health-reform/slide/current-status-of-the-medicaid-expansion-decision/ (last visited July 25, 2016).

[14] Code §§ 4980H(a), (c)(2).

[15] 42 U.S.C. § 18031(b), (d) (requiring each state to establish a health insurance marketplace); 42 U.S.C. § 18041(c) (permitting the federal government to establish a marketplace on behalf of any state that fails to do so itself, known as a federally-facilitated marketplace); 45 C.F.R. § 155.20 and Treas. Reg. § 1.36B-1(k) (treating all marketplaces, including the federally-facilitated marketplace established on behalf of a state, as a "state" marketplace); *King v. Burwell*, 135 S. Ct. 2480, 2495-96 (2015) (finding the IRS's interpretation to be consistent with a reading of the ACA that takes into account the ACA's context and structure).

who are not eligible for Medicaid, the ACA subsidizes individual health coverage purchased in the Marketplace through the PTC.[16] Finally, for certain lower-income people who are eligible for a PTC-subsidized Marketplace policy, the ACA provides access to special plans with reduced cost sharing (lower deductibles, copayments, coinsurance, etc.).[17]

The PTC is a critically important cog in the ACA reform mechanism. Without the PTC, lower- to moderate-income people likely would find it financially infeasible to purchase individual policies. Such individuals would likely opt out of the system, choosing to not purchase an unaffordable policy. All (or virtually all) people would find paying the tax penalty for not having coverage far less costly than paying for an unsubsidized individual health policy.[18] In addition, many of the people targeted for the PTC would not owe the tax penalty for failing to maintain health coverage because there are exemptions from the tax penalty for an individual (1) whose income falls below the threshold for having an obligation to file a tax return,[19] (2) if coverage is deemed unaffordable for the individual,[20] or (3) who is experiencing a hardship that undermines the individual's ability to obtain qualifying health care coverage.[21] There are other exemptions from the individual mandate tax penalty.[22] Thus, without a well-designed, functional PTC, many low- to moderate-income people may opt out of coverage, choosing instead to pay the lower penalty or seeking an exception from the penalty.

It is also likely that those who choose to opt of coverage will be relatively healthy. Relatively healthy people generally value health coverage less than people with health conditions and needs. When faced with multiple

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[16] Code § 36B.

[17] 42 U.S.C. § 18071; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,826 (Feb. 27, 2015). See *infra* Section II.E. for details regarding the ACA's cost sharing reduction subsidies.

[18] The average unsubsidized premium for a Marketplace individual policy in 2016 is $396 per month, counting the premiums for plans actually selected by individuals. Dep't of Health and Hum. Services, *Health Insurance Marketplace Premiums after Shopping, Switching, and Premium Tax Credits, 2015–2016*, 9 (Apr. 12, 2016) https://aspe.hhs.gov/sites/default/files/pdf/198636/MarketplaceRate.pdf. This is far less than the average tax penalty paid in 2015 for not having coverage, which was around $210 for the year. Letter from John Koskinen to Members of Congress, *supra* note 4.

[19] In 2016, single individuals with less than $10,350 of income do not have an obligation to file a tax return (higher if they are under age 65 or blind). Code § 6012; Rev. Proc. 2015-53, 2014-44 I.R.B. 615 (Nov. 2, 2015).

[20] Coverage is deemed unaffordable if the lowest-priced coverage available costs more than 8.13 percent (in 2016) of household income, after applying the PTC. Code § 5000A(e)(1)(D); Rev. Proc. 2014-62, 2014-50 I.R.B. 948 (Dec. 8, 2014). The affordability threshold (also called the required contribution percentage) is 8%, but is indexed annually to account for inflation – specifically "the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period." Code § 5000A(e)(1)(D).

[21] Code § 5000A(e)(5).

[22] Code §§ 5000A(d), (e).

potential uses for limited money, healthy people are more likely to opt to spend money on more immediate needs and goals, like rent, car repairs, or school supplies. In addition, because the ACA prohibits the application of preexisting condition exclusions and prohibits charging higher premiums based on health status or claims experience, relatively healthy people for whom health insurance is too costly can simply wait until they need the insurance to purchase it.[23] It is true that people cannot buy insurance at any time they wish. New coverage can be added in the Marketplace only at the annual enrollment period or during special enrollment periods.[24] Therefore, there is clearly some risk to taking the strategy of waiting to purchase insurance until illness or accident strikes. The newly-ill person would have to wait until the next special or open enrollment period to add coverage, probably delaying treatment for that period of time as well, unless he or she is able to find a doctor or institution willing to provide charity care.

As the United States Supreme Court acknowledged in its *King vs. Burwell* decision, such adverse selection can have a devastating effect on the cost of health insurance.[25] If healthier people are not included in the insurance risk pool, the cost of insurance goes up because the covered losses are high on a per-covered-person basis. The more expensive insurance is, the more likely it is that healthier people will opt out of purchasing it, making the risk pool more unhealthy and driving costs higher. It is this insurance cost "death spiral" that was of such concern in *King v. Burwell*.[26]

Thus, the PTC is a critical piece in the ACA's plan to achieve near universal coverage and bring insurance costs down. The design of the PTC should reinforce its critical role in incentivizing lower- to moderate-income people to purchase health insurance. The design of the PTC should encourage people to opt into the risk pool, rather than opt out.

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[23] 42 U.S.C. § 300gg, gg-3, gg-4.

[24] 42 U.S.C. § 18031(c)(6) (requiring an initial enrollment period, annual open enrollment periods, special enrollment periods, and monthly enrollment periods for Indians). There is some concern among insurers that special enrollment periods are being misused by customers, leading to high levels of adverse selection. In response, the Center for Medicare & Medicaid Services ("CMS") announced a narrowing of eligibility criteria for special enrollment periods as well as increased enforcement efforts. Kevin Counihan, *Clarifying, Eliminating and Enforcing Special Enrollment Periods*, THE CMS BLOG (Jan. 19, 2016), https://blog.cms.gov/2016/01/19/clarifying-eliminating-and-enforcing-special-enrollment-periods/. Other commentators have argued that special enrollment periods actually are underused. Laurel Lucia, *How Do We Make Special Enrollment Periods Work?*, HEALTHAFFAIRS BLOG (Feb. 16, 2016), http://healthaffairs.org/blog/2016/02/16/how-do-we-make-special-enrollment-periods-work/.

[25] *King v. Burwell*, 135 S. Ct. 2480, 2485-86 (2015).

[26] *Id.* at 2484.

B. Current PTC Design and Operation

1. The Basic Rules

The PTC is a federal subsidy which helps low- and moderate-income people buy individual health insurance policies on the Marketplace. Generally speaking, a PTC is available to a person with household income between 100% and 400% of the federal poverty line ("FPL")[27] if the person purchases a Marketplace health insurance policy and if the person is not otherwise eligible for or actually covered by a qualifying employer or public health plan.[28] The eligibility rules are discussed in more detail in Section II.B.3. *infra.* The amount of the PTC varies depending on the cost of plans where the person lives as well as the person's household income and family size, both of which are discussed in detail in Section II.B.4. *infra*.[29] The PTC is a refundable tax credit.[30] Thus, the PTC first reduces the taxpayer's tax liability to as low as zero, and if there is credit left over, the taxpayer receives that left over credit amount as a refund.[31] A person will receive a PTC amount for each month that he or she is eligible.[32] However, the inputs for calculating the PTC (cost of available plans, income, and household size) are annualized.

The PTC may be claimed retroactively on a tax return; the credit for any month in 2014 would be claimed on a 2014 tax return, normally filed before April 15, 2015.[33] The PTC also may be paid on an advance basis.[34] If the advance credit (the "APTC") is elected, the estimated amount of the PTC is calculated by the Marketplace and payments are made by the IRS directly

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[27] The federal poverty figures are published by the Department of Health and Human Services in the Federal Register at the start of every year. The figures that apply for a year are the most-recently published figures as of the beginning of the open enrollment period for that year. Code § 36B(d)(3). The open enrollment period for 2016 began November 1, 2015. HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,866 (Feb. 27, 2015). Thus, the poverty figures that apply for 2016 are the figures published at the start of 2015. For 2016, the poverty line for a single individual not living in Alaska or Hawaii is $11,770; each additional family member adds $4,160 to the poverty line. Annual Update of HHS Poverty Guidelines, 80 Fed. Reg. 3,236, 3,237 (Jan. 22, 2015). Thus, for 2016, between 100% and 400% of the FPL for a single person means between $11,770 and $46,800. The poverty line is higher in Alaska and Hawaii. *Id*.

[28] Code § 36B.

[29] Code § 36B(b)(2).

[30] Code §§ 36B(b)(2), 6401.

[31] I.R.S., *Questions and Answers on the Premium Tax Credit,* http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-the-Premium-Tax-Credit, question 1 (last visited May 24, 2016) [hereinafter *IRS PTC Q&A*] ("The credit is "refundable" because, if the amount of the credit is more than the amount of your tax liability, you will receive the difference as a refund.").

[32] Code § 36B(b).

[33] Code § 36B(a).

[34] 42 U.S.C. § 18082.

to the insurance company covering the individual.[35] APTC payments are reconciled on the tax return for the year of the payments, meaning advance payments made during 2014 were reconciled on the tax return for 2014, normally filed before April 15, 2015.[36]

If the amount of the PTC on the tax return is higher than the advance payments made during the year, that excess amount will be a refundable credit, which will either lower the taxpayer's tax due or result in a refund.[37] If the amount of the credit on the tax return is lower than the advance payments made during the year, the taxpayer will have to repay the deficit; the deficit amount will either lower the taxpayer's refund or the return will show an amount due.[38] Repayment is subject to certain caps.[39] There is no cap for a taxpayer at or above 400% of the FPL.[40] For taxpayers below 400% of the FPL, the maximum repayment ranges from $300 to $2,500 depending on filing status and income level.[41] Congress has amended the ACA twice since it was enacted to raise the repayment caps, and a bill that would eliminate the repayment caps altogether was reported out of committee in March 2016 and placed on the calendar of the House of Representatives.[42]

The repayment amount may result in a late payment penalty (if the taxpayer is unable to pay the amount due by April 15) or a penalty for the underpayment of estimated tax (if the taxpayer failed to have enough tax withheld during the year or to make sufficient estimated tax payments).[43]

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[35] *Id.*

[36] Code § 36B(f).

[37] *IRS PTC Q&A*, *supra* note 31, at question 22 ("When you complete your tax return, you will figure your credit and compare it to the amount of APTC on Form 8962. . . . If your actual allowable credit is more than your APTC, the difference will be added to your refund or subtracted from your balance due.").

[38] *IRS PTC Q&A*, *supra* note 31, at question 22 ("When you complete your tax return, you will figure your credit and compare it to the amount of APTC on Form 8962. If your actual allowable credit on your return is less than your APTC, the difference, subject to certain repayment caps, will be subtracted from your refund or added to your balance due.").

[39] *Id.*

[40] Code § 36B(f).

[41] *Id.*

[42] Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, § 208, 124 Stat. 3285, 3291-92 (2010) (replacing the original repayment caps for taxpayers with income under 400% of the FPL of $250 for single taxpayer and $400 for all other taxpayers with a graduated table of repayment caps ranging from $3,500 to $600 for taxpayers with income under 500% of the FPL); Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Pub. L. No. 112-9, § 4, 125 Stat. 36, 36-37 (2011) (replacing the graduated table of repayment caps ranging from $3,500 to $600 for taxpayers with income under 500% of the FPL to a different graduated table of repayment caps ranging from $2,500 to $600 for taxpayers with income under 400% of the FPL); Protecting Taxpayers by Recovering Improper Obamacare Subsidy Overpayments Act, H.R. 4723, 114th Cong. (2016).

[43] Code § 6651(a)(2) (penalty assessed for failure to pay entire tax liability by April 15); Code § 6654 (penalty assessed for failure to pay, through withholding or estimated tax payments, the greater of 100% of the prior year tax liability or 90% of the current year tax liability).

These penalties were waived for tax year 2014, but the IRS did not extend the waiver.[44]

While APTC payments may make health insurance accessible by solving a cash flow problem, they do create the risk that the taxpayer will have a nasty surprise come tax time.[45] This risk can be mitigated by opting to receive only some of the expected credit amount on an advance basis.[46] The risk also can be mitigated somewhat by the taxpayer diligently reporting to the Marketplace every month changes to his or her household income or family size (perhaps not the most realistic expectation for taxpayer behavior). The Marketplace in turn will adjust the APTC payments made to the insurance company to take into account the changed circumstances. However, the only way to completely eliminate the risk of owing money back to the IRS (potentially with penalties) is to forego the APTC payments.

2. Amount of the PTC

The amount of the PTC is calculated based on the taxpayer's household income and family size as well as the cost for a benchmark plan (or the cost for the actual plan selected, if lower).[47] The benchmark plan is the second-lowest cost "silver" plan that can cover the taxpayer's entire household.[48] The Marketplace categorizes plans by "metal colors"; plans are classified, from least generous to most generous, as bronze, silver, gold, and platinum. A silver plan has a benefit structure (amount of copayments, coinsurance, and deductibles) more generous than a bronze plan but not as generous as a gold or platinum plan.[49] The cost for the benchmark plan is the cost to the taxpayer if he or she were to actually enroll in the benchmark plan.[50] Thus, the cost of the benchmark plan will vary depending on the

[44] I.R.S. Notice 2015-9, 2015-6 I.R.B. 590, Feb. 9, 2015; I.R.S., Instructions for Form 2210, at 1 (2015), https://www.irs.gov/pub/irs-pdf/i2210.pdf (noting that "[i]f you received premium assistance through advance payments of the PTC in 2015, and the amount advanced exceeded the amount of PTC you can take, you could be subject to a penalty for underpaying your estimated tax.").

[45] For a detailed analysis of reconciliation under different hypothetical fact patterns, see Francine J. Lipman & James E. Williamson, *Reconciling the Premium Tax Credit: Painful Complications for Lower and Middle-Income Taxpayers*, 69 SMU L. REV. (forthcoming 2016) (available at SSRN http://ssrn.com/abstract=2794466).

[46] *Premium Tax Credit*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/premium-tax-credit/ (last visited May 24, 2016).

[47] Code § 36B(b).

[48] This could be a combination of plans if the family is unable to be covered by a single plan, for example because a child is away at college or because of the relationships between the family members. Treas. Reg. § 1.36B-3(f)(3).

[49] *See generally Your Insurance Choices in a Marketplace: FAQ*, WEBMD.COM, http://www.webmd.com/health-insurance/insurance-marketplace/marketplace-insurance-choices (last visited May 24, 2016).

[50] Code § 36B(b)(3)(C).

taxpayer's location, family size, and the ages of the enrollees.[51] The PTC amount is the premium amount for the benchmark plan less the expected taxpayer contribution toward the premium. The taxpayer's contribution varies depending on the taxpayer's household income and ranges from 2% of income to 9.5% of income.[52] It is important to note that, although the PTC amount is based on the cost for the benchmark plan, the taxpayer is free to enroll in a lower cost or higher cost plan.[53]

3. Eligibility for the PTC

There are several eligibility criteria for claiming a PTC: (1) the taxpayer must have "household income" between 100% and 400% of the FPL;[54] (2) the taxpayer cannot be eligible to be claimed as the dependent of any other person;[55] (3) the taxpayer must file a joint return if considered married within the meaning of Code § 7703;[56] (4) the taxpayer must not be

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[51] The ACA permits insurers to charge higher premiums to older insureds; an older insured may be charged up to three times more than a younger insured. 42 U.S.C. § 300gg(a)(1). Any age-based adjustment in premiums will be taken into account under the benchmark plan for calculating the PTC. Treas. Reg. § 1.36B-3(e). The benchmark plan, however, will not take into account a premium adjustment for tobacco use; the ACA allows insurers to charge tobacco users up to 1.5 times the premium it would charge a non-user. *Id.*; 42 U.S.C. § 300gg(a)(1).

[52] Code §§ 36B(b)(2), (3)(A). The calculation of the taxpayer's required contribution is fairly complicated, although online calculators can help taxpayers (and their advisors) estimate the likely contribution amount. *See, e.g.,* THE HENRY J. KAISER FOUND., SUBSIDY CALCULATOR, http://kff.org/interactive/subsidy-calculator/ (last visited May 24, 2016).

[53] Code § 36B(b)(3)(B); Cent. on Budget and Pol'y Priorities, *Premium Tax Credits: Answers to Frequently Asked Questions*, HEALTH REFORM: BEYOND THE BASICS, http://www.cbpp.org/sites/default/files/atoms/files/QA-on-Premium-Credits.pdf (July 2013).

[54] Code § 36B(c)(1)(A). As discussed *supra* in note 27, for 2016, between 100% and 400% of the FPL for a single person means between $11,770 and $46,800, with higher amounts in Alaska and Hawaii. Annual Update of HHS Poverty Guidelines, 80 Fed. Reg. 3236, 3237 (Jan. 22, 2015).

[55] Code § 36B(c)(1)(D). Notice that this is different than actually being claimed as a dependent of another taxpayer, despite the language in the FAQs posted on the IRS's website. The IRS's FAQs states that the claimant "cannot be claimed as a dependent by another person." *IRS PTC Q&A*, *supra* note 31, at question 5. This is contrary to the plain language of the statute and likely represents an oversight rather than a conscious interpretation choice.

[56] Code § 36B(c)(1)(C). Temporary and proposed IRS regulations create a limited exception to this requirement for victims of domestic violence and spousal abandonment. Rules Regarding the Health Insurance Premium Tax Credit, 79 Fed. Reg. 43,622 (July 28, 2014) (issuing temporary regulations to be codified at 26 C.F.R. pt. 1); Rules Regarding the Health Insurance Premium Tax Credit, 79 Fed. Reg. 43,693 (July 28, 2014) (issuing proposed regulations to be codified at 26 C.F.R. pt. 1). This author has argued that the exception is laudable and that it should be extended to cover more categories of taxpayers (such as long-separated spouses) and to apply to other tax benefits (such as the EITC). Mary Leto Pareja, *Beyond the Affordable Care Act's Premium Tax Credit: Ensuring Access to Safety Net Programs*, 38 HAMLINE L. REV. 241 (2015). Other scholars have proposed other solutions to the problem of married taxpayers losing tax benefits for filing separate rather than joint returns. *See, e.g.,* Michelle Lyon Drumbl, *Joint Winners, Separate Losers: Proposals To Ease*

eligible for government-sponsored coverage such as Medicare, Medicaid, CHIP, or TRICARE;[57] (5) the taxpayer must not be eligible for an employer-sponsored plan that is affordable and provides minimum value;[58] (6) neither the taxpayer nor any member of the taxpayer's "household" can be actually enrolled in an employer-sponsored plan, whether or not the plan is considered affordable or to provide minimum value;[59] and (7) the taxpayer, taxpayer's spouse, or taxpayer's dependent must have purchased coverage through a Marketplace and paid the premium for the coverage.[60] There are special rules that apply to non-citizens that are beyond the scope of this Article.

4. Determining Family Size and Household Income

Because the taxpayer's "family" and "household income" are so important to eligibility for the PTC as well as the calculation of the amount of the PTC, it is worth looking closely at how those two concepts are defined. The "family" consists of all the individuals for whom a taxpayer is allowed to claim a "personal exemption amount" under Code § 151 for the taxable year.[61] Code § 151 allows taxpayers to subtract from income a "personal exemption amount" for themselves, their spouse if filing jointly, and for eligible dependents claimed on the return.[62] Thus, "family" for PTC purposes really refers to the tax unit and not to a family law or a more

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the Sting for Married Taxpayers Filing Separately, 19 FL. TAX REV.(forthcoming 2016) (available at SSRN: http://ssrn.com/abstract=2739948) (arguing alternatively that the current PTC exception be extended to other tax benefits, or that credits be calculated based on residence and not simply marital status, or that a married taxpayer filing separately be entitled to half the credit amount available to a single taxpayer); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010) (arguing that joint returns should be abolished).

[57] Code §§ 36B(c)(2)(B), 5000A(f)(1)(A). This applies on a month-by-month basis and is based on eligibility for the plan, not enrollment in the plan. Thus, if a person meets all the eligibility requirements for a PTC in January, but becomes eligible for Medicare starting in February, the person will receive a PTC only for January, even if the person does not actually enroll in Medicare. *Id.*

[58] Code § 36B(c)(2)(C). A plan is considered "affordable" if the employee's share of the premium for self-only coverage is 9.5% or less of the employee's "household income." Code § 36B(c)(2)(C)(i). A plan is considered to provide minimum value if it covers at least 60% of the total allowed costs of benefits under the plan. Code § 36B(c)(2)(C)(ii).

[59] Code § 36B(c)(2)(C)(iii).

[60] Code § 36B(c)(2)(A). The statute requires that the individual be enrolled "through an Exchange established by the State . . ." *Id.* As discussed *supra* in note 15, this includes state marketplaces as well as the federally-facilitated marketplace.

[61] The term "exemption" is a confusing misnomer, given that the amount of the "personal exemption" is actually a below-the-line deduction from adjusted gross income. Code § 151.

[62] This is a simplification of the spousal exemption rules. If the taxpayers are filing jointly, they each get a personal exemption as taxpayers. Code § 151(b). If they are not filing jointly, a taxpayer may claim a personal exemption for his or her spouse if the spouse had no gross income and was not the dependent of another taxpayer. *Id.*

common parlance understanding of family.[63] Family for PTC purposes also differs in some key respects from how household size is determined for purposes of Medicaid; generally, tax dependents are not part of the household for Medicaid eligibility if the tax filer is a non-custodial parent or is not the parent of the tax dependent.[64] Still different rules apply for SNAP and frequently TANF benefits, which use a more functional definition tied to program goals.[65]

The rules for who can be claimed as a dependent on a tax return are not as simple as one would hope.[66] However, generally speaking, the following broad categories of people potentially qualify as dependents of a taxpayer, if they meet other requirements: (1) the taxpayer's descendants, siblings, and sibling's descendants (nieces and nephews, grand-nieces and grand-nephews, etc.) provided the dependent is unmarried, lives with the taxpayer the majority of the year, is under age 19, or a full-time student and under age 24, or any age but permanently disabled, and does not provide most of his or her own support;[67] (2) almost anyone that lives with the taxpayer as part of the household for the entire year as well as the taxpayer's descendants, siblings, nieces and nephews (but not grand-nieces or grand-nephews), direct ancestors, and aunts and uncles (but not their descendants), provided the dependent makes under the personal exemption amount for the year (for 2014, $3,950)[68] and provided that the taxpayer provides more than half of the dependent's support.[69] This is merely a broad summary of the

[63] *See generally* Tessa R. Davis, *Taxing Modern Families: Mapping the Families of Tax*, 22 VA. J. SOC. POL'Y & L. 179 (2014) (discussing the different broad conceptions of family in the Code and how those conceptions compare to family law conceptions of family).

[64] For example, a parent who is a tax dependent of a son or daughter, and thus part of the household for purposes of the PTC, is not part of the son or daughter's household for Medicaid purposes. Ctr. on Budget and Policy Priorities, *Part II: Determining Households and Income for Premium Tax Credits and Medicaid*, HEALTH REFORM: BEYOND THE BASICS, slides 32, 33 (Oct. 15, 2015), http://www.healthreformbeyondthebasics.org/wp-content/uploads/2015/10/Webinar-10-15-15-Part-II_Household-Size-and-Income.pdf; Tricia Brooks, GEO. UNIV. HEALTH POL'Y INST. CTR. FOR CHILDREN AND FAMILIES, *Getting MAGI Right: Exceptions for Who Counts in the Household for Medicaid and CHIP* (Feb. 2, 2015), http://ccf.georgetown.edu/all/getting-magi-right-exceptions-counts-household-medicaid-chip/.

[65] U.S. Dep't of Agric., Food and Nutrition Serv., *Supplemental Nutrition Assistance Program (SNAP): Eligibility* (Feb. 25, 2016) (with some exceptions, for SNAP "[e]veryone who lives together and purchases and pre together is grouped together as one household."), http://www.fns.usda.gov/snap/eligibility; TANF eligibility rules vary because the program operates as a block grant to the states.

[66] *See generally* Mary Leto Pareja, *Earned Income Tax Portability: Respecting the Autonomy of American Families*, 117 W. VA. L. REV. 11–28 (2014) (discussing the mechanics of the rules for claiming dependents on a tax return).

[67] Code § 152(c).These dependents are called "qualifying children" even though they are not necessarily children or the taxpayer's biological children. *Id.*

[68] Rev. Proc. 2013-35, 2013-47 I.R.B. 537, 42 (Nov. 18, 2013).

[69] Code § 152(d). These dependents are called "qualifying relatives" even though the potential dependent does not actually need to be related to the taxpayer. *Id.*

rules; there are many wrinkles and exceptions that have been left out in the interest of brevity.

Correspondingly, "household income" is the income of the "family" -- or tax unit -- described above, with an important exception. The income of a family member (i.e., a spouse or tax dependent) is ignored if the family member is not "required to file a return of tax imposed by [Code] section 1 for the taxable year."[70] Code § 1 is the section that imposes the income tax; it does not contain any rules regarding the requirement to file a return. The rules regarding when there is a requirement to file a return to report taxes imposed under Code § 1 are contained in Code § 6012. Code § 6012 exempts an individual from the obligation to file a return to report the tax applicable under Code § 1 if the individual's income is not more than the personal exemption amount ($3,950 for 2014) plus the applicable standard deduction amount (in 2014, ranging from $6,200 for single taxpayers to $12,400 for joint taxpayers to $17,200 for blind and over age 65 taxpayers filing jointly).[71] In other words, for ACA purposes, a family member's income (including a spouse) would not count toward household income if it is under the applicable threshold, ranging from $10,150 to $21,150 in 2014 depending on the circumstances.[72] An individual may be required to file a tax return for other reasons, even though he or she is exempt from filing a return under the Code § 6012 rules. For example, if a person has over $400 of income from self-employment, he or she must file a return to report employment taxes.[73] Additionally, there are many situations where a person will want to file a return even if he or she is not required to; for example, to receive a refund of over-withholding or a refundable tax credit like the Earned Income Tax Credit ("EITC"). In such cases, that person's income is not counted toward household income for ACA purposes.

Household income is actually "modified adjusted gross income."[74] Modified adjusted gross income begins with the person's adjusted gross income.[75] The adjusted gross income is modified by adding back in any amounts excluded under the foreign income exclusion of Code § 911, and any tax-exempt interest, and any portion of Social Security benefits excluded under Code § 86.[76] There are clear inequities in using this definition to

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[70] Code § 36B(d)(2)(A)(ii)(II).

[71] I.R.S. Notice 2013-35, 2013-47 I.R.B. 537; *see also* I.R.S. PUB. 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2014) at 24–26, http://www.irs.gov/pub/irs-pdf/p501.pdf.

[72] *Id.*

[73] Code § 6017.

[74] Code § 36B(d)(2).

[75] *Id.* Adjusted gross income is a tax term of art. It is the taxpayer's gross income as reported on his or her return less certain "above-the-line" deductions, such as the deduction for alimony paid, the deduction for certain tuition payments, and the deduction for one-half of self-employment taxes. Code § 62.

[76] Code § 36B(d)(2)(B).

measure an individual's ability to afford health care. For example, completely excluded from this definition of income is inherited wealth.[77]

It is critical to understand that the PTC amount ultimately is based on the household composition and income reported on the tax return for the year -- in other words retrospectively. The APTC amount requires a projection or estimate of the anticipated PTC amount, which in turn requires an estimate of credit-year, prospective household composition and income. For some taxpayers these prospective amounts are relatively easy to predict and do not fluctuate much from year to year. A person with a stable family and a stable job that pays a salary without possibility for bonuses would probably find estimating a future PTC a fairly easy task. The rest of us would likely find such a task difficult, in some cases close to impossible. There are multiple variables that could cause an estimate to be off. Because family size is tied to the dependency exemption which in turn is tied to custody or a negotiated relinquishment of the exemption, a family experiencing a custody dispute will have a difficult time predicting a future PTC. An employee with variable hours or multiple or unpredictable jobs will find predicting a future PTC difficult. For example, the young single mom who works three part time jobs to make ends meet, but who never knows when her hours will be cut or she will be asked to work double shifts, probably does not have a reliable way to predict what her cumulative income will be. An employee who has a possibility of incentive pay, such as bonuses or commissions, will have difficulty predicting a future PTC. For example, a low-paid worker who has the good fortune of working at a company that has a banner year and announces generous end-of-year bonuses will have mispredicted his future PTC amount. A self-employed person may find predicting a future PTC difficult. A person newly self-employed may find predicting a future PTC so difficult it amounts to little more than a shot in the dark. With the rise of the "gig economy" and the expansion of the use of contingent workers, such fluctuations in income will become even more common than they have been traditionally.[78] Individuals with unanticipated lump sum income also will find it difficult to predict a future PTC. For example, a grandparent who withdraws a lump sum from an IRA to help with a family emergency will have mispredicted his or her future PTC amount. A person who receives a lump sum payment of retroactive social security disability benefits will have mispredicted his or her future PTC amount.[79] These are only some situations

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[77] Thus, for example, an individual who has no earned income (meaning they do not work), and who has investment income between $11,770 and $46,800 (or between 100% and 400% of the FPL in 2016 as explained in *supra* note 27) has income qualifying him or her for a PTC even if the individual also receives thousands or even millions of dollars from a family trust.

[78] INTUIT, INTUIT 2020 REPORT 21 (Oct. 2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf ("In the U.S. alone, contingent workers will exceed 40 percent of the workforce by 2020.").

[79] This particular problem was highlighted by the National Taxpayer Advocate, Nina Olson, in her 2015 report to Congress. NAT'L TAXPAYER ADVOCATE, I.R.S., MOST

where predicting a future PTC is difficult. A person receiving an APTC is required to report income and family composition changes during the year; the APTC amount would then be adjusted upward or downward.[80] However, some people experience such wide fluctuations that this process still will not result in an accurate estimate. In addition, if the unanticipated income occurs late in the year, it may not be possible to adjust the remaining APTC payments to avoid a reconciliation repayment obligation. For example, if the grandmother takes her lump sum IRA withdrawal in December to deal with an unexpected family emergency, the reconciliation repayment obligation cannot be avoided.

5. A Slight Detour: Cost Sharing Reduction Subsidies

The PTC has a lesser known cousin within the ACA that is designed to make insurance and health care affordable – the cost-sharing reduction ("CSR") subsidies.[81] If a taxpayer is estimated to have household income between 100% and 250% of the FPL for the year of the subsidy,[82] meets requirements for an APTC, and is enrolled in a silver level Marketplace plan, then the taxpayer is eligible to enroll in a plan with reduced cost sharing.[83] Lower-income people receive larger reductions in cost sharing.[84] The subsidy does not come in the form of a tax credit or a check to the insured. Rather, the Marketplace directs the insurance company to place the eligible person in a special insurance plan that has the exact same features as a regular plan, except that the insured's cost sharing (such as deductibles and copays) for essential health benefits are reduced.[85] The insured person never

SERIOUS PROBLEMS, 2015 ANN. REP. TO CONGRESS 175, http://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1_MSP_15_ACA-Individuals.pdf.

[80] *See infra* note 118 and accompanying text.

[81] 42 U.S.C. § 18071.

[82] The careful reader will notice that the statute provides that taxpayers between 100% and 400% of the FPL are eligible for cost sharing subsidies, while the regulations narrow that range to between 100% and 250% of the FPL. 42 U.S.C. § 18071(b); 45 C.F.R. § 155.305(g). The reason for this is that the statute specifies particular reductions in out of pocket costs, but also requires those reductions to be coordinated so that the actuarial values of the plans do not increase above a certain amount. 42 U.S.C. § 18071(c). Each year, HHS has determined that no reductions are possible for taxpayers over 250% of the FPL that would not cause the plan to fail the actuarial value test. 42 U.S.C. § 18071; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,826 (Feb. 27, 2015). For 2016, between 100% and 250% of the FPL is between $11,770 and $29,425 for a single person and between $47,080 and $117,700 for a family of four. *See supra* note 27.

[83] 42 U.S.C. § 18071(b); 45 C.F.R. § 155.305(g). Indians up to 300% of the FPL can receive a no-cost-sharing plan regardless of the metal level of the plan. 42 U.S.C. § 18071(d).

[84] 42 U.S.C. § 18071(c); 45 C.F.R. § 155.305(g).

[85] CENT. FOR MEDICARE & MEDICAID SERV., *Draft Manual for Reconciliation of Advance Payment of Cost-Sharing Reductions for Benefit Years 2014 and 2015*, at 5 (Jan. 15, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS-Guidance-on-CSR-Reconciliation.pdf [hereinafter CMS, *Draft Manual*].

experiences a reconciliation process similar to the PTC. If it turns out that the insured person's annual income for the subsidy year was too high for the level of cost sharing reduction he or she received, he or she will not be obligated to repay any portion of the cost sharing that he or she avoided (absent fraud).[86] The federal government sends money directly to the person's insurance company to pay for the reduced cost sharing.[87] The insurance companies (not the covered individuals) receive estimated payments and then must go through a reconciliation process where the estimates are compared against actual expenses.[88] Eligibility for the CSR subsidies is determined by the Marketplace using the same process as eligibility for the APTC.

6. The Marketplace's Role in Authorizing an APTC

The Marketplaces play a critical role in the PTC process. A Marketplace is an Amazon.com-like online platform where individuals can shop for and enroll in individual health insurance policies; there is a separate marketplace for small employers.[89] The Marketplaces are sometimes also called exchanges.[90] There is a separate Marketplace for each state.[91] Some states run their own Marketplace under regulations issued by the Health and Human Services Department.[92] For example, California's Covered California

[86] Cent. on Budget and Pol'y Priorities, *Key Facts: Cost Sharing Reductions*, HEALTH REFORM: BEYOND THE BASICS, (last updated Dec. 3, 2015), http://www.healthreformbeyondthebasics.org/cost-sharing-charges-in-marketplace-health-insurance-plans-part-2/.

[87] *Id.* In the latest challenge to the ACA, the U.S. House of Representatives is challenging the federal reimbursement of the CSR subsidies incurred by the insurance companies, arguing that the ACA did not contain a continuing appropriation of money for these payments and that Congress did not authorize any annual appropriation for these payments; a District Court judge recently ruled in favor the U.S. House of Representatives. U.S. House of Representatives v. Burwell, No. 14-1967 (RMC) (D.D.C. May 12, 2016) (decision), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1967-73. The decision will certainly be appealed, and the judge has stayed the decision in anticipation of an appeal. *Id.* The case is important to watch for its impact on CSR subsidies as well as premiums and PTC amounts. *See generally* Timothy Jost, *Judge Rules Against Administration In Cost-Sharing Reduction Payment Case*, HEALTH AFFAIRS BLOG (May 12, 2016), http://healthaffairs.org/blog/2016/05/12/judge-blocks-reimbursement-of-insurers-for-aca-cost-sharing-reduction-payments/.

[88] CMS, *Draft Manual*, supra note 85, at 5.

[89] *Health Insurance Marketplace*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/health-insurance-marketplace-glossary/ (last visited June 30, 2016).

[90] *Id.*

[91] *Id.*

[92] THE HENRY J. KAISER FOUND., STATE HEALTH INSURANCE MARKETPLACE TYPES, 2016, http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/#note-4 (last visited June 30, 2016).

is a state-based Marketplace.[93] Other states run a Marketplace in partnership with the federal government, with some functions handled by the state and others handled by the HHS.[94] The Centers for Medicare & Medicaid Services ("CMS"), a division of HHS, is responsible for the federally-facilitated Marketplace.[95] There is a wide variety within this category, with some states merely using CMS's information technology platform to other states relying on CMS for most functions.[96] Oregon and Michigan are examples of partnership Marketplaces.[97] Most states have opted to allow CMS to run a Marketplace on their behalf, called a federally-facilitated marketplace.[98] This Article focuses on the federally-facilitated Marketplace, because it is servicing most of the states. However, similar issues arise in the state-based and partnership Marketplaces.

While it is possible for a taxpayer to enroll in a Marketplace individual plan and wait to claim a PTC on the tax return filed the following year, most taxpayers do not do this, principally because their budgets are unable to absorb such a large up-front cost.[99] The process begins when a person seeking insurance contacts the Marketplace and completes an application.[100] The Marketplace will screen the person for eligibility for Medicaid and CHIP.[101] Next, the Marketplace will screen the person for eligibility to enroll in a Marketplace plan.[102] Finally, the Marketplace will screen the person for eligibility for and the amount of an APTC and cost sharing reductions.[103]

The Marketplace then attempts to verify the applicant's claimed household size and household income by comparing the application with

[93] *Id.* For an interesting description of the benefits and challenges to a state of running a state-based marketplace, see Brendan W. Williams, *A Better "Exchange": Some States, Including Washington, Control Their Health Care Markets While Most Surrender Autonomy to Resist Reform*, 48 GONZ. L. REV. 595 (2012/2013).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] 45 C.F.R. § 155.310(b) (applicant has a right to request that a Marketplace not determine his or her eligibility for insurance affordability programs, including the APTC). Of taxpayers who timely claimed a PTC for tax year 2014, 97% received APTC payments. Letter from John Koskinen to Members of Congress, *supra* note 4.

[100] 45 C.F.R. § 155.310(a).

[101] 45 C.F.R. § 155.345.

[102] 45 C.F.R. § 155.315. This involves verifying the Social Security number provided by the individual with the Social Security Administration, verifying the immigration status of the individual with the Department of Homeland Security, verifying the individual's residency by examining approved electronic data sources, and verifying the individual's incarceration status by examining approved electronic data sources. *Id.*

[103] 45 C.F.R. § 155.320.

information obtained from the federal data hub.[104] The federal data hub contains information from the IRS (prior year tax returns) and the Social Security Administration (social security benefits that are excluded from taxable income), as well as information from the U.S. Department of Homeland Security (to verify immigration status) and The Work Number (a service owned by Equifax for verifying employment and income).[105] If the taxpayer attests that the (historic) data in the federal data hub accurately represents family size and household income for the year of the APTC, the Marketplace is required to accept that representation.[106]

With respect to family size, if information is not available from the federal data hub, or if the taxpayer attests that a change in circumstances has or will change the family size, the Marketplace will attempt to verify the taxpayer's estimate with other information provided by the applicant or other approved electronic data sources.[107] If there is a discrepancy that would affect the taxpayer's eligibility for an APTC or the amount of the PTC (to the extent the data is not "reasonable compatible" with the taxpayer's attestation), then the Marketplace is required to obtain additional documentation from the taxpayer.[108]

With respect to household income, if the taxpayer reports a higher income than is supported by the federal data hub, the Marketplace generally will not attempt further verification, but will use the higher income to calculate the PTC and cost sharing subsidies.[109] This makes sense from the perspective of the government's budget because the higher income results in lower benefits. An overstated income estimate that results in a significantly lower APTC is a potential issue from a health-policy standpoint because it

[104] 45 C.F.R. § 155.320(c). If the identifying information for a household member does not match the records at the IRS and HHS, the Marketplace must follow a particular procedure to resolve the inconsistency. *Id.*

[105] Ctr. on Budget and Policy Priorities, *Preventing & Resolving Data-Matching Issues in the Federally-Facilitated Marketplace*, HEALTH REFORM: BEYOND THE BASICS, slides 2, 3 (Jan. 21, 2016), http://www.healthreformbeyondthebasics.org/wp-content/uploads/2016/01/Webinar-01-21-16_Resolving-Data-Matching-Issues.pdf [hereinafter CBPP, *Data Matching Issues*].

[106] 45 C.F.R. § 155.320(c)(3)(i)(B).

[107] 45 C.F.R. § 155.320(c)(3)(i)(C), (D).

[108] *Id.* The Marketplace is directed to perform additional due diligence if the taxpayer's application is not "reasonably compatible" with other available information. *Id.* The Marketplace is directed that a taxpayer's attestation is "reasonably compatible" with other information if the difference or discrepancy between the data "does not impact the eligibility of the applicant, including the amount of advance payments of the premium tax credit or category of cost-sharing reductions." 45 C.F.R. § 155.300(a).

[109] CBPP, *Data Matching Issues*, *supra* note 105, at slide 38. As discussed *supra* in note 108, the Marketplace is supposed to request additional documentation if the taxpayer's application is not "reasonably compatible" with the information in the federal data hub. This should mean that the Marketplace would request additional information from an applicant that attests to an income that results in a lower APTC than would appear to be supported based on the historic information in the federal data hub. It is unclear whether or the extent to which the Marketplace is doing this.

might distort the taxpayer's purchasing decision, causing the taxpayer to select a more meager policy. However, it does not create a risk that the taxpayer will have to repay excess APTC through the reconciliation process. Thus, this Marketplace policy of not questioning an income overstatement is reasonable with respect to the APTC. However, an overstated income estimate that causes the taxpayer to be approved by the Marketplace for a more meager cost sharing reduction than that which an accurate income estimate would support is clearly a problem for the taxpayer. It is not possible for the taxpayer to later claim cost sharing reductions that were foregone.[110] Thus, it would be preferable from a policy standpoint for the Marketplace to engage in some verification process of overstated income so that the taxpayers' rights to cost sharing reductions are protected.

If the taxpayer reports a household income at least 10% lower than the income that is supported by the federal data hub, or if there is no data in the federal data hub, then the Marketplace will ask the taxpayer for additional documentation to support the lower income.[111] Additional documentation is also required if the reported income is not "reasonably consistent" with the income in the federal data hub. This means that if the difference would affect eligibility for or the amount of the PTC or cost sharing reductions, the Marketplace must seek to verify the income.[112] This is called a "data matching issue."

If a data matching issue arises, the taxpayer is granted temporary eligibility for an APTC and cost sharing reductions based on the taxpayer's estimates for up to 90 days while the taxpayer gathers additional documentation to support the estimates.[113] If the taxpayer does not respond within 90 days or fails to adequately verify the estimates, the taxpayer either loses eligibility for any further APTC or cost sharing reductions or is granted an APTC or cost sharing reduction based on the information from the federal data hub.[114] The taxpayer can still claim any PTC not already paid in advance on the tax return for that year. HHS may extend the 90 day period for resolving data mismatches where "the applicant demonstrates that a good faith effort has been made to obtain the required documentation during the period."[115] HHS has further authority to "provide an exception, on a case-by-

[110] *See* Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies*, 65 TAX. L. REV. 723, 729 (2012).

[111] CBPP, *Data Matching Issues*, *supra* note 105, at slide 38; Cent. for Medicare & Medicaid Serv., *Consumer Guide for Annual Household Income Data Matching Issues* at 2-3, (Oct. 2015), https://marketplace.cms.gov/outreach-and-education/household-income-data-matching-issues.pdf. [hereinafter CMS *Consumer Guide*].

[112] CMS *Consumer Guide, supra* note 111, at 2-3. Again, this rule seems to conflict with the rule requiring the Marketplace to accept a taxpayer's higher income estimates. It is unclear whether the Marketplace is engaging in any verification of higher income estimates, even if the higher income is not "reasonably consistent" with the federal data hub.

[113] CBPP, *Data Matching Issues*, *supra* note 105, at slides 5, 38.

[114] CBPP, *Data Matching Issues*, *supra* note 105, at slide 49.

[115] 45 C.F.R. § 155.315(f)(3).

case basis, to accept an applicant's attestation as to the information which cannot otherwise be verified" where an applicant "does not have documentation with which to resolve the inconsistency . . . because such documentation does not exist or is not reasonably available and for whom the Exchange is unable to otherwise resolve the inconsistency," except for data mismatches related to citizenship or immigration status."[116]

Significantly, the Marketplace communicates to taxpayers that it engages in data verification to "provide the correct financial assistance and protect you against owing money back when you file your taxes."[117] Thus, while there are limited circumstances where the Marketplace defers to the taxpayer's income and household size estimates, the communicated message to the taxpayer is that the Marketplace is verifying the information provided and protecting the taxpayer from having to repay an excess APTC.

There is a statutorily-defined appeals process by which a taxpayer can appeal Marketplace determinations.[118] While that appeals process is important, it is not likely to be helpful to taxpayers who have been approved for an overly-large APTC. It simply will not occur to the vast majority of taxpayers to file an appeal asking for a lower subsidy amount than was approved, and to do so could jeopardize CSR subsidies which are not subject to reconciliation. In any event, taxpayers who recognize the problem would be best served by simply taking less than the full amount of approved APTC payments.

Once approved, a taxpayer is required to contact the Marketplace within thirty days to report changes during the year that affect eligibility for or the amount of the APTC or CSR subsidies.[119] Once the Marketplace verifies the reported changed information, the Marketplace then adjusts the APTC and CSR subsidies.[120] There does not appear to be any penalty for not reporting changes.

III. COMPARING THE PTC WITH OTHER SOCIAL SUPPORT PROGRAMS

It is instructive to compare the PTC with other social support programs. The design and delivery of these programs hold valuable lessons for redesigning the PTC (or in fashioning new health care subsidies). The list of benefits examined in this Article is selective and not exhaustive. I have chosen to focus on benefits that have intriguing similarities to the PTC in purpose or design. The lessons that this Article chooses to describe also are not exhaustive. More work in this area would be valuable.

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[116] 45 C.F.R. § 155.315(g).
[117] CMS *Consumer Guide, supra* note 111, at 3.
[118] 42 U.S.C. § 18081(f); 45 C.F.R. Part 155, Subpart F.
[119] 45 C.F.R. § 155.330(b).
[120] 45 C.F.R. § 155.330(g).

A. Tax and Non-Tax Delivery Systems Generally

Debates and discussions about administrative methods of delivering social welfare benefits have been ongoing for years. Since at least the advent of the EITC, policy makers have chosen to deliver selected social welfare benefits through the tax code, in sharp contrast to traditional public benefits systems that rely on non-tax based administration. Advocates for tax-based programs have argued that using the tax system is more administratively efficient than traditional administration, and that the cost of delivering tax-based benefits is lower.[121] Advocates also have pointed out that delivering benefits through the near-universal income tax system is less stigmatizing and isolating than visiting the welfare office.[122] Critics have pointed to laxer enforcement in tax-based benefits [123] and the mismatch between the enforcement mindset of the IRS and the needs of taxpayers for help with compliance.[124] Some have pointed out that placing social benefit programs within the tax system necessarily means compromise of some goals, such as responsiveness to need, because of the structural limitations of the current income tax system.[125] Yet others have been concerned that asking the IRS to administer social welfare benefits is detrimental to the IRS's primary mission of revenue collection.[126]It is safe to say that there are pros and cons to tax-based administration, just as there are for non-tax based administration.

B. TANF (aka Welfare) and SNAP (aka Food Stamps)

Like the PTC, Temporary Assistance to Needy Families ("TANF") (formerly known as AFDC or welfare) and Supplemental Nutrition Assistance Program ("SNAP") (formerly known as food stamps) are social support programs that are means-tested.[127] TANF provides income support to

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[121] Anne Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 564-565 (1995).

[122] *Id.*

[123] Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1875 (2005) (noting that EITC enforcement efforts are stricter than enforcement of other tax provisions, but far less strict than enforcement of non-tax cash transfer programs, and concluding that perhaps this is a "price worth paying" for the survival of the EITC).

[124] Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351 (2002) (discussing the unique barriers that low-income taxpayers face when dealing with the IRS audit and appeal process).

[125] Alstott, *supra* note 121, at 564-565.

[126] Kristen E. Hickman, *Pursuing a Single Mission (Or Something Closer To It) for the IRS*, 7 COLUM. J. OF TAX L. 169 (2016) (arguing that "Congress's repeated utilization of the IRS to serve functions beyond its traditional revenue raising mission has reached a tipping point that threatens to undermine substantially the viability of the IRS's primary mission as the national's tax collector" and suggesting that the IRS be restructured by mission).

[127] Code § 36B (premium tax credit); 42 U.S.C. §§ 601-619 (Block Grants to States for Temporary Assistance for Needy Families); 7 U.S.C. §§ 2011-2036c (Supplemental Nutrition Assistance Program).

needy families (as well as serving other purposes),[128] and SNAP helps needy families to purchase food.

Eligibility for and the amount of SNAP benefits are determined based on monthly income and household composition.[129] Eligibility for and the amount of TANF benefits also are commonly determined based on monthly income and household composition, although there is some variety because the TANF program operates as a federal block grant to the states.[130] The PTC, by contrast, is based on annualized income and household composition. More frequent determinations of income and household size are more intrusive than using annualized figures, but also are more responsive, better reflecting current need for services. The PTC approximates the TANF and SNAP system by requiring a taxpayer to report income and household changes during the year to the Marketplace so that subsidies can be adjusted.[131] However, the addition of a reconciliation requirement alters the system fundamentally, reserving the bulk of verification and enforcement to the end of the year.

TANF and SNAP are both prospective benefits. Eligibility for payments and the amount of payments are determined by a government agency in advance of receiving the payments.[132] While a taxpayer can appeal

[128] This Article is focusing on the traditional TANF function of cash assistance, which was the primary purpose of the predecessor program Aid to Families with Dependent Children ("AFDC") and is the programmatic support most people associate with TANF. Liz Schott, LaDonna Paventti & Ife Floyd, *How States Use Federal and State Funds under the TANF Block Grant*, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 15, 2015), http://www.cbpp.org/sites/default/files/atoms/files/4-8-15tanf_0.pdf. However, the TANF program gives states fairly broad latitude to use grant funds for a variety of purposes that are approved by the federal statute. *Id.* TANF's approved purposes are to "(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families." 42 U.S.C. § 601(a). These purposes have supported traditional cash assistance payments, but also state programs such as child care services, work training and placement activities, child welfare programs, parenting training, substance abuse treatment, domestic violence services, early education, teen pregnancy prevention programs, and state earned income tax credits. Schott, Paventti & Floyd, *supra*.

[129] U.S. Dep't of Agric., Food and Nutrition Serv., *Supplemental Nutrition Assistance Program (SNAP): Fact Sheet on Resources, Income, and Benefits* (Oct. 5, 2015), http://www.fns.usda.gov/snap/fact-sheet-resources-income-and-benefits.

[130] *See* Elizabeth G. Patterson, *Mission Dissonance in the TANF Program: Of Work, Self-Sufficiency, Reciprocity, and the Work Participation Rate*, 6 HARV. L. & POL'Y REV. 369, 395-96 (2012) ("As of 2003, monthly income eligibility criteria ranged from $256 in Alabama to $1993 in Alaska."); Alstott, *supra* note 121, at 580 ("Traditional income-transfer programs, in contrast, typically measure income at much shorter intervals, usually monthly, in order to maximize responsiveness to changing circumstances.").

[131] 45 C.F.R. §§ 155.330(b), (g).

[132] 42 U.S.C. §§ 601-619 (Block Grants to States for Temporary Assistance for Needy Families); 7 U.S.C. §§ 2011-2036c (Supplemental Nutrition Assistance Program).

these determinations, the determinations themselves are not preliminary or estimated. [133] Future changes in circumstances can change the benefit amount, but generally not retroactively. In the SNAP program, participants are required to report changes at regular intervals (generally monthly or quarterly), or they may be required to report changes as they occur.[134] The TANF programs rules vary because of the block grant nature of the program, but usually follow the same pattern.[135]

This contrasts with the PTC which is a retrospective benefit in the form of a tax credit. Even though the PTC can be paid in advance, taxpayers are subject to later reconciliation, which makes the advance payments more like a loan than a prospective benefit. There are caps on the amount that taxpayers with incomes under 400% of the FPL must repay, but everyone with excess APTCs must repay something. Because Congress has already twice raised the caps and there are proposals to eliminate the caps altogether, it is unwise to rely on the caps to provide financial protection for taxpayers.[136] While overpayments of both SNAP and TANF payments can be recovered by the state, the process is not structural and automatic like it is for the APTC. States have discretion to not seek repayment of SNAP or TANF payments and frequently do so when the overpayment was not the result of fraud or abuse by the recipient.[137]

TANF (in the form of income support) provides cash payments directly to beneficiaries while the APTC is paid directly to the insurance company. When the TANF payment's purpose is to provide income support, this difference makes sense. Income support is sharply contrasted with the APTC's purpose of subsidizing a current purchase. Unlike TANF, SNAP benefits are not paid in cash and cannot be converted to cash, but are paid as an electronic benefit transfer card (like a voucher or a debit card) that can be used at approved vendors to purchase approved food products.[138] In this way, SNAP benefits are similar to APTC benefits. This makes sense because SNAP benefits, unlike TANF but similar to the APTC, are designed to support a particular, identified, current purchase.

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[133] 42 U.S.C. § 602(a)(1)(B)(iii); 7 C.F.R. § 273.15.

[134] 7 C.F.R. § 273.12. *See also* U.S. Dep't of Agric., *Supplemental Nutrition Assistance Program (SNAP): Facts about SNAP* (Mar. 14, 2016), http://www.fns.usda.gov/snap/facts-about-snap [hereinafter USDA, *Facts about SNAP*].

[135] *See* David Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, note 49 and accompanying text (2004).

[136] *See supra* note 42 and accompanying text. As with most things, how one views the caps is a matter of perspective. Some may view the caps, as I do, as a mechanism for tempering the financial risk of refundable credits that are payable in advance and tied to credit-year income. Others view the caps as a forgiveness of tax that is rightly due, because of the way the credit is calculated.

[137] To receive a TANF block grant, the state must have "standards and procedures to ensure against program fraud and abuse." 42 U.S.C. § 602(a)(6).

[138] USDA, *Facts about SNAP, supra* note 134.

Like TANF and SNAP, eligibility for and the amount of the APTC is determined largely by a government official, with inputs from the beneficiary. None of the programs rely exclusively (or even mainly) on self reporting. Administrative protections for SNAP and TANF recipients are similar. There is an administrative appeals process to contest negative determinations. APTC determinations also are appealable. However, APTC determinations, unlike TANF and SNAP, are preliminary or estimated in nature. Moreover, because of the reconciliation requirement, it is less clear when it makes sense for a taxpayer to contest a Marketplace's APTC determination. Unlike TANF and SNAP, where a winning appeal results in a higher benefit, it is less clear what a good result is for the APTC. A taxpayer may want to appeal a Marketplace seeking a higher advance subsidy, but that could create a higher risk of repayment.

C. The EITC and the Now-Repealed Advance EITC

The EITC is the largest federal cash assistance poverty relief program in the United States today.[139] It is a powerful tool for reducing poverty among the lowest-level earners in American society.[140] The EITC is a refundable tax credit equal to a certain percentage of a taxpayer's "earned income" (*i.e.,* income from work), up to a certain dollar amount. While childless taxpayers are eligible for a small EITC, the amount of the credit increases dramatically for a taxpayer with children. The EITC is means-tested, and phases out as a taxpayer's income rises. There have been regular proposals for reform and improvement,[141] but the EITC is a successful and

[139] In 2014, the federal government spent $60.1 billion on the refundable portion of EITC, 34% of the entire outlay for all public assistance and related programs combined ($175.2 billion including the EITC). The second-largest needs-based cash assistance program in 2014 was the supplemental security income program at $51.5 billion. In comparison, TANF payments were only $20.4 billion in 2014. Other non-cash assistance programs are more expensive. For example, the federal government spent $102.8 billion in 2014 on food and nutrition assistance programs, including food stamps. U.S. Office of Management and Budget, Budget of the United States Government, Historical Tables, Table 11.3, Outlays for Payments for Individuals by Category and Major Program: 1940-2021, https://www.whitehouse.gov/omb/budget/Historicals.

[140] President Obama, in his 2014 State of the Union Address, explained that "few [measures] are more effective at reducing inequality and helping families pull themselves up through hard work than the Earned Income Tax Credit. Right now, it helps about half of all parents at some point." Barack Obama, U.S. President, President Barack Obama's State of the Union Address (Jan. 28, 2014), http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address.

[141] *See, e.g.*, Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 520 (2013); Kerry A. Ryan, *EITC as Income (In)Stability?*, 15 FLA. TAX REV. 583 (2014); George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225 (1994); Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301 (2004).

popular program with largely bipartisan support.[142] It is easy to understand why the EITC enjoys bipartisan support; the left appreciates the social welfare aspect of the credit, while the right can stand behind the credit's encouragement to work. The EITC often is described as a payroll offset measure, and indeed that has been a purpose since the beginning.[143] However, the EITC also was part of the welfare reform and welfare-to-work movements.[144]

Like the PTC, the EITC is a means-tested social welfare program. Both are refundable tax credits. The purpose of the EITC is to provide income support (like TANF) rather than to subsidize a specific purchase (like SNAP benefits and the PTC). Both being income tax credits, a taxpayer has

[142] See, e.g., Richard Rubin & Eric Morath, *Obama, Ryan See Potential for a Tax-Policy Compromise*, WALL ST. J., Feb. 2, 2016, http://www.wsj.com/articles/obama-ryan-see-potential-for-a-tax-policy-compromise-1454417318 (noting agreement between President Barack Obama (a Democrat) and Speaker of the House Paul Ryan (a Republican) on expanding the EITC available to workers without qualifying children). The EITC, brainchild of Senator Russell Long (a Democrat), was born as a compromise measure in response to President Nixon's (a Republican) proposed "negative income tax," which would have provided a small guaranteed income to everyone. Jane Gravelle & Jennifer Gravelle, *Taxing Poor Families: The Evolution of Treatment Under the Federal Income Tax*, 7 CONN. PUB. INT. L.J. 35, 38 (2008); Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit*, 1969-99, 53 NAT'L TAX J. 983, 992 (2000). Despite having bipartisan support, the EITC is regularly criticized, sometimes for being unsustainable "welfare," sometimes for being expensive, sometimes for disincentivizing marriage or (perversely) work and sometimes for a high rate of overpayments. *See, e.g.*, STEVE HOLT, BROOKINGS INST., THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 3 (2006), http://www.brookings.edu/research/reports/2006/02/childrenfamilies-holt; *see also* Book, *supra* note 124.

[143] The House of Representatives included an EITC in the Tax Reduction Act of 1975. Tax Reduction Act of 1975, Pub. L. No. 94-12, tit. II, § 204(a), 89 Stat. 30, 30–31 (1975) (codified in scattered sections of 26 U.S.C.). The House Ways and Means Committee indicated the purpose of the credit was to provide relief to earners with little or no tax liability by providing a refundable tax credit based on earned income noting that the credit amount was designed to "closely match [] the employee and employer social security tax on the first $4,000 of income . . . ." H. REP. NO. 94-19, at 3 (1975). The committee also found that it was "appropriate to use the income tax system to offset the impact of the social security taxes on low-income persons . . . ." *Id.* at 29. The Senate Finance Committee agreed with the House that it was appropriate to offset social security taxes through an income tax system. S. REP. NO. 94-36, at 33 (1975).

[144] While fully agreeing with the goal of offsetting payroll taxes for low wage workers, the Senate Finance Committee had a different view of the scope of the new EITC. It explained that "the most significant objective of the provision should be to assist in encouraging people to obtain employment, reducing the unemployment rate and reducing the welfare rolls." S. REP. NO. 94-36, at 33 (1975). Thus, the Senate proposed an amendment increasing the amount of the credit and restricting the credit to "individuals who maintain a household." *Id.* at 34. The Senate wanted to offset payroll taxes, but only for those individuals likely to be eligible for welfare payments if they were not working. It was a strategy for moving families from welfare to work by making work more attractive than welfare (or at least not more unattractive). The Conference Committee adopted the Senate's version of the EITC. H.R. REP. NO. 94-120, at 58-59 (1975). It passed Congress and was signed by President Nixon.

the same administrative and judicial rights with respect the denial of an EITC or PTC claimed on a tax return, such as the right to a Notice of Deficiency and access to the U.S. Tax Court.[145]

The APTC is similar in many important ways to the Advance EITC ("AEITC"), which was available from its introduction for tax year 1979 until its repeal for tax year 2011.[146] Under the AEITC, certain taxpayers could receive advance payments of their anticipated EITCs in their paychecks. To claim the AEITC, the taxpayer would notify his or her employer by giving the employer an IRS Form W-5. The Form W-5 asked the employee to certify that he or she was eligible to receive an AEITC, asked what the employee's anticipated filing status was, and asked whether the employee's spouse also received an AEITC.[147] The employer would calculate the amount of the AEITC based on the employee's wages from the employer and IRS tables, and then would include the calculated amount in the employee's paycheck.[148] Thus, like the APTC, the taxpayer was required to allow another entity to calculate the amount of the advance credit payment, with little self-reporting. Unlike the APTC, the AEITC process was not designed to predict the final EITC amount with high accuracy, opting instead for certainty and ease for the employers charged with administering the advance payments.

Like the APTC, there was a reconciliation process. If the AEITC payments received during the year turned out to be more than the EITC to which the taxpayer was eligible on the tax return for that year, the taxpayer was required to repay the excess amount.[149] Unlike the APTC, there were no caps on repayment.[150] However, also unlike the APTC, the IRS limited the total amount of AEITC payments that could be paid during the year to only a portion of the anticipated EITC eligibility.[151] This feature limited the risk that a taxpayer would face a repayment obligation, but also made the AEITC much less responsive to the current income needs of taxpayers.[152]

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[145] *See, e.g.*, 26 U.S.C., Subtitle F, Chapter 63, Subchapter B – Deficiency Procedures in the Case of Income, Estate, Gift, and Certain Excise Taxes.

[146] Revenue Act of 1978, Pub. L. No. 95-600, tit. I, § 105, 92 Stat. 2763, 2773–76 (1978) (making the EITC permanent and adding advance payment option); Education Jobs and Medicaid Assistance Act of 2010, Pub. L. No. 111-226, § 219, 124 Stat. 2389, 2403 (2010) (eliminating advance refundability of EITC).

[147] I.R.S. Form W-5 (2010), https://www.irs.gov/pub/irs-prior/fw5--2010.pdf.

[148] I.R.S. PUB. 15, at 19-20 (2010), https://www.irs.gov/pub/irs-prior/p15--2010.pdf.

[149] I.R.S. Form W-5 (2010), https://www.irs.gov/pub/irs-prior/fw5--2010.pdf.

[150] *Id.*

[151] I.R.S. PUB. 15, at 19-20 (2010), https://www.irs.gov/pub/irs-prior/p15--2010.pdf. Alstott, *supra* note 121, at 584 and notes 196-197 (noting that 1993 amendments "limit advance payments for all recipients to sixty percent of the EITC benefit to a family with one child" and further "limited advance payments by excluding from the advance payment system the additional credit amounts for larger families, young children, and purchasers of health insurance.").

[152] *Id.*

A repayment obligation can occur even when the advance payments are designed to be only a portion of the ultimate credit and even if income is carefully estimated throughout the year. For example, under the AEITC program, a taxpayer whose income increased at the end of the year could have owed a repayment, even though the credit was designed to limit this occurrence.[153] Proposals for correcting for these overpayment situations generally focus on more accurate income calculations (which will likely add complexity to the process for the taxpayer) or limiting the advance payments (which reduces the responsiveness of the benefit to the taxpayer's need).[154]

The AEITC was repealed by Congress effective for tax year 2011.[155] The principal reason was that the participation rates for the program were persistently very low.[156] Evidence indicates that the low participation rates occurred in part from not knowing about the availability of the AEITC (despite IRS outreach efforts on this topic), but also from a general preference by taxpayers for a lump sum benefit.[157] Taxpayers in general seem to prefer lump sum refunds after filing a tax return over receiving money throughout the year.[158] In part, this preference stems from a (perhaps unacknowledged) preference for a forced saving program; in part, it is due to a marked fear of owing money with the filing of a tax return.[159]

The APTC program should build on the lessons learned from the AEITC experience. EITC recipients overwhelming opted out of receiving

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[153] Stephen D. Holt, *Improvement of the Advance Payment Option of the Earned Income Credit*, 57 TAX NOTES 1583, 1585-1586 (1992) (identifying several situations which create a risk of overpayment of an AEITC).

[154] *See, e.g.*, *id.* at 1587.

[155] Education Jobs and Medicaid Assistance Act of 2010, Pub. L. No. 111-226, § 219, 124 Stat. 2389, 2403 (2010).

[156] U.S. GOV'T ACCOUNTABILITY OFF., GAO-92-26, EARNED INCOME TAX CREDIT: ADVANCE PAYMENT OPTION IS NOT WIDELY KNOWN OR UNDERSTOOD BY THE PUBLIC 3 (1992) [hereinafter GAO, ADVANCED PAYMENT OPTION] (noting that most taxpayers surveyed did not know about the advance payment option, but that most would prefer a lump sum benefit in any event); Book, *supra* note 124, at note 45 (noting that "[i]n 1998, 216,238 taxpayers, out of the total 12.7 million who received the EITC, received the credit through advance payment; in 1999, only 185,027 out of 19.4 million EITC recipients received the credit through advance payment; [and] in 2000, only 169,002 out of 19.2 million EITC recipients received the credit through advance payment").

[157] GAO, ADVANCED PAYMENT OPTION, *supra* note 156, at 3 (noting that most taxpayers surveyed did not know about the advance payment option, but that most would prefer a lump sum benefit in any event); *see also* Stephen D. Holt, *Periodic Payment of the Earned Income Tax Credit Revisited*, METROPOLITAN POL'Y PROG. AT BROOKINGS, 5 (Dec. 2015), http://www.brookings.edu/~/media/research/files/reports/2015/12/17-holt/holtperiodicpaymenteitc121515.pdf (citing as reasons for the failure of the AEITC its "complexity, involvement of employers, and too-small disbursements").

[158] Greene, *supra* note 141, at 563 (describing the strategy used by many respondents of intentionally over-withholding throughout the year in order to get a lump sum refund after filing a tax return).

[159] Greene, *supra* note 141, at 562 ("Respondents liked the forced-savings aspect of the EITC lump sum, and they were afraid that if they took an advance on the money, they would ultimately owe the IRS money at the end of the year.").

advance payments. This was possible in large part because the EITC is not tied to particular, current spending.[160] PTC recipients do not have the luxury of waiting for their benefits. PTC eligibility is conditioned on purchasing a health insurance policy on the Marketplace. In 2016, $283 per month is the average cost for a 40-year-old single person to buy the lowest cost silver plan, before any subsidies.[161] That is an annual expense of $3,396. For taxpayers with income in the range that would qualify them for a PTC, between $11,770 (100% of the FPL) and $47,080 (400% of the FPL),[162] that is a significant outlay; it represents 29% of annual income for a single person living at the poverty line. It is unrealistic to expect such taxpayers to wait to receive their PTC as the tradeoff for protecting themselves from having to repay excess payments. If a single individual living at the poverty line instead claimed just the average 2016 APTC amount of $291 per month,[163] (the actual subsidy amount is likely to be higher because our hypothetical person has lower-than-average income), the out-of-pocket cost for health coverage is $0 (because the PTC is higher than the cost of the insurance). If, however, our hypothetical single person gets a much better paying job or an unexpected bonus in December, or wins the lottery, or takes a lump sum withdrawal from a 401(k) plan or IRA, or has phantom income like cancellation on indebtedness, he or she will face a (perhaps unlimited) repayment obligation and potential tax penalties. It is critical to recall that the purpose of the APTC (and the PTC) is to induce lower-income individuals to opt into the risk pool.

Another part of the reason the AEITC was not very responsive to the needs of taxpayers was because the inputs used in the calculation of the advance payments was simplified to make it easy for employers to administer the payments. Employers simply used the employee's pay for the current pay period and looked up the advance payment amount in IRS published tables. There were different tables for single employees, married employees, and married employees whose spouse also was receiving an AEITC.[164] This simplified method made the system palatable for employers, who generally reported no significant difficulty in administering AEITCs.[165]

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[160] However, the prevalence of high-cost refund anticipation loans (or RALS) indicates a desire of taxpayers to accelerate year end lump sum EITCs. Holt, *supra* note 157, 2-3.

[161] Cynthia Cox, Gary Claxton, & Larry Levitt, *Potential Savings from Actively Shopping for Marketplace Coverage in 2016*, THE HENRY J. KAISER FOUND. (Nov 18, 2015), http://kff.org/health-costs/issue-brief/potential-savings-from-actively-shopping-for-marketplace-coverage-in-2016/.

[162] *See supra* note 27.

[163] Cent. for Medicare & Medicaid Serv., *March 31, 2015 Effectuated Enrollment Snapshot*, (June 2, 2015), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-06-02.html.

[164] Holt, *supra* note 153, at 1584.

[165] GAO, ADVANCED PAYMENT OPTION, *supra* note 156, at 4; *but see* Holt, *supra* note 153, at 1584 (noting the employers who were aware of the AEITC "often are confused about their responsibilities and liabilities").

However, it too often resulted in an AEITC that was not well matched with the EITC to which the taxpayer was ultimately entitled.[166]

The APTC system has much better inputs of information (although skewed toward historical information), which in theory should result in more accurate estimates. However, the inputs are complex and at least as an initial matter are self-reported. This is concerning in terms of accuracy. The average taxpayer will likely rely heavily on the Marketplace to confirm that the income estimate is accurate, just as the average taxpayer relies heavily on paid preparers to accurately file a tax return that claims an EITC.[167] Indeed, this is precisely what the Marketplace claims to do for taxpayers; as the Marketplace's own consumer information claims, "The Marketplace asks you to document your annual household income so that it can provide the correct financial assistance and protect you against owing money back when you file your taxes."[168]

D. The Health Coverage Tax Credit and the Advance Payment Option

The Health Coverage Tax Credit ("HCTC") became effective in 2002,[169] and is similar in design to the PTC and APTC. The HCTC can in a very real sense be called a precursor program for the PTC, although the HCTC now coexists and is coordinated with the PTC.[170] The HCTC is a refundable tax credit that helps to offset the cost of health coverage for displaced workers receiving Trade Adjustment Assistance payments and early retirees receiving Pension Benefit Guaranty Corporation payments.[171] The credit covers 72.5% of the cost of qualifying health coverage, typically COBRA coverage and state-qualified insurance plans and (for 2014 and 2015 only) Marketplace plans.[172] While a taxpayer can wait to claim the

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[166] Holt, *supra* note 153, at 1585.

[167] About 70% of all tax returns with an EITC are filed by commercial tax preparers. PRESIDENT'S ECON. RECOVERY ADVISORY BD., THE REPORT ON TAX REFORM OPTIONS: SIMPLIFICATION, COMPLIANCE, AND CORPORATE TAXATION 3 (2010), http://www.whitehouse.gov/sites/default/files/microsites/PERAB_Tax_Reform_Report.pdf [hereinafter PERAB].

[168] CMS *Consumer Guide*, *supra* note 111, at 3.

[169] Trade Act of 2002, Pub. L. 107-210, div. A, tit. II, 116 Stat. 933, 954-960 (2001) (codified at Code § 35). The HCTC program was allowed to expire at the end of 2013, but in 2015 it was modified, reinstated retroactively to 2014, and extended through tax year 2019. Trade Preferences Extension Act of 2015, Pub. L. 114-27, § 407, 129 Stat. 362, 381-83 (2015).

[170] Code § 35(g)(12) (a taxpayer who elects to take a HCTC for a coverage month may not take a PTC for the same month).

[171] Code § 35. *See also* BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R44392, THE HEALTH COVERAGE TAX CREDIT (HCTC): IN BRIEF (Feb. 18, 2016), https://www.fas.org/sgp/crs/misc/R44392.pdf.

[172] *Id.* The HCTC subsidy amount originally covered 65% of the cost of coverage, was raised to 80% in 2009, and was lowered to the current 72.5% by the extension legislation, with the rest of the premium amount (currently 27.5%) to be paid by the taxpayer regardless of income level. FERNANDEZ, *supra* note 171. Whether or not this compares favorably or

credit on the tax return for the year,[173] there is an option to have the credit paid in advance directly to the insurer.[174]

Significantly, if the taxpayer elects advance payments of the HCTC, there is no reconciliation process. Eligibility is confirmed by the IRS upon enrollment in the advance payment program.[175] If a taxpayer receives advance HCTC payments, but was actually ineligible, there is no automatic process as part of filing a tax return that results in the taxpayer repaying those amounts. This stands in sharp contrast with the PTC reconciliation process. A taxpayer who has been approved by the IRS for advance payment of HCTC can rely on the amount of that credit. Absent fraud, the taxpayer will not have to repay it. It is tempting to believe that the difference exists because eligibility is clearer under the HCTC than the PTC. However, the IRS's advance HCTC program engages in administratively burdensome steps to ensure continuing eligibility of the taxpayers enrolled. For example, the IRS collects the taxpayer's premium payments and forwards them timely to the insurance company to ensure that the taxpayer is actively enrolled in the insurance. The costs of this type of administration are high, compared with relying on reconciliation to catch overpayments.[176] But it is a system that proactively prevents overpayments. Furthermore, it is reliable for the taxpayer, unlike the APTC. I suspect that this difference exists because eligibility for an HCTC and the amount of the HCTC do not vary based on household income, unlike the PTC. Because the PTC is based in part on income, I believe the Congress, somewhat reflexively, assumed it should be

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poorly to the subsidies available under the PTC, where a taxpayer's contribution can be as high as between 6% and 9.5% of income, depends on the details of the taxpayer's particular situation. *See supra* note 52 and accompanying text.

[173] The taxpayer must attach Form 8885 to his or her return as well as documents showing that the coverage was qualified and that the taxpayer paid the premium. I.R.S., Instructions for Form 8885, at 5 (2015), https://www.irs.gov/pub/irs-pdf/i8885.pdf.

[174] Code §§ 35, 7527. Note that although the current text of Code § 7527 has an effective date after the enactment of the 2015 extension legislation, prior versions of Code § 7527 also allowed advance payments. Because of the retroactive reinstatement of the credit, however, advance payments were not available for tax years 2014 or 2015. The IRS is currently finalizing an interim system for authorizing and paying advance credit payments for 2016, expected to be active July 2016, and a final program for 2017 through 2019. I.R.S., *Health Coverage Tax Credit* (last updated May 26, 2016), https://www.irs.gov/credits-deductions/individuals/hctc (noting that "the IRS expects to implement a limited interim process this summer for making advance monthly payments in 2016" and that "[t]he IRS expects to implement the full advance monthly payment program in January 2017 and will provide more information about the enrollment process later this year"); I.R.S., Instructions for Form 8885, at 1 (2015), https://www.irs.gov/pub/irs-pdf/i8885.pdf (noting that "[m]onthly advance payments of the HCTC are planned to begin in July 2016").

[175] FERNANDEZ, *supra* note 171, at 6.

[176] Stan Dorn, *Health Coverage Tax Credits: A Small Program Offering Large Policy Lessons*, URBAN INST., at (Feb. 2008), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411608-Health-Coverage-Tax-Credits.PDF ("As of 2006, $1 in IRS administrative costs was required to deliver each $5 in HCTC subsidies.").

based on credit-year income, because that is the model followed by other tax credits, like the EITC. Once you add an advance payment feature in, reconciliation seems like an obvious next step. But credit-year income is not necessarily the best benchmark for measuring the credit.[177]

The Code requires that "income" be measured on a tax year basis and, while it can be calculated using any method of accounting that "clearly reflect[s] income," a taxpayer's "income" is the figure shown on the return at the end of that year which reflects an annual measurement of income.[178] While this is a very ingrained tax concept, it really is a rule of administrative convenience.[179] Income must be measured somehow, and it is easier to administer an income tax system that measures income retroactively based on a tax year rather than a system that measures income in a variable way.[180] However, measuring income retroactively based on a tax year is not an immutable feature of the Code. Where other considerations (such as equity or the advancement of substantive policy goals) outweigh administrative convenience, Congress can and should opt for different measurements of income.

The take up rate in the HCTC program historically has been very low, meaning that many of the people eligible for the credit do not claim it.[181] One commentator estimated that in 2006, only twelve to fifteen percent of eligible households elected coverage.[182] Commonly cited reasons for the low take up rate are (1) that the program is not generous enough to make insurance affordable, (2) that the individual must enroll in coverage and start making premium payments before the advance payments begin, (3) that enrollment in the program is complex, and (4) that many participants find the insurance to be of little value.[183] A high take up rate for the PTC is critical

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[177] Zelenak, *supra* note 110, at 731.

[178] Code § 441(a) ("Taxable income shall be computed on the basis of the taxpayer's taxable year," which for individuals is almost always the calendar year); Code § 446 (requiring that the accounting method used "clearly reflect income" and specifically authorizing use of the cash and accrual accounting methods).

[179] Joseph M. Dodge, *Exploring the Income Tax Treatment of Borrowing and Liabilities, Or Why the Accrual Method Should Be Eliminated*, 26 VA. TAX REV. 245, note 243 (2006) (describing both the accrual and cash methods of annual accounting as "realization systems based on convenience"); Myron C. Grauer, *The Supreme Court's Approach to Annual and Transactional Accounting for Income Taxes: A Common Law Malfunction in a Statutory System?* 21 GA. L. REV. 329, 337 (1986) (noting that "an ideal tax system would measure income over lifespans," but that "[p]ractical considerations preclude that, so annual accounting has been adopted for administrative convenience"); Matthew A. Melone, *Adding Insult to Injury: the Federal Income Tax Consequences of the Clawback of Executive Compensation*, 25 AKRON TAX J. 55, 76 (2010) ("The annual accounting concept is an artifice borne out of administrative convenience.").

[180] *Id.*

[181] Dorn, *supra* note 176.

[182] *Id.* at 2.

[183] *Id.* at 2-3.

for success of health reform overall; it is important that the PTC do its job of enticing people into the health insurance risk pools.

The PTC compares favorably against the HCTC as to affordability and liquidity. Because the PTC is income based, and because the taxpayer's share of the premium is limited to a sliding percentage of income, Marketplace insurance should be considered relatively affordable.[184] The APTC program has taken a different approach than the HCTC program, and APTC subsidies begin upon application, even if there is a data mismatch.[185] Thus, there is no initial liquidity problem, like in the HCTC program where an individual might have to pay as many as three months of premiums in full before subsidies begin.[186]

Whether enrollment in a Marketplace plan (with an APTC) is more or less complex than enrollment in the HCTC program is hard to determine. However, commentators generally agree that easier enrollment equates with higher take up rates. The ACA adopted several features in an attempt to make enrollment customer friendly. For example, a single application is used to screen for both Medicaid and PTC eligibility.[187] Also, enrollment assistance is provided through multiple platforms, including call centers, websites, and in-person community-based navigators, and education and outreach programs are required.[188] However, the process has been plagued with problems from the outset, from the Marketplace website not working

[184] There have been transition pains, however, that have led many to conclude that Marketplace coverage is out of reach. Many people who were on less generous individual plans pre-ACA commonly had those plans cancelled by the insurance companies, leaving the insured to shop for more expensive (but more generous) coverage on the Marketplaces. *See* Juan Williams, *Insurance Cancelled? Don't Blame Obama or the ACA, Blame America's Insurance Companies*, FOX NEWS (Nov. 5, 2013), http://www.foxnews.com/opinion/2013/11/05/insurance-cancelled-dont-blame-obama-or-aca-blame-america-insurance-companies.html; Jon R. Gabel, Ryan Lore, Roland D. McDevitt, Jeremy D. Pickreign, Heidi Whitmore, Michael Slover, & Ethan Levy-Forsythe, *More Than Half Of Individual Health Plans Offer Coverage That Falls Short Of What Can Be Sold Through Exchanges As Of 2014,* HEALTH AFFAIRS (June 2012) ("More than half of Americans who had individual insurance in 2010 were enrolled in plans that would not qualify as providing essential coverage under the rules of the exchanges in 2014."). In addition, there is concern that Marketplace premiums will inevitably be steep. *See* Cynthia Cox, Gary Claxton, Larry Levitt, Michelle Long, Selena Gonzales, & Nolan Sroczynski, *Analysis of 2017 Premium Changes and Insurer Participation in the Affordable Care Act's Health Insurance Marketplaces*, THE HENRY J. KAISER FOUND. (June 2016), http://files.kff.org/attachment/Issue-Brief-Analysis-of-2017-Premium-Changes-and-Insurer-Participation-in-the-ACA-Marketplaces (predicting a higher increase in premiums for 2017 than in prior years, but noting that the data are preliminary). However, even if premiums rise very high for Marketplace plans, because the PTC subsidies are tied to taxpayer income, the government would shoulder most of the increase for subsidized policies.

[185] *See supra* note 113 and accompanying text.

[186] Dorn, *supra* note 176, at 3.

[187] 42 C.F.R. § 435.907.

[188] 45 C.F.R. § 155.205.

for weeks after its official rollout,[189] to enrollees getting bounced back and forth between the federally-facilitated Marketplace and state Medicaid agencies,[190] to enrollees receiving very confusing requests for documents to verify information provided on the application.[191] Part of the problem surely lies with the involvement in the process of so many players: multiple federal agencies, state agencies, state quasi-agencies, and non-profit organizations all have a role to play in Marketplace enrollment. If the technical problems can be adequately addressed, enrollment for APTCs should be relatively easy from the individual's perspective.[192] The government continues to work on these technical problems, and it appears that the process is improving, but more work is needed.[193] Importantly, I think it would be a mistake to make enrollment easier by loosening APTC verification requirements. Making it easier to get an APTC, but increasing the risk of a reconciliation problem will negatively impact take up in the long run. Regrettably, this seems to be HHS's current approach. HHS recently announced that for 2017 with respect to the federally-facilitated marketplace, a taxpayer will be required to verify claimed income if it is lower than the (largely historical) information contained in the federal data hub, but only if the discrepancy is more than the greater of 25% or $6,000.[194] This is down from the 10% lower tolerance levels in 2014 through 2016, which itself was a loosening of the standard

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[189] Michael D. Shear & Robert Pear, *Obama Admits Web Site Flaws on Health Law*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/politics/obama-pushes-health-law-but-concedes-web-site-problems.html?pagewanted=all.

[190] Seanna Adcox, *Despite Claims, Healthcare.Gov Is Not Enrolling Applicants in Medicaid*, CHRISTIAN SCI. MONITOR (Dec. 5, 2013), http://www.csmonitor.com/USA/Latest-News-Wires/2013/1205/Despite-claims-healthcare.gov-is-not-enrolling-applicants-in-Medicaid.

[191] Chabeli Herrera, *Paperwork Inconsistencies Causing South Floridians, Others To Lose Obamacare Subsidies*, MIAMI HERALD (June 16, 2015), http://www.miamiherald.com/news/health-care/article24665932.html.

[192] It is worth noting that a highly functional coordinated system that links federal and state agencies as well as non-profits and other entities involved in administering social support systems could prove exceptionally valuable in streamlining our social support system. A coordinated network could make enrollment and administration more efficient and cost effective and could help to combat fraud and abuse. *See* Terri Shaw, *Unlocking the Potential of the ACA's "No Wrong Door"*, GOVERNING (November 11, 2014), http://www.governing.com/gov-institute/voices/col-affordable-care-act-potential-no-wrong-door-a-87-exception.html (advocating for states to leverage federal money available to modernize their health and human services eligibility systems to "promote horizontal integration across a full spectrum of federal, state and local health and social-services programs.").

[193] U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-238, HEALTHCARE.GOV: CMS HAS TAKEN STEPS TO ADDRESS PROBLEMS, BUT NEEDS TO FURTHER IMPLEMENT SYSTEMS DEVELOPMENT BEST PRACTICES 13 (Mar. 2015), http://www.gao.gov/assets/670/668834.pdf.

[194] CENT. FOR MEDICARE & MEDICAID SERV., *Annual Income Threshold Adjustment FAQ* (July 21, 2016), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FINAL-Income-Datamatching-FAQ-7-21-16.pdf [hereinafter, CMS, *Annual Income Threshold*].

established in the statute.[195] HHS stated that the change is expected to "improve the customer experience in the Marketplace" yet "maintain[] program integrity."[196] With reconciliation looming to catch the overpayments this approach will generate, the strategy appears more to be kicking the can down the road.

The final factor in the low take up rate in the HCTC was that the coverage available was not valued by the potential participants. Many participants (pre-ACA) had gaps in coverage that meant the imposition of preexisting condition exclusions.[197] Some states offered only high deductible plans; others offered only high-premium low-deductible plans.[198] Many of these prior concerns have been greatly alleviated by the protections put into place by the ACA, such as the elimination of preexisting condition exclusions, the adoption of modified community rating, and the requirement to offer minimum essential benefits. However, there is concern that the policies available on the Marketplace commonly have narrow networks and high cost sharing, making the policies generally less expensive but also less protective of health.[199] HHS and the states need to keep a close watch on the policies offered on the Marketplace and take the steps necessary to ensure that the coverage is actually valuable to the insured people.

E. The ACA's Cost Sharing Reduction Subsidies

Recall from *infra* Section II.B.5 that CSR subsidies are available to taxpayers between 100% and 250% of the FPL who meet requirements for an APTC and who are enrolled in a silver level Marketplace plan. The subsidy is paid directly to the insurance company who places the taxpayer in a special reduced-cost-sharing insurance plan. The insured person never experiences a reconciliation process similar to the PTC and will never have to repay any portion of the cost sharing reductions that he or she receives (absent fraud). The insurance companies go through a reconciliation process where the estimates are compared against actual expenses. Eligibility for the CSR subsidies is determined by the Marketplace using the same process as eligibility for the APTC.

It is intriguing that Congress passed in the same act two provisions (the PTC and the CSR subsidies) that subsidize individual taxpayers, both of which are tied to the individual's income in terms of eligibility and amount

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[195] See *supra* Section II.B.5.

[196] CMS, *Annual Income Threshold*, *supra* note 194.

[197] Dorn, *supra* note 176, at 3.

[198] *Id.*

[199] Dan Polsky & Janet Weiner, LEONARD DAVIS INST. OF HEALTH ECON., *The Skinny on Narrow Networks in Health Insurance Marketplace Plans* 1 (June 2015), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2015/rwjf421027; Suzanne McGee, *Obamacare Premiums And Deductibles Going Up – But It's Still Better Than Before,* THE GUARDIAN (Nov. 20, 2015), https://www.theguardian.com/money/us-money-blog/2015/nov/20/obamacare-premiums-deductibles-increase-health-care.

of subsidy, but chose to designate one as a tax " with required reconciliation and to designate the other as a "non-tax" subsidy with no required reconciliation. Professor Zelenak has speculated that perhaps Congress viewed reconciliation of the CSR subsidies as too administratively complex and thus costly, but did not have similar concerns with respect to reconciliation of the PTC.[200] While it is true that reconciling the actual use of cost sharing reductions (which means tracking each copay, coinsurance, and deductible dollar for each insured) is much more complicated than calculating a tax credit, I am is not convinced that this adequately explains Congress's choice. CMS currently is embarking on exactly the sort of complicated, costly reconciliation process that Congress supposedly wanted to avoid, but with the insurance companies rather than individuals.[201] Indeed, the timeline for this reconciliation keeps being pushed back because of the complicated nature of the data to be submitted, first from April 2015 (for the 2014 year) to April 2016 (for the 2014 and 2015 years) and now to June 2016.[202] On the other hand, it is probable that the costs will be less (although still high) for reconciling accounts with insurance companies (which are fewer in number and which have greater expertise) than for reconciling accounts with the covered individuals themselves. Perhaps administrative complexity is at least part of the reason for the difference, but that seems like a weak reason for such a big difference. Professor Zelenak was not convinced either, but could think of no other explanation.[203] I suspect this is a simple case of a difference that lacks a reason; Congress simply did not think about it, and the ACA did not go through the normal conference committee process that might have highlighted the issue.[204]

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[200] Zelenak, *supra* note 110, at 731.

[201] CMS, *Draft Manual*, supra note 85, at 5.

[202] *Id.;* CENT. FOR MEDICARE & MEDICAID SERV., *Data Submission Deadline For Cost-Sharing Reduction Reconciliation* (Apr. 15, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-on-data-submission-deadlline-for-CSR-reconciliation-Final-4_15_16.pdf. If the House succeeds in its challenge of the CSR subsidies, it is likely that reconciliation will never happen.

[203] Zelenak, *supra* note 110, at 738 ("No other explanation for the difference – satisfying or otherwise – comes to mind.").

[204] The ACA passed the House and Senate when Democrats had a majority in the House and the sixty-vote majority needed to break a filibuster in the Senate. Earlier in the Congressional session, Senator Edward Kennedy, a Democrat and life-long proponent for health care reform, had passed away. Before the House and Senate versions could go to conference committee to work out the differences, a Republican was elected in a special election to fill Senator Kennedy's seat, meaning that the Democrats no longer had the supermajority votes necessary to break a Senate filibuster. It was anticipated that a conference committee bill would be blocked in the Senate by filibuster. Thus, the House adopted word-for-word the Senate version that had been passed before Senator Kennedy's replacement was elected, the House made some limited amendments through the budget reconciliation process, and the Senate approved the budget reconciliation changes with a simple majority vote because those type of changes could not be filibustered. *See* Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119, 124–27 (2013).

Importantly for the thesis of this Article, the CSR subsidies illustrate another model for delivering benefits to individuals – the "tax-related" benefit. Most commentators have focused on the difference between delivering benefits outside the tax code or through the tax code.[205] The CSR subsidies are a hybrid, though. They are tied in meaningful ways to tax concepts, relying on tax dependents to define the household and modified adjusted gross income to define income, but they are not claimed or reconciled on a tax return.[206] They also represent a new form of collaborative administration, involving more than one federal agency, which may prove to be an effective model, allowing agencies more freedom to focus on their core competencies.[207] The CSR subsidies work a bit like TANF and SNAP, in that an individual is determined to be eligible and then prospectively provided with benefits that are reliable in amount. But they are tied to eligibility for a tax credit (the PTC). The CSR subsidies have high take up, because the process is almost invisible to the taxpayer; take up rates are likely to be higher once taxpayers understand that CSR subsidies are available in silver plans only.[208] If a taxpayer is determined to be eligible for an APTC (whether or not the taxpayer elects to actually take an APTC) and if the taxpayer meets the other criteria, the Marketplace directs the insurance company to place the taxpayer in a reduced cost sharing plan. From that point forward, the taxpayer experiences no difference in using a reduced cost sharing plan versus using a standard plan.

IV. DESIGNING AN EFFECTIVE PTC

The PTC is a critically important part of the plan for achieving near-universal health coverage. Having the broadest possible participation in the risk pool ultimately should lower health insurance costs for everyone, allowing for a true spreading of risk among a large group of people, the very function of insurance. In order for the PTC to serve its function, it needs to be properly designed so that taxpayers will opt into the system. With that broad goal in mind, and with an understanding of the target population, the PTC should (1) be sufficiently large that insurance is considered affordable

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[205] *See, e.g.,* Alstott, *supra* note 121.

[206] It is very unclear whether or to what extent the administrative functions related to the CSR subsidies, or future "tax-related" benefits, will follow the tax model or the Administrative Procedures Act model. *See* James M. Puckett, *Structural Tax Exceptionalism,* 49 GA. L. REV. 1067 (2015) (comparing and no contrasting the features of tax administration and other agency administration). An analysis of this question would be a valuable project.

[207] Zelenak, *supra* note 110, at 739. Whether the current allocation of responsibility for the PTC program are ideal is a separate question and open to debate.

[208] Timothy Jost, *Judge Rules Against Administration In Cost-Sharing Reduction Payment Case*, HEALTH AFFAIRS BLOG (May 12, 2016), http://healthaffairs.org/blog/2016/05/12/judge-blocks-reimbursement-of-insurers-for-aca-cost-sharing-reduction-payments/ ("As of the end of 2015, 5 million Americans, or 56 percent of all marketplace enrollees were receiving CSRs. It is believed that as many as 2 million more marketplace enrollees could be eligible for CSRs if they enrolled in silver plans.").

by its users, (2) be relatively simple to claim, without undue stigma and with sufficient enrollment support, (3) be currently available to offset the current cost of insurance, (4) be stable and not create additional financial risk for its users, and (5) have adequate and efficient enforcement to address fraud and abuse (recognizing that it is impossible, or at least financially infeasible, to eliminate all fraud and abuse).

A. The PTC Should Be Sufficiently Large That Insurance Is Considered Affordable By Its Users

The PTC should be sufficiently large that insurance is considered affordable by its users. As experience with the HCTC demonstrates, when a benefit or tax credit is conditioned on the taxpayer incurring an expense, taxpayers will use the benefit only if the net cost of the expense is actually affordable and fits within their budgets. The HCTC was (and remains) largely underutilized in part because the subsidy left too large an out-of-pocket cost for the taxpayers to absorb.[209]

The current design of the PTC does reasonably well in this regard. The amount of the credit is variable and takes into account the actual cost of available health plans and the taxpayer's income, ensuring that taxpayers pay no more than a certain percentage of their income (between 2% and 9.5%) toward a benchmark silver plan. Reasonable minds might differ regarding whether the credit is too generous or too meager. Some taxpayers might still subjectively find their portion of the premium unaffordable. However, because the PTC is calibrated to the specific characteristics of the taxpayer, it is more responsive than other programs, like the HCTC, that use one-size-fits-all subsidy amounts.

B. The PTC Should Be Relatively Simple To Claim

The PTC should be relatively simple to claim. This includes having sufficient enrollment support and, to the extent possible, reducing any stigma associated with claiming the benefit. One of the reasons why the HCTC was underutilized was that it was complex to claim, involving paperwork filed with multiple government agencies.[210] One of the theories behind why benefits delivered through the tax code tend to have higher take up rates than non-tax-delivered benefits is that there is little stigma involved.[211] Most

[209] The HCTC faced low participation rates by those eligible in part because the credit required that the trade-displaced worker pay 35% of the premium cost, which many found unaffordable. Dorn, *supra* note 176, at 2-3.

[210] *See supra* note 188 and accompanying text. When individualized assistance was available for claiming the HCTC, for example through labor unions, participation rates were significantly higher. Dorn, *supra* note 176, at 2-3.

[211] Barak Y. Orbach, *Unwelcome Benefits: Why Welfare Beneficiaries Reject Government Aid*, 24 LAW & INEQ. 107, 151 (2006) ("Choices among forms of benefits may mitigate self-esteem related costs, since some benefits are perceived to be more legitimate

people file tax returns whereas few people visit the welfare office, and the negative image of the "welfare queen" looms over those who would claim needs-based benefits.[212] Additionally, there is a robust private and public system in place for helping taxpayers to file tax returns. Claiming a benefit by visiting H&R Block, side by side with more affluent people, is normalizing.

In some respects, the PTC is relatively simple to claim, but in other respects, the process is very opaque and difficult to navigate. A taxpayer can claim the APTC at the same time and in the same place that he or she is enrolling for health care coverage, which is efficient and convenient. The PTC program's incorporation of a one-stop-shop Marketplace for enrollment and the availability of a variety of enrollment assistance both are admirable design improvements. Reconciliation of the APTC, or claiming a regular credit, occurs through the filing of a tax return. Because most Americans file income tax returns annually, either because they are required to or because they are claiming a refundable credit or a return of over-withholding, an entire industry exists to help taxpayers file returns, including free services to help older and low-income taxpayers.[213]

However, the process for estimating an APTC based on annualized credit-year income with later reconciliation is difficult. A taxpayer who claims the APTC must submit documentation to the Marketplace to support the income estimate. As noted above, this includes detailed information about the makeup of the household, whether those household members are tax dependents, and information on current income. None of this information is particularly easy to gather, and the Marketplaces reportedly have been

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than others and may even be culturally encouraged. For example, tax benefits that are less observable than other benefits, are rather welcome by individuals, and tend to minimize the costs of redistribution.").

[212] Camille Gear Rich, *Reclaiming The Welfare Queen: Feminist And Critical Race Theory Alternatives To Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDIS. L.J. 257, 277-278 (2016).

[213] U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-467T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, PREPARERS MADE SIGNIFICANT ERRORS, STATEMENT OF JAMES R. MCTIGUE, JR., DIRECTOR STRATEGIC ISSUES, 1 (Apr. 8, 2014), http://www.gao.gov/assets/670/662356.pdf ("In tax year 2011 -- the most recent data available -- paid preparers completed approximately 56 percent of all individual tax returns filed."); PERAB, *supra* note 167, at 3 (about 70% of all tax returns with an EITC are filed by commercial tax preparers). The IRS has long supported access to free tax preparation services for low-income taxpayers through its Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs. For the 2012 filing season, the IRS awarded $12 million in grants to 213 VITA organizations in all 50 states. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2012-40-049, ADDITIONAL STEPS ARE NEEDED TO ENSURE THE VOLUNTEER INCOME TAX ASSISTANCE GRANT PROGRAM REACHES MORE UNDERSERVED TAXPAYERS (2012), http://www.treasury.gov/tigta/auditreports/2012reports/201240049fr.html. In 2011, VITA sites prepared over one million returns. *Id.* In addition, the IRS has partnered with tax software companies to provide free access to tax preparation software to lower-income taxpayers. *See Free File: Do Your Federal Taxes for Free*, I.R.S., https://www.irs.gov/uac/free-file-do-your-federal-taxes-for-free (last visited June 23, 2016).

doing a poor job of making sensible documentation requests and in communicating those requests to taxpayers.[214] The complicated process of applying for an APTC could well drive some taxpayers away from purchasing insurance on the Marketplaces; studies have shown that such "psychological frictions" result in eligible taxpayers foregoing EITCs.[215] This is exactly the opposite result from what good health policy would dictate. The PTC exists to entice people to elect into the risk pool. If the design of the PTC is pushing people away from the risk pool, the PTC is not well designed. Care must be taken, however, to ensure that there is adequate enforcement to avoid overpayments and outright fraud.

C. The PTC Should Be Currently Available To Offset the Current Cost of Insurance

The PTC should be currently available to offset the current cost of insurance. Again, the HCTC provides valuable insight into this goal. Even though the HCTC was available in advance form, there was a lag time between enrolling for health coverage and starting premium payments and the advance payments beginning.[216] This requirement of paying up-front costs was simply not possible for many potential enrollees. Recent research has demonstrated the very small margin that most lower-income people have in their budget to weather unexpected expenses.[217] Because enrolling in health insurance creates a current expense, and because the PTC is aimed at lower-income individuals whose budgets likely could not easily absorb that extra cost, it is very important that the PTC be available ratably, to concurrently offset the expense incurred. Requiring taxpayers to incur a large expense and wait up to a year for reimbursement is impractical for most of the targeted taxpayers. If the goal is to encourage taxpayers to opt into the risk pool, the PTC must work for them. The credit's current design achieves this goal quite well, and any redesign must preserve this feature.

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[214] Daniel Chang and Nick Madigan, *Consumers Asked To Verify Income, Other Information – Or Risk Losing Government Subsidies For Health Insurance*, MIAMI HERALD (July 31, 2014), http://www.miamiherald.com/news/local/community/miami-dade/article1977462.html.

[215] Saurabh Bhargava & Dayanand Manoli, *Psychological Frictions and the Incomplete Take-Up of Social Benefits: Evidence from an IRS Field Experiment*, 105 AM. ECON. REV. 1, 4 (Nov. 2015) (exploring the role of "'psychological frictions' associated with low program awareness, confusion, or an aversion to program complexity or hassles" in failure to claim EITC benefits). Empirical work is needed to determine the extent to which taxpayers are opting out of the insurance risk pools because of the complicated process of applying for an advance credit.

[216] *See supra* note 186 and accompanying text.

[217] *See supra* note 6 and accompanying text.

D. The PTC Should Be Stable and Not Create Additional Financial Risk for Its Users

The PTC should be stable and not create additional financial risk for its users. This lesson is most clearly demonstrated by experience with the AEITC. Taxpayers avoided claiming the AEITC in part because of the risk of having to repay excess amounts at tax time.[218] This effect could be considered tolerable in the EITC program because the "forced savings" aspect of a lump sum EITC can be seen as a valuable policy goal in and of itself and is valued by participants.[219] However, it is unacceptable for the PTC, which subsidizes a current purchase. Too many taxpayers may opt not to purchase health insurance, especially if they have had to repay APTCs in the past.[220]

The PTC fails miserably on this measure of design effectiveness. Because the APTC (paid ratably over the year) is only an estimate (more like a loan than a credit), it is highly likely that there will be adjustments during the subsequent reconciliation process. Indeed, the IRS estimates that about 4.8 million people who were enrolled in a Marketplace plan in 2014 were eligible for a PTC and reported that 97% of the taxpayers who filed a timely 2014 return claiming a PTC received an advance payment of the credit.[221] The IRS further reported that 51% of PTC claimants in 2014 faced repayment obligations, 41% received PTC credits on their returns higher than the advance payments, and only 8% claimed PTCs equal to the advance payments received.[222] Only about 26% of those reporting a repayment obligation were affected by the repayment caps.[223] Thus, the evidence from the 2014 filing season supports what seems instinctively true: it is a difficult task to accurately predict annual income. That makes the use of credit-year income particularly troubling for a tax credit payable in advance with later reconciliation.

To the extent the taxpayer's APTC was underestimated, the taxpayer will receive a refund of the excess. Thus, ultimately, the taxpayer receives the full amount of credit for which he or she is eligible. However, the timing of the payment is not ideal from a health policy standpoint. The PTC is intended to support the purchase of health insurance, and the decisions about

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[218] *See supra* note 159 and accompanying text.

[219] *See supra* note 159 and accompanying text.

[220] Anecdotally, this appears to be a common response the first time a taxpayer discovers that they owe back all or a portion of their APTC payments. Again anecdotally, responses fall either into the "the government did something wrong and took away my benefits" camp or the "I must have done something wrong" camp. Both responses create real problems. The first camp will feel cheated by their government and might be more inclined to cheat themselves in the future to make up for the perceived slight. The second camp may opt to forego benefits altogether.

[221] Letter from John Koskinen to Members of Congress, *supra* note 4.

[222] *Id.*

[223] *Id.*

whether or not to buy insurance, and which policy to buy, occur over a year earlier than the payment of the excess PTC in the year of reconciliation. Thus, the taxpayer's decisions about purchasing insurance are skewed to the extent that the Marketplace underestimates the APTC. The likely result in many cases will be taxpayers choosing more meager coverage than they could otherwise afford, or in extreme cases, deciding that they cannot afford coverage at all, even with the (under)estimated credit.[224] This is precisely the type of risk that the ACA sought to remedy – the risk of being un- or under-insured.

A different problem arises when the Marketplace overestimates the amount of the APTC. Taxpayers who receive too large an APTC because the estimate was off must repay some or all of the excess when they file a reconciliation tax return.[225] While the caps for taxpayers between 100% and 400% of the FPL help to alleviate some of the financial burden, a taxpayer in that range of income will likely find it difficult to weather a sudden and unexpected debt like that. Studies document that most Americans do not have savings sufficient to pay even relatively small unexpected expenses.[226] Further, there is potentially a large cliff effect for a taxpayer whose income is at or above 400% of the FPL.[227] For those taxpayers, there is no repayment cap, and just a few extra dollars of income could push them over 400% of the FPL and from a repayment cap of $2,500 to unlimited repayment.[228] While it is possible that the repayment obligation will lower a tax refund that was otherwise due and not actually result in a bill that must be paid, this means that the PTC repayment obligation is eating away at the policy goals of other programs that commonly generate tax refunds, such as the EITC or the Child Tax Credit. While this situation may not create what feels like a huge financial burden for taxpayers, because there will not be an actual tax bill to pay, the PTC repayment is parasitic to the goals of the other programs when it lowers the refunds attributable to those programs.

The lowest capped repayment amount is $300, and it is reserved for single taxpayers who make less than 200% of the FPL (but above 100% of the FPL). Thus, in 2016, a single person making as little as $11,771 might

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[224] Again, empirical work is needed to confirm this phenomenon and measure the extent to which taxpayers' decisions are skewed. At least anecdotally, this appears to be occurring not infrequently.

[225] Recall that there is no cap for a taxpayer at or above 400% of the FPL, and for taxpayers below 400% of the FPL, the maximum repayment ranges from $300 to $2,500 depending on filing status and income level. Code § 36B(f)(2)(B).

[226] Picchi, *supra* note 6.

[227] Lipman & Williamson, *supra* note 45 (manuscript at note 166 and accompanying text); *see also* Seth Chandler, *The Architecture of Contemporary Healthcare Reform and Effective Marginal Rates*, 29 MISS. L. REV. 335, 342 (2010) (describing the cliff effect of denying the PTC to taxpayers with incomes at or above 400% of the FPL).

[228] Lipman & Williamson, *supra* note 45 (manuscript at note 166 and accompanying text).

face a $300 repayment obligation.[229] That equals 2.5% of the person's annual income. This is quite a large penalty for an overestimate that probably was a completely innocent misestimate (a misestimate that was approved by the Marketplace). To add insult to injury, there may be tax penalties added to the repayment obligation. Anecdotally, I have talked with taxpayers who faced PTC repayment obligations that felt cheated by the government or bewildered by what had gone wrong and who planned on dropping coverage so as to not face future repayment obligations. Even when faced with the possibility of a tax penalty for failing to maintain coverage, these individuals felt that that a certain penalty that they chose in advance to incur would be preferable to an uncertain penalty (or repayment obligation) imposed after the fact. Some may reason that they can apply for a waiver of the penalty due to hardship or unaffordability. This is the worst of all possible scenarios from a health policy standpoint -- the very design of the PTC causing people to opt out of the system.

E. The PTC Should Have Adequate and Efficient Enforcement to Address Fraud and Abuse

The PTC should have adequate and efficient enforcement to address fraud and abuse. One of the biggest weaknesses faced by almost all of the other programs discussed in this Article is a level of fraud and abuse that is concerning. While it is impossible to completely avoid fraud and abuse, it is important that systems and procedures be put into place to effectively combat the problem. It is important to understand the difference between an overpayment and fraud and abuse. Fraud and abuse entails intentional or deliberate action by a taxpayer to claim a benefit to which he or she is not entitled or gaming of the system to obtain an advantage.[230] An overpayment is when the government pays a benefit that should not have paid, but does not imply wrongdoing on the part of the taxpayer.[231] An overpayment can stem from government error, taxpayer error, or even no error at all. Whether something is an overpayment depends in large part on how benefit eligibility is defined. If all excess PTCs discovered on reconciliation are considered overpayments, the program may well have a terrible record on paper.

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[229] See *supra* note 27 for calculation of federal poverty levels.

[230] *Fraud*, BLACK'S LAW DICTIONARY (Online 2d ed.) (last visited July 27, 2016), http://thelawdictionary.org/fraud/ ("Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury"); *Abuse*, BLACK'S LAW DICTIONARY (Online 2d ed.) (last visited July 27, 2016), http://thelawdictionary.org/abuse/ ("A misuse of anything.").

[231] *Overpayment*, MERRIAM-WEBSTER.COM (last visited July 27, 2016), http://www.merriam-webster.com/legal/overpayment ("payment in excess of what is due"); *See, e.g.*, 42 U.S.C. § 404(a) ("Whenever the Commissioner of Social Security finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Commissioner of Social Security, as follows . . .").

However, this is primarily a function of the choice to measure payments by annualized credit-year income, which has been shown to be difficult if not impossible to predict accurately in advance. If we instead chose to define benefit eligibility by reference to more certain inputs, then overpayments would decrease dramatically. While we should seek to reduce all overpayments to the extent we are able, I believe the focus of enforcement should be on fraud and abuse. Reducing fraud and abuse helps ensure that the money devoted to the program is directed to those actually in need. It also helps to insulate the program from political scrutiny. It is beyond the scope of this Article to do a detailed analysis of what an effective enforcement strategy might be. I strongly believe that a lot more work is needed in this area.

The current PTC effectively has two levels of enforcement: one when the APTC is approved and one upon reconciliation. In other words, the current PTC combines traditional "welfare" administration and tax administration. While having a double layer of enforcement may seem like a good strategy for addressing fraud and abuse, in too many cases, this combination merely constitutes a trap for an unwary taxpayer. For example, in the first enrollment season, the federally-facilitated Marketplace experienced many technical difficulties and had trouble verifying taxpayers' information and resolving data mismatches. HHS announced its intent to utilize its administrative discretion to waive some verification requirements for taxpayers that were engaging in good faith in the process, but only for the first enrollment year.[232] (HHS later announced that all suspect applications would undergo a verification process.)[233] While not stated, it seems clear that the HHS was favoring the goal of enrollment in the critical first enrollment season over the goal of strict enforcement. Reasonable people might make different decisions when faced with that situation, but that decision was clearly within the HHS's discretion. The problem was that the HHS's enforcement decision was not coordinated with the IRS's enforcement step, and innocent taxpayers were caught up in reconciliation. In fact, the HHS explicitly pointed to the "suspenders" of the IRS's reconciliation process to justify loosening its own "belt" of verification for the first enrollment year.[234] There is nothing inherently wrong with two levels of enforcement. However,

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[232] Lori Robertson, *Blunt Wrong on Income Verification*, FACTCHECK.ORG (posted July 15, 2013, updated Oct. 15, 2013), http://www.factcheck.org/2013/07/blunt-wrong-on-income-verification/.

[233] *Id.*

[234] Medicaid and Children's Health Insurance Programs: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes, and Premiums and Cost Sharing; Exchanges: Eligibility and Enrollment; Final Rule, 78 Fed. Reg. 42,159, 42,254 (July 15, 2013) ("We note that we believe this exercise of enforcement discretion concerning the Exchange's obligations to verify income information in these specific circumstances is made in the context of all information – including the actual household income amounts for 2014 – being available at the end of the year for the reconciliation performed under section 36B(f) of the Code.")

it does seem that it is overly expensive, not very efficient, and designed more to catch well-intentioned taxpayers rather than those who intentionally game or defraud the system. This type of "gotcha" enforcement seems likely to alienate taxpayers caught in the reconciliation process. At a minimum, HHS and IRS enforcement should be coordinated. In addition to being a trap for the unwary, uncoordinated enforcement efforts present opportunities for abuse, as demonstrated below.

The superiority of up-front (or at least coordinated) enforcement is illustrated by examining the clearest opportunity for abuse. A taxpayer is in the best position by having the Marketplace find an overly-low income that qualifies for a plan with CSR subsidies. Even though an overly-low income means that the Marketplace would have approved an overly-large APTC which would ultimately need to be reconciled, the taxpayer can take less than the approved APTC (just the amount to which he or she thinks he or she is entitled). If final credit-year income is under 400% of the FPL, the repayment caps could prevent such a taxpayer from have a full repayment obligation. Thus, repayment of the APTC can be limited while obtaining overly- generous CSR subsidies that do not have to be repaid. This strategy is explicitly easier for taxpayers whose historic income was low, due to the Marketplace's policy of not verifying applications that match the historic information in the federal data hub. Of course, this type of gaming could subject the individual to some fairly steep penalties, up to $25,000 for failing to provides correct information due to "negligence or disregard of any rules or regulations" of HHS and up to $250,000 for "knowingly and willfully provid[ing] false or fraudulent information."[235] Nevertheless, strategies like this illustrate the need for better up-front enforcement, at the Marketplace level, rather than relying on the IRS's "audit and chase" enforcement strategy.

One of the theorized benefits of tax-based administration is the reduction of stigma and isolation for claiming benefits.[236] This benefit appears to be realized to a significant extent in the EITC program, for example.[237] Claiming an EITC requires a tax return, which is something that does not separate the taxpayer out as being "needy." Receiving a tax refund check is an experience shared by the low-income and high-income alike. The PTC is not so simple, nor could it be. As discussed above, the advance payment feature of the PTC is critical to its success. Advance payment will necessarily require some level of up-front enforcement in the form of enrollment. Up-front verification of eligibility is likely superior as an

[235] 42 U.S.C. § 18081(h)(1).

[236] Alstott, *supra* note 121, at 564-565.

[237] Danshera Cords, *Paid Tax Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Tax Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives*, 59 CASE W. RES. 351, 358 (2009) ("The EITC participation rates also appear to exceed most direct benefit programs, with participation rates estimated to be between 75 and 90 percent.").

enforcement strategy for social welfare benefits. Individual payments (and thus overpayments) are typically small in amount, and the cost to pursue collection of such small amounts may well be more than the overpayment itself.[238] In this instance, it appears better to keep people from receiving benefits for which they are not eligible rather than trying to collect improper payments after the fact.

There is a tension with up-front enforcement between making an accurate determination and not making enrollment unduly burdensome. Social welfare programs have dealt with that tension for decades. With reconciliation, however, the risk of an inaccurate estimate rests almost exclusively with the taxpayer. This skews the enforcement incentives. Unfortunately, the Marketplace does not appear to be doing a very good job at combatting fraud. The Government Accountability Office found that the Marketplace was not engaging in some basic analytical steps to identify fraud and that 11 out of 12 fictitious "undercover shoppers" in 2014 were able to enroll for Marketplace coverage and maintain that coverage throughout the year, with APTC payments and CSR subsidies.[239] The federally-facilitated Marketplace is actively working on improving the speed and accuracy of the verification process, and it is imperative that that work continue. Because up-front enforcement is a practical necessity, and may well be superior, I believe it makes sense to strengthen and rely on that enforcement rather than add another layer of after-the-fact enforcement.

In any program where the government is trying to reach a target population with benefits, but also combat fraud and abuse, there is a delicate balance to be struck between enforcement and a supportive enrollment experience. In my estimation, the level of enforcement engaged in by the federally-facilitated Marketplace strikes a relatively good balance between enforcement and enrollment support. The federally-facilitated Marketplace is a far different place than the prototypical stigma-inducing welfare office, in part because it is open to all, not just those applying for assistance.[240] The federally-facilitated Marketplace appears to do a reasonably good job of balancing an enforcement mentality with a customer-service mentality, engaging in outreach programs and customer-assistance programs. As the GAO report above indicates, Marketplace enforcement needs to be strengthened, but also can be expected to become more efficient and less burdensome on taxpayers as the Marketplace gains experience.[241]

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[238] Alstott, *supra* note 121, at 587.

[239] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-29, PATIENT PROTECTION AND AFFORDABLE CARE ACT: CMS SHOULD ACT TO STRENGTHEN ENROLLMENT CONTROLS AND MANAGE FRAUD RISK (Feb. 2016), http://www.gao.gov/assets/680/675340.pdf.

[240] However, incarcerated people, and people who are neither U.S. citizens or lawfully present in the U.S. are not permitted to purchase insurance through the Marketplace, even without subsidies. 42 U.S.C. § 18032(f)(1). This seems directly contrary to the policy impetus of having bigger and more diverse risk pools.

[241] This tension has long been present in Medicaid and other public benefit programs. For an insightful analysis of the role of private enforcement litigation in those

V. LEGISLATIVE PROPOSALS

As illustrated above, the current design and administration of the PTC could be better suited to the goals of the program. By creating financial risk, it does not operate as well as it might as an incentive to purchase health insurance. Even if the PTC design does not push a taxpayer out of the risk pool, the reconciliation process is parasitic on other anti-poverty programs. By reserving the bulk of oversight and enforcement to the reconciliation process, it invites an unacceptable level of overpayments if not outright fraud. By engaging in two levels of enforcement, one upon approval of an APTC and one upon reconciliation, it wastes government and taxpayer resources.

It is currently unclear the extent to which there might be appetite in the United States Congress for making fairly substantial changes in the ACA. Bernie Sanders, a candidate for the 2016 Democratic Party nomination, advocated for a complete overhaul of the health care system and a move toward Medicare for all, a universal, single payer system.[242] A single payer system, or Medicare for all, was proposed but rejected in favor of the ACA's managed competition approach.[243] Vermont initially was moving toward implementation of a single payer system as an alternative to the ACA, but that initiative has been tabled by the governor.[244] In Colorado, a single payer system will be on the ballot in November 2016 as a voter initiative.[245] Clearly there is some appetite for replacing the ACA with a more expansive reform.

On the flip side of the spectrum, the Republican-led House has voted to repeal the ACA several dozens of times, and the now-Republican-led Senate has recently used the budget reconciliation process to pass repeal

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programs, and its potential application to the ACA and the Marketplaces, see Sarah L. Grusin, *Holding Health Insurance Marketplaces Accountable: The Unheralded Rise and Imminent Demise of Structural Reform Litigation in Health Care*, 24 ANN. HEALTH L. 337 (2015).

[242] *Medicare for All: Leaving No One Behind*, BERNIE 2016, https://berniesanders.com/issues/medicare-for-all/ (last visited June 14, 2016).

[243] The Expanded and Improved Medicare for All bill was first introduced in 2003 and has been introduced in each subsequent Congressional session. CONGRESS.GOV, https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22search%22%3A%22%5C%22improved%20medicare%20for%20all%20act%5C%22%22%7D (last visited June 14, 2016). In 2009 during the 111th Congress, the same Congress in which the ACA was passed, it was introduced with a Democratic sponsor and 87 Democratic cosponsors. CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/676?q=%7B%22search%22%3A%5B%22%5C%22expanded+and+improved+medicare+for+all+act%5C%22%22%5D%7D&resultIndex=1 (last visited June 14, 2016). It was referred to committees, but no committee produced a report and the bill was not debated. *Id.*

[244] John E. McDonough, *The Demise of Vermont's Single-Payer Plan*, 372 NEW ENG. J. MED. 1584 (2015), http://www.nejm.org/doi/pdf/10.1056/NEJMp1501050.

[245] David Olinger, *Colorado to Vote on Single-Payer State Health-Care System*, THE DENV. POST, (Nov. 9, 2015), http://www.denverpost.com/2015/11/09/colorado-to-vote-on-single-payer-state-health-care-system/.

measures.[246] In 2013, Senator Ted Cruz led a successful shut down of the federal government in an attempt to force a total repeal of the ACA.[247] Republican Presidential candidate Donald Trump has proposed complete repeal of the ACA plus reforms "based on free market principles."[248] Thus, it is also clear that there is appetite for a total repeal of the ACA coupled with less-comprehensive reforms.

What is unclear is the extent to which a future Congress and President might be interested in keeping the structure of the ACA, but making significant improvements. Democratic presidential candidate Hillary Clinton has argued for such an approach.[249] Even the ACA-phobic Congress of the last four years has passed incremental reforms at the edges, resisting the ideological impetuses of complete repeal or unquestioning defense of the status quo.[250] Thus, I feel hopeful that her legislative proposals are not lofty academic abstractions or wishes that are divorced from reality. If a future Congress feels inclined to improve upon the ACA, the following reforms should be considered. Even if the specific reforms discussed in this Article are not viable due to the political climate surrounding the ACA, the lessons developed in this Article would be relevant to many replacement ideas. For example, the RNC (among others) has proposed refundable tax credits payable in advance as a mechanism for subsidizing insurance.[251] In addition, the design may increasingly be proposed outside of the health care arena.[252]

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[246] The repeal attempt count is a bit hard to pin down exactly because it depends on what counts as repeal, but as of February 2016, the count was around 60 attempts at repeal. Steve Benen, *On Groundhog Day, Republicans Vote to Repeal Obamacare*, MSNBC.COM (Feb. 2, 2016), http://www.msnbc.com/rachel-maddow-show/groundhog-day-republicans-vote-repeal-obamacare.

[247] David A. Fahrenthold & Katie Zezima, *For Ted Cruz, The 2013 Shutdown Was a Defining Moment,* THE WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/politics/how-cruzs-plan-to-defund-obamacare-failed--and-what-it-achieved/2016/02/16/4e2ce116-c6cb-11e5-8965-0607e0e265ce_story.html.

[248] *Healthcare Reform to Make America Great Again*, DONALDJTRUMP.COM (last visited July 27, 2016), https://www.donaldjtrump.com/positions/healthcare-reform. Specifically, Mr. Trump proposes to allow the sale of health insurance across state lines, allow individuals a full income tax deduction for health insurance premiums, allow individuals to use Health Savings Accounts, which would be free of income tax as well as estate tax, "require price transparency from all healthcare providers," turn the Medicaid program into a block grant, and "remove barriers to entry into free markets for drug providers that offer safe, reliable and cheaper products." *Id.*

[249] *Affordable Health Care Is a Basic Human Right*, HILLARY FOR AMERICA (last visited June 20, 2016), https://www.hillaryclinton.com/issues/health-care/.

[250] C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., R43289, LEGISLATIVE ACTIONS TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT (Feb. 5, 2016), https://www.fas.org/sgp/crs/misc/R43289.pdf.

[251] *See supra* note 9.

[252] The AEITC is a historic example of trying to use this benefit design for poverty relief. In another example, a refundable, advanceable tax credit has been proposed to help fund maternity leaves. Aparna Mathur, *A Simple Proposal to Fund Maternity Leave,* FORBES.COM (Mar. 26, 2015), http://www.forbes.com/sites/aparnamathur/2015/03/26/a-simple-proposal-to-fund-maternity-leave/#3dda1ea52b93.

A. Eliminate Reconciliation and Convert the PTC to a Prospective Benefit While Maintaining an Option for Claiming a Retrospective Tax Credit

One approach is to simply eliminate the reconciliation process and have the Marketplace approve benefits on a prospective rather than an estimated basis. To address privacy concerns[253] and reduce stigma, the option could be preserved for a taxpayer to claim the PTC retroactively on a tax return using final credit-year income. However, as is the case now, most taxpayers would elect to be approved in advance for an APTC based on projected credit-year income. Thus, the PTC would still be calibrated to an individual's particular circumstances. It would be relatively simple to claim, either on a tax return or through an application to the Marketplace, just as is currently the case. The PTC would still be available to offset the current cost of insurance. However, under my proposal, the PTC would be stable and would not create additional financial risk for its users. Thus, the market skewing effects identified above would be greatly alleviated. Adopting this proposal makes the PTC program work a bit more like TANF or SNAP benefits, where the applicant applies and is approved on a prospective basis, with adjustments for changes in circumstances as they arise. It also incorporates features of the HCTC program because there would be an option to wait until tax time and claim a refundable tax credit.

While the Marketplaces will likely become better at estimating income as everyone gains experience,[254] it will be impossible to accurately estimate income in all cases. Thus, as long as the credit remains calibrated to credit-year income,[255] it is true that the "advance" PTCs approved under my proposal are likely to not match the PTCs that would have been claimed on a reconciled tax return to the same extent as they are now. Assuming that the taxpayer responds fully and honestly to all requests for information made by the Marketplace in the estimating process, it is entirely appropriate that the risk for the misestimates fall on the government. The taxpayer has no choice but to rely on the Marketplace for an estimate. The law does not allow for third party estimates, or self estimates. The taxpayer is relying on the government, and the government should bear the burden of doing accurate work.

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[253] For an insightful analysis of the privacy tradeoffs of requiring taxpayers to disclose detailed and often very personal to the IRS, see Michael Hatfield, *Privacy in Taxation*, 69 FLA. ST. U. L. REV. (forthcoming 2017) (available at SSRN http://ssrn.com/abstract=2788238).

[254] A majority of people working in ACA Assister Programs (people providing outreach and enrollment assistance to Marketplace customers) responded to a poll that the third open enrollment period (occurring at the end of 2015) went better than prior enrollment periods, while acknowledging that significant challenges remain. KAREN POLLITZ, JENNIFER TOLBERT & ASHLEY SEMANSKEE, KAISER FAMILY FOUNDATION, 2016 SURVEY OF HEALTH INSURANCE JUNE 2016 MARKETPLACE ASSISTER PROGRAMS AND BROKERS, 32 (June 2016), http://files.kff.org/attachment/2016-Survey-of-Marketplace-Assister-Programs-and-Brokers.

[255] See *infra* Section IV.B. for a discussion of potential alternatives.

This approach may cause the Marketplaces to adopt a stricter enforcement attitude, causing them to become more vigilant in confirming eligibility. At some point, vigilant and burdensome application processes become counterproductive, driving legitimate claimants away (and probably out of the risk pools entirely). However, the system as it operates now imposes a large enforcement burden on taxpayers on the front end, but without the corresponding protection of being a final adjudication. A high percentage of Marketplace applications generate data mismatch issues, which is not surprising given that a data mismatch is flagged when a taxpayer reports income or household composition that varies from the tax return filed two years ago, among other issues.[256] The Marketplace sent many requests for additional documentation that were confusing to taxpayers and created anxiety and a heavy compliance burden.[257] While it is true that a hostile Marketplace that handles applicants with overt suspicion would likely be very detrimental to the take-up rate of the PTC, it is possible to have effective enforcement in an assistive environment.

Another serious current issue that would be alleviated by my proposal is the repeated enforcement to which taxpayers are subjected. Currently, there is an enforcement process upon application for the APTC and then an enforcement process upon filing a tax return, which seem unreasonably burdensome and unnecessary.[258] It seems more reasonable to rely on the Marketplace's application process as determinative of eligibility, and take the steps necessary to make sure that that process supports taxpayers with the assistance needed and that there are adequate procedures to prevent fraud and abuse. This would have the further benefit of eliminating the administrative burden to the IRS, taxpayers, tax preparers, and employers of having to reconcile APTCs during tax filing season. Thus, eliminating reconciliation is likely to be more efficient overall (slightly less efficiency for the Marketplace but much more efficiency for the IRS).

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[256] Amy Goldstein & Sandhya Somashekhar, *Federal Health-Care Subsidies May Be Too High Or Too Low For More Than 1 Million Americans*, THE WASH. POST (May 16, 2014), https://www.washingtonpost.com/national/health-science/federal-health-care-subsidies-may-be-too-high-or-too-low-for-more-than-1-million-americans/2014/05/16/8f544992-dd14-11e3-8009-71de85b9c527_story.html

[257] Daniel Chang & Nick Madigan, *Consumers Asked To Verify Income, Other Information – Or Risk Losing Government Subsidies For Health Insurance*, MIAMI HERALD (July 31, 2014), http://www.miamiherald.com/news/local/community/miami-dade/article1977462.html.

[258] In fact, the U.S. Taxpayer Advocate is concerned that in many cases the IRS is effectively auditing PTC returns twice, meaning that there are three levels of enforcement. NAT'L TAXPAYER ADVOCATE, I.R.S., MOST SERIOUS PROBLEMS, 2015 ANN. REP. TO CONGRESS 168, http://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1_MSP_15_ACA-Individuals.pdf ("The pre-refund Automated Questionable Credit (AQC) procedures for PTC mismatches impose the same burden as a post-refund PTC examination without the same due process protections, thereby subverting the statutory protections against multiple audits of the same return.").

As part of an effective enforcement strategy, taxpayers should be under an affirmative obligation to report changes in income or household composition so that the Marketplace can adjust the APTC amount on a going forward basis. If the taxpayer fails to do this, then it is appropriate for there to be reconciliation on the next tax return, or some repayment obligation. This type of enforcement system is used by SNAP and most TANF systems, and thus should be easy to replicate.

This approach is also very similar to the HCTC system already in place. Taxpayers have a right to wait until they file a tax return and claim the credit at that time. However, they may apply to the IRS for advance payments of the credit. The advance payments really do not look or act like part of the income tax system.[259] They are applied for and approved separately, there is no reconciliation process, and advance payments are sent directly to the insurance companies.[260] The advance HCTC mechanism is intended to and actually does operate much more like a subsidized premium system rather than a tax credit system.

Bipartisan legislation proposed prior to the passage of the ACA demonstrates that the goal of the PTC was subsidized premiums, and that the tax credit was merely a mechanism for providing that benefit. The Healthy Americans Act was introduced in 2009, during the same legislative session in which the ACA was passed.[261] A clear precursor to the PTC provisions of the ACA, the Healthy Americans Act proposed fully subsidized premiums for individuals under 100% of the FPL and partially subsidized premiums based on income for individuals between 100 and 400% of the FPL.[262] Subsidies were to be calculated by a state-based purchasing pool (somewhat analogous to a Marketplace) based on modified annual income from the "most recent income tax return or other information furnished to the Secretary by [the] individual, as the Secretary may require."[263] Subsidies were not claimed on a tax return, but were calculated upon enrollment.

The PTC, while designed as a tax credit, has the goal of operating as a subsidized premium system. With 97% of all PTC claimants in 2014 requesting advance payments, it is clear that taxpayers want and need reduced premium payments throughout the year, rather than a reimbursement after the fact. The PTC design should match that reality and provide true subsidized premiums rather than loans to taxpayers.

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[259] Zelenak, *supra* note 110, at 743-44 (noting that the HCTC is "not tax-based in any substantive sense" and questioning Congress' decision to impose the burden of administering the HCTC on the IRS).

[260] *See supra* Section II.D.

[261] Healthy Americans Act, S. 391, 111th Cong. (2009) (sponsored by Sen. Ron Wyden (D-OR) and cosponsored by eight democrats, five republicans, and one independent democrat); Healthy Americans Act, H.R. 1321, 111th Cong. (2009) (sponsored by Rep. Anna Eshoo (D-CA-14) and cosponsored by eight democrats and two republicans).

[262] Healthy Americans Act, S. 391 § 121; H.R. 1321 § 121.

[263] Healthy Americans Act, S. 391 § 123; H.R. 1321 § 123.

B. Calculate Premium Subsidies Using Other Measures of Income

Eliminating reconciliation of the PTC opens a major opportunity; without reconciliation,[264] APTC payments can be based on something other than subsidy-year annual income and household size figures. There is nothing inherent in the PTC that requires use of subsidy-year information. Other programs use different methods, like TANF and SNAP. Presumably, subsidy-year income was used to more closely assess need.[265] It is not clear that subsidy-year information is the "best" measure; that depends on the goals for the program. If we choose to emphasize getting subsidies to taxpayers in current need of them, we would tie eligibility to monthly data, like TANF and SNAP.[266] If we choose to emphasize certainty and efficiency over other values, we would tie eligibility to past data. The statute calls for APTC amounts to be based on income from the most recent taxable year available, unless there have been changes in circumstances that affect eligibility.[267] The most recent taxable year available is two years before the subsidy year because open enrollment for the upcoming year occurs before tax returns are due for the just completed year. HHS uses the change in circumstances rule to justify calculating APTC payments based on an estimate of subsidy-year income rather than the tax return from the year before last, likely in an attempt to make the APTCs match as closely as possible the reconciled PTC amounts, which are based on subsidy-year income. But if reconciliation were eliminated, the Marketplace could adopt different rules for calculating APTC payments.

The most administratively complex measurement, but the most accurate in terms of matching subsidies with need, would be to base premium subsidies on monthly income. State-based welfare programs could serve as a model for this type of system. Because health insurance generally is paid for monthly and is effective in month-long segments, using monthly income makes sense. The current PTC is calculated monthly, recognizing that health insurance operates in a monthly cycle. Such a system would provide a stronger safety net for people whose situations change suddenly. A sudden drop in income could cause the health insurance bill to be unaffordable, and a monthly subsidy program would open the path to a subsidy to help. Conversely, a sudden rise in income makes the monthly insurance bill more affordable, but only on a going forward basis.

This type of subsidy system is probably the most intrusive option; the Marketplace would need to monitor the taxpayer's income continually, or at least periodically. This type of oversight could lead to lower take up of the

[264] Actually, there could be reconciliation coupled with other income measures, but it likely would not be tax return based.

[265] Zelenak, *supra* note 110, at 733-737 (questioning whether subsidy-year income is the ideal standard for determining subsidy eligibility and amount).

[266] *Id.*

[267] 42 U.S.C. § 18082(b)(1)(B), (b)(2).

subsidies because some people avoid benefit programs when the "hassle factor" becomes too high.[268] A strict monthly system may be subject to more gaming. A taxpayer with the ability to "bunch" income may manipulate his or her income to be eligible for subsidies during low-income months, even though insurance is overall affordable to the taxpayer. On the other hand, a taxpayer with unavoidably variable income may lose eligibility for subsidies during high-income months, even though insurance overall is unaffordable to that person.A solution to these problems is to adopt a smoothing mechanism for calculating premium subsidies, rather than a strict month-by-month method. Using income averaging mechanisms, the Marketplace could smooth income over several months or even several years. A smoothing mechanism would make it much harder for taxpayers to game the system by manipulating income, and it would protect taxpayers who have unusual and short-term spikes in income. A smoothing mechanism would better serve taxpayers because it would produce a fairly steady, though not unchangeable, premium subsidy. A subsidy amount that is reliable in amount would support better insurance purchasing decisions. Taxpayers could "right size" their purchase of insurance if they could know the true cost of that insurance.

The use of annual accounting periods for reporting and paying income tax has long been widely recognized as being the source of horizontal equity problems; equally-positioned taxpayers have different tax results depending on when their income is obtained.[269] A traditional solution to this problem is income averaging, and the Code has contained various income averaging provisions at different points in its history.[270] While income averaging has been generally criticized because it tends to favor wealthier taxpayers (violating vertical equity and progressivity principles), some have defended income averaging for lower-income taxpayers.[271] While it would be important to look at those provisions for lessons learned, this Article's proposal that the Marketplace utilize income averaging methods to calculate premium subsidies has more in common with smoothing mechanisms used by businesses to improve forecasts.[272] Because what we are really asking the Marketplace to do is forecast future income (as a

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[268] Bhargava & Manoli, *supra* note 215, at 4 (exploring the role of "'psychological frictions' associated with low program awareness, confusion, or an aversion to program complexity or hassles" in failure to claim EITC benefits).

[269] Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509, 546-548 (1984) (explaining the horizontal equity problems associated with annual accounting periods and progressive rates).

[270] *Id.* at 510-511.

[271] *See, e.g.*, Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395 (2003) (demonstrating that the poor are affected more severely by income fluctuations and arguing for targeted averaging mechanisms); Neil H. Buchanan, *The Case against Income Averaging*, 25 VA. TAX REV. 1151 (2006) (endorsing limited income averaging for lower-income taxpayers).

[272] *See* John C. Chambers, Satinder K. Mullick & Donald D. Smith, *How to Choose the Right Forecasting Technique*, HARVARD BUS. REV. (1971) (explaining different forecasting techniques and when businesses might use over another).

substitute for future need for a premium subsidy), allowing the Marketplace to employ widely-used forecasting mechanisms is sensible.[273]

A potential concern with adopting a smoothing mechanism to calculate premiums subsidies is that the process is unlikely to be very transparent. It could be difficult for taxpayers to understand how their subsidies were calculated because, while not exceptionally complex mathematically, smoothing is likely beyond the math capacity of the vast majority of taxpayers.[274] This is probably especially true of lower-income taxpayers, who generally are less educated that higher-income taxpayers.[275] Thus, taxpayers may lack confidence that their subsidies are accurate. It could also be harder to discover and appeal erroneous calculations.

A middle approach would be to base subsidies on prior year tax return income, but move open enrollment to mid-year. If open enrollment were moved to begin shortly after the due date for filing a return, then more-recent tax return information would be available, except for taxpayers who file on extension. This would be much more transparent and would be efficient for both the government and the taxpayer. There would, however, be a loss of accuracy in terms of reliably getting subsides to taxpayers with current need. Whether that is a tradeoff worth making in exchange for easier enrollment and no reconciliation is hard to say. It would certainly be a more efficient system, though less responsive. The Marketplace could continue to use a changed circumstances exception for taxpayers with respect to whom even the prior year income figures are very inaccurate for determining need. A taxpayer who requests an exception from using the prior year tax return could be required to periodically verify income throughout the year, to limit abuse.

C. Establish Safe Harbors that Protect Reasonable Reliance

Safe harbors are a technique used frequently to promote efficiency and predictability and to demonstrate good faith compliance. For example, the penalty for failure to pay estimated tax is waived under the statute if the taxpayer meets certain safe harbors, one of which is that the taxpayer made estimated payments equal to the tax due for the previous year.[276] As an

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[273] Smoothing is so prevalent in business forecasting that basic spreadsheet programs include smoothing functions. Mary Ann Richardson, *Excel Quick Tip: Use Excel's Exponential Smoothing Add-In Analysis Tool to Forecast Future Demand*, TOOLBOX.COM (Apr. 29, 2015), http://it.toolbox.com/blogs/it-solutions/excel-quick-tip-use-excels-exponential-smoothing-addin-analysis-tool-to-forecast-future-demand-66516.

[274] *See* ORG. FOR ECON. CO-OPERATION AND DEV., COUNTRY NOTE: UNITED STATES, SURVEY OF ADULT SKILLS FIRST RESULTS (2013) https://www.oecd.org/site/piaac/Country%20note%20-%20United%20States.pdf (noting that the average American is at a level 2 in numeracy; being able to check the accuracy of statistical forecasting would probably require level 4 or 5 skills).

[275] *Id.*

[276] Code § 6654(d)(1)(B).

alternative to eliminating the reconciliation process for all taxpayers, Congress could establish safe harbors to protect good faith participation in the process. Congress has more leeway than the IRS in crafting safe harbors. For example, Congress could waive repayment of excess APTCs to the extent that APTC payments in the current year do not exceed the amount of PTC to which the taxpayer was eligible in the prior tax year, or to the extent that the APTC payments are within certain tolerance levels of prior years' eligibility. The primary political challenge would be in identifying the acceptable level of mismatch between APTC payments and ultimate eligibility. I am somewhat skeptical of this approach because to the extent that the PTC is viewed as "welfare" or a handout, tolerance for any mismatch is likely to be low from a political standpoint, just as the repayment caps have been weakened But such an approach offers partial protection to taxpayers willing to use prior years' information and does so in an efficient way.

VI. ADMINISTRATIVE PROPOSAL: GOOD FAITH SAFE HARBOR

This Article's legislative proposals are the most direct and simplest way to correct the problem of taxpayers bearing the burden of inaccurate PTC estimates performed by the Marketplaces. However, politically speaking, it may be unrealistic to expect Congress to adopt legislative fixes to an act that still generates intense political skepticism. In fact, attempting to legislatively fix the ACA may jeopardize its very existence because it seems relatively clear that the ACA's detractors would use the opportunity to seek outright repeal or to seek changes that would weaken the ACA.[277] To the extent that Congress revisits the ACA, it should seriously consider these proposed reforms. To the extent that Congress turns toward replacement reforms, this Article's observations may be helpful.

However, another way forward may be to pursue an administrative solution. An administrative solution will necessarily be a compromise, offering protection to only a subset of affected taxpayers, but it would be an improvement over the status quo. Specifically, I propose that the IRS and HHS establish a safe harbor that allow a taxpayer to claim an exemption from the reconciliation requirement where the taxpayer has (1) claimed an APTC, (2) cooperated fully with the Marketplace's requests for information as it estimated the APTC, and (3) promptly reported to the Marketplace all changes in income and household composition.

The IRS already has embarked on the task of creating administrative rules and regulations that effectively create exceptions to explicit statutory language. For example, while the statute requires married individuals to file a joint return in order to claim a PTC, the IRS has created a limited exception

[277] *See supra* notes 246 and 247 and accompanying text.

to this requirement for victims of domestic abuse or spousal abandonment.[278] To claim that the domestic abuse or abandoned spouse exception, a victim must (1) be living apart from the spouse when the return is filed and (2) be unable to file a joint return because of the abuse or abandonment.[279] The taxpayer must certify on the married filing separate tax return that he or she meets those criteria by checking a box on IRS Form 8962.[280] The exception can only be claimed for three consecutive years.[281]

The IRS also has created an exception to the repayment obligation for taxpayers on the cusp of 100% of the FPL. Normally, if a taxpayer receives an APTC during the year and, upon filing a tax return, discovers that he or she actually was under 100% of the FPL and thus not eligible for any PTC amount, that taxpayer would have to repay the subsidy, subject to the repayment cap. However, the IRS has created an exception that waives repayment in this situation.[282] This exception is very similar to the proposal advanced by this Article. It protects reliance by a taxpayer on a Marketplace's estimate of an APTC.

Another example of the IRS creating special rules that ease taxpayer burden in the face of the complexity of the ACA, and that also protects taxpayer from burdens due to Marketplace error, occurs when a taxpayer is approved by an Marketplace for an APTC but it is later determined that the taxpayer was eligible for Medicaid.[283] Recall that the Marketplace has the responsibility of screening enrollees for Medicaid eligibility; if the taxpayer is eligible for Medicaid, he or she is not eligible for a PTC.[284] Under the IRS

[278] I previously explored this exception thoroughly and argued for an extension of the exception to other taxpayers and other tax benefits. *Pareja*, *supra* note 56.

[279] Final and temporary regulations, 79 Fed. Reg. 43,622 (July 28, 2014) (to be codified at 26 C.F.R. § 1.36B-2T(b)(2)). Abandonment is determined based on all facts and circumstances and exists if "the taxpayer is unable to locate his or her spouse after reasonable diligence." *Id.* § 1.36B-2T(b)(2)(iv). Domestic abuse is defined fairly broadly as including "physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently" and is determined based on all facts and circumstances. *Id*. § 1.36B-2T(b)(2)(iii).

[280] *Id*. § 1.36B-2T(b)(2)(ii)(C) (taxpayer must "[c]ertif[y] on the return, in accordance with the relevant instructions, that the taxpayer meets the criteria of this paragraph (b)(2)(ii)").

[281] *Id.* § 1.36B-2T(b)(2)(v).

[282] Treas. Reg. § 1.36B-1(b)(6). I.R.S., Instructions for Form 8962: Premium Tax Credit (PTC), at 7 (2015), https://www.irs.gov/pub/irs-pdf/i8962.pdf.

[283] Treas. Reg. § 1.36B-1(c)(2)(v). *IRS PTC Q&A*, *supra* note 31, at question 26 ("If a Marketplace makes a determination or assessment that an individual is ineligible for Medicaid or CHIP and eligible for APTC when the individual enrolls in a qualified health plan, the individual is treated as not eligible for Medicaid or CHIP for purposes of the premium tax credit for the duration of the period of coverage under the qualified health plan (generally, the rest of the plan year). Accordingly, if you were enrolled in both Medicaid coverage and in a qualified health plan for which advance credit payments were made for one or more months of the year following a Marketplace determination or assessment that you were ineligible for Medicaid, you can claim the premium tax credit for these months, if you are otherwise eligible.").

[284] Code § 36B(c)(2)(B).

exception, where the Marketplace made an erroneous conclusion that the taxpayer was not eligible for Medicaid and instead approved the taxpayer for an APTC, the taxpayer will not have to repay any excess PTC amount for the period he or she was erroneously enrolled in a Marketplace plan.[285] This is true even if the taxpayer enrolls in Medicaid when the error is discovered but fails to drop the Marketplace plan, and thus is dual enrolled.[286] The IRS treats those taxpayers as being eligible for Medicaid, generally through the rest of the plan year.[287]

HHS has created a special rule that allows it to waive verification requirements where a taxpayer has attempted in good faith to provide documentation.[288] While not frequently used, and not a safe harbor that can be categorically claimed by a taxpayer, the existence of this type of discretion demonstrates that there is room for some leniency in the process.

In all of these cases, special rules were crafted to protect taxpayers with respect to whom the regular rules are inappropriate. I propose that the regular rule of reconciliation is inappropriate with respect to a taxpayer who has fully engaged in good faith in the process of estimating income and household composition.

VII. CONCLUSION

The goals of the ACA are lofty indeed. Universal (or near-universal) health coverage has been an elusive policy target for decades. Assuming that the United States continues to desire to work toward universal coverage, and assuming that the United States continues to use an ACA-type model as the vehicle for achieving universal coverage, a premium subsidy to make private coverage affordable is a necessary element. The PTC is a critical cog in the ACA reforms, and while the PTC is an improvement over the prior status quo of little to no subsidies, as this Article has demonstrated, the PTC can be improved in ways that should boost participation rates.

The current design of the PTC, with an estimated credit amount based on end-of-credit-year income and household composition payable ratably throughout the year, followed by a reconciliation process where the taxpayer may have to repay some or all of the advance payments, creates

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[285] *IRS PTC Q&A*, *supra* note 31, at question 26 ("If a Marketplace makes a determination or assessment that an individual is ineligible for Medicaid or CHIP and eligible for APTC when the individual enrolls in a qualified health plan, the individual is treated as not eligible for Medicaid or CHIP for purposes of the premium tax credit for the duration of the period of coverage under the qualified health plan (generally, the rest of the plan year). Accordingly, if you were enrolled in both Medicaid coverage and in a qualified health plan for which advance credit payments were made for one or more months of the year following a Marketplace determination or assessment that you were ineligible for Medicaid, you can claim the premium tax credit for these months, if you are otherwise eligible.").

[286] *Id.*

[287] *Id.*

[288] *See supra* notes 115 and 116 and accompanying text.

avoidable problems for taxpayers and the government. This design creates financial uncertainty for low-income households and undercuts the effectiveness of other anti-poverty programs administered through the federal tax code. The design uses a double enforcement strategy divided between two federal agencies, which is an inefficient use of government resources. The double enforcement strategy is not justifiable because it is more effective. Because the IRS and HHS enforcement is relatively uncoordinated, the double layer does not meaningfully reduce fraud or abuse and may actually increase opportunities for fraud and abuse in the CSR subsidy program. HHS is heavily focused on boosting enrollment, often by relaxing income verification requirements, on the explicit assumption that the IRS reconciliation process will rectify errors in the APTC estimates. There is no taxpayer reconciliation process for CSR subsidies, so this enforcement shift creates opportunities for fraud and abuse with respect to those subsidies.

It is true that the IRS reconciliation process will catch many over- and underpayments of the APTC (to the extent that taxpayers file returns and to the extent those returns are accurate). However, as detailed in this Article, both underpayments and overpayments create real, systemic problems from a health policy standpoint. An underpayment means that the subsidy did not efficiently affect the health insurance purchasing decision, which is the ultimate goal of the program. An overpayment either reduces a tax refund that likely was the result of a different tax program designed to combat poverty or converts the subsidized health policy purchaser into a tax debtor. The IRS PTC reconciliation process is focused on discovering tax debts, imposing tax penalties, and collecting money after the fact, and is rather impersonal. Owing tax, having tax penalties imposed, or undergoing an audit is understandably troubling to most taxpayers, leading to the misperception that either the taxpayer did something wrong or that the system is not fair. However, as this Article demonstrated, it is easy for a well-intentioned taxpayer to do everything "right," to follow all the rules, to engage fully and in good faith in the HHS and IRS system, and still owe a reconciliation amount. In fact, in the first year of the program only 8% of the taxpayer claiming the PTC received an accurate APTC payment, with over half of the claimants owing a reconciliation amount.[289] Labeling these often-innocent taxpayers as tax scofflaws is a strong stigma and may well push people away from the insurance pools that are at the core of the ACA's strategy for increasing insurance coverage and reducing insurance premiums. This dynamic is important for evaluating future reforms of the PTC. However, Congress also should consider the downsides of this dynamic when designing possible future benefits that utilize tax credits payable in advance with reconciliation.

[289] *See supra* note 5 and accompanying text.

This Article compared the current PTC design with a salient selection of other social welfare programs. From those comparisons, this Article developed a set of design goals that could guide PTC reform efforts or could guide the development of delivery systems for other subsidy programs intended to support specific purchases. Specifically, this Article concludes that important design goals include that the PTC (1) should be sufficiently large that insurance is considered affordable by its users, (2) should be relatively simple to claim, (3) should be currently available to offset the current cost of insurance, (4) should be stable and not create additional financial risk for its users, and (5) should have adequate and efficient enforcement to address fraud and abuse. Some of these design goals are in tension with other, but they all are important features of an effective program.

This Article then detailed specific and concrete legislative proposals for reforming the PTC to advance these design goals and correct some of the problems inherent in the current PTC design, once again borrowing from lessons learned from other social welfare programs. Specifically, this Article explored the option of eliminating reconciliation and relying exclusively on the Marketplace determination of the APTC as a conclusive benefit determination, much like what happens currently with the CSR subsidies.

This Article also explored the possibility of using a different metric for measuring income and household composition that would create more certainty than using credit-year figures. Different choices have different trade-offs in terms meeting actual taxpayer need, ease of administration for the government and ease of utilization for the taxpayer, avoiding being overly intrusive (which has privacy implications as well as being a concern for the participation rate), and being effective at combatting fraud and abuse. This Article specifically looked at basing the APTC amounts on (1) monthly income (similar to TANF or SNAP), (2) a prediction of future monthly income using a smoothing mechanism that would even out monthly income fluctuations, and (3) the immediate prior tax year amounts which would be possible for most individuals if open enrollment were moved to after the tax return filing deadline. This Article finished with a discussion of what a safe harbor would look like that would protect individuals who have acted in good faith from repaying reconciliation amounts, whether such a safe harbor were adopted by Congress or pursued by the IRS.

Any of these reforms would improve the functioning of the PTC. Each should be seriously considered by policy makers considering reforms. The ultimate goal must be kept firmly in mind. We are seeking to entice the uninsured to jump into an insurance risk pool. Asking the uninsured to jump into a pool that harbors a lurking shark in the form of reconciliation is unwise.