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# Reconciling the Premium Tax Credit: Painful Complications for Lower and Middle-Income Taxpayers

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# Articles



# RECONCILING THE PREMIUM TAX CREDIT: PAINFUL COMPLICATIONS FOR LOWER AND MIDDLE-INCOME TAXPAYERS

Francine J. Lipman\* and James E. Williamson\*\*

## I. INTRODUCTION

### A. THE PERNICIOUS CYCLE OF POVERTY

**P**OVERTY affects health and well-being.<sup>1</sup> Lack of financial resources costs a sixty-five year old, below-median income earner more than five years of average life expectancy as compared to an

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1. THE STAN. CTR. ON POVERTY AND INEQ., STATE OF THE UNION: THE POVERTY AND INEQUALITY REPORT, 44-46 (2014), [http://web.stanford.edu/group/scspi/sotu/SOTU\\_2014\\_CPI.pdf](http://web.stanford.edu/group/scspi/sotu/SOTU_2014_CPI.pdf) [<https://perma.cc/7N5V-FVFF>] (finding that while health care costs have tripled since 1960, the economy, and changes to health insurance coverage have undermined access to health care for many lower income individuals). “Poor children have increased infant mortality; more frequent and severe chronic diseases such as asthma; poorer nutrition and growth; less access to quality health care; lower immunization rates; and increased obesity and its complications.” *Poverty Threatens Health of U.S. Children*, American Academy of Pediatrics (May 4, 2013), <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Poverty-Threatens-Health-of-US-Children.aspx> [<https://perma.cc/R95V-F3KK>] [hereinafter *Poverty*]. “Socioeconomic status is a significant predictor of physical and mental health outcomes—not to mention overall well-being—and the many links between poverty and poor health are a rising public health concern.” Carolyn Gregoire, *This is the Single Biggest Threat to Health and Happiness*, HUFFINGTON POST (Jan. 25, 2014), [http://www.huffingtonpost.com/2014/01/22/how-poverty-can-impact-you\\_n\\_4589123.html](http://www.huffingtonpost.com/2014/01/22/how-poverty-can-impact-you_n_4589123.html) [<https://perma.cc/5CUY-L5G4>]. “The EITC may also improve the health of infants and mothers, research indicates. Infants born to mothers who could receive the largest EITC increases in the 1990s had the greatest improvements in such birth indicators as low-weight births and premature births. As one researcher notes, ‘income transfers to pregnant women through a work-conditional tax subsidy substantially improves the health of their new born children.’ Similarly, mothers who received the largest EITC increases in the 1990s had greater improvements in their own health indicators.” Chuck Marr, Chye-Ching Huang, Arloc Sherman, and Brandon Debot, *EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children’s Development, Research Finds*, CTR BUDGET AND POL’Y PRIORITIES (Oct. 1, 2015), <http://www.cbpp.org/sites/default/files/6-26-12tax.pdf> [<https://perma.cc/6CNC-6CRP>]. “[A] growing body of research finds that low-income children whose families receive the EITC have better health and higher school test scores and educational attainment, on average, which in turn is linked to increased earnings and employment—and, thus, likely lower rates of poverty—in adulthood.” Robert Greenstein, *New Research: EITC Boosts Employment; Lifts Many More Out of Poverty Than Previously Thought*, CTR ON BUDGET & POL’Y PRIORITIES (July 23, 2015), <http://>

above-median income earner.<sup>2</sup> A person living below the poverty threshold is 5.4 times more likely to report being in poor or fair health as compared to a person living at or above 400% of the poverty threshold.<sup>3</sup> This statistic soars with respect to psychological distress.<sup>4</sup> An adult living below the poverty threshold was eight times more likely to experience serious psychological distress than an adult living at or above 400% of the poverty threshold.<sup>5</sup>

Similarly, health insurance coverage, which has been historically tied to employment,<sup>6</sup> varies significantly based upon household income.<sup>7</sup> Twenty-five percent of households with incomes below \$25,000 were uninsured, while less than 6% of households with incomes of \$75,000 and above were uninsured.<sup>8</sup> As a result of lack of access to health services, about 17% of adults living in poverty did not receive any health care in 2012, as compared to about 3% of adults living at 400% and above the poverty threshold.<sup>9</sup> Poverty undermines health because of lack of access to health care and the related physical and mental stress. Also, poor health undermines access to financial resources because of inability to work. This pernicious and circuitous cycle of poverty and poor health exacerbates economic inequality and has stifled progress in America and the world for decades.<sup>10</sup>

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[www.cbpp.org/blog/new-research-eitc-boosts-employment-lifts-many-more-out-of-poverty-than-previously-thought](http://www.cbpp.org/blog/new-research-eitc-boosts-employment-lifts-many-more-out-of-poverty-than-previously-thought) [<https://perma.cc/TLQ7-HAZ4>]. In addition, brain health is meaningfully affected by poverty. Brains of children in families that earned less than \$25,000 a year had 6% less surface area than the brains of children from families earning \$150,000 or more. See Kimberly Noble et al., *Family Income, Parental Education and Brain Structure in Children and Adolescents*, NATURE NEUROSCIENCE, Mar. 30, 2015, at 773. This reduced brain surface area correlated with lower scores on cognitive tests. *Id.* (noting that small differences in income resulted in relatively larger differences in areas of the brain associated with academic success for children from the lowest-income households); SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES (PICADOR 2014) (examining how scarcity, including poverty, force the brain to focus on alleviating pressing shortages reducing the mental bandwidth available for other thought processes including solving problems and planning ahead).

2. *Poverty*, *supra* note 1, at 44 (demonstrating that in 2012, 26.2% of people living below the poverty threshold were suffering poor or fair health as compared to only 4.8% of people living at 400% and above the poverty threshold).

3. *Poverty*, *supra* note 1, at 45 (Figure 2).

4. *Poverty*, *supra* note 1, at 43-44 (Figure 4) (setting forth significant income disparities of the levels of severe psychological distress).

5. *Poverty*, *supra* note 1, at 45; see also Noble, *supra* note 1 (hypothesizing that excess chaos and stress in the lives of poor children affects the size of their brains and ability to perform in school).

6. *Poverty*, *supra* note 1, at 45 (Figure 7) (noting that in 2013 60% of firms with less than 35% earning less than \$23,000 provided health insurance coverage as compared to only 23% of firms with 35% or more earning less than \$23,000).

7. *Poverty*, *supra* note 1, at 45 (Figure 6) (setting forth insurance coverage from 1998-2012 based upon household income).

8. *Poverty*, *supra* note 1, at 45.

9. *Poverty*, *supra* note 1, at 47 (Figure 10) (describing the increasing gap from 12.7% in 1997 to 14.1% in 2012 between the poorest and the wealthiest households for households not receiving any health care due to costs).

10. ANN KERN, DYING FOR CHANGE 2, [http://www.who.int/hdp/publications/dying\\_change.pdf](http://www.who.int/hdp/publications/dying_change.pdf) [<https://perma.cc/NV8Y-FA3Z>] (noting that “the biggest enemy of health in the developing world is poverty”); see also WORLD HEALTH ORG., WORLD HEALTH RE-

## B. BREAKING POVERTY CYCLES THROUGH ACCESS TO HEALTH CARE

Among other efforts to break this pernicious cycle of poverty and poor health, federal and state governments have tried to facilitate access to health care through affordable and effective comprehensive health insurance.<sup>11</sup> As Chief Justice Roberts of the United States Supreme Court said in his recent majority decision in *King et al. v. Burwell, Secretary of Health and Human Services et al.*, “[t]he Patient Protection and Affordable Care Act . . . grew out of a long history of failed health insurance reform.”<sup>12</sup> From many decades of government experience, three interrelated components have emerged as necessary for a successful health insurance system.<sup>13</sup> The first component is that insurance coverage must be regulated to “guarantee coverage” to everyone, irrespective of their health status, including any pre-existing illnesses, diseases, or medical conditions.<sup>14</sup> In addition, to ensure that guaranteed coverage is accessible, insurance premiums must be priced through “community rating,” meaning that no health status issues are included in the price of an individual’s premium.<sup>15</sup> While these two integral requirements successfully expanded access to health insurance coverage, the requirements resulted in individuals responding rationally by delaying incurring health care coverage costs and not acquiring any coverage until immediately before they needed health care.<sup>16</sup> This “adverse selection” necessarily resulted in higher costs for insurance coverage, as only unhealthy individuals were purchasing coverage.<sup>17</sup> This process resulted in the exact opposite goal of trying to increase access to health care coverage, as premium prices necessarily soared in response to escalating health care coverage costs. With higher costs resulting in higher premiums, only the sickest and most affluent individuals could acquire health care coverage.<sup>18</sup> This adverse selec-

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PORT (1995), [http://www.who.int/whr/1995/media\\_centre/executive\\_summary1/en/](http://www.who.int/whr/1995/media_centre/executive_summary1/en/) [<https://perma.cc/Q95L-E3KB>].

11. For example, see Medicare coverage generally for seniors age sixty-five and older. See Medicare Coverage and Basics, MEDICARE.COM, <https://medicare.com/about-medicare/medicare-coverage-basics/>.

12. *King v. Burwell, Sec. of Health and Human Services.*, 135 S. Ct. 2480, 2485 (2015) (finding that the government’s federal tax credit was an integral part of the design for an affordable and effective health insurance program).

13. *Id.* at 2486 (describing how Massachusetts implemented these three components into their state insurance program to reduce its uninsured rate down to 2.6%).

14. *Id.*

15. *Id.* (describing health care insurance coverage in the 1990s as including the “guarantee coverage” and the “community rating” to expand coverage by ensuring that anyone could buy insurance coverage); 42 U.S.C. § 300gg-1(a) (2010) (setting forth the language in The Patient Protection and Affordable Care Act by providing the “guaranty coverage” of “each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage” and the “community rating” barring any insurer from pricing premiums by including a person’s health).

16. *King*, 135 S. Ct. at 2485-86 (describing that access to health insurance coverage irrespective of your health led to adverse selection and skyrocketing premium prices to accommodate this bias).

17. *Id.*

18. *Id.*

tion eventually resulted in a “death spiral” of the health care coverage industry with insurers leaving the market entirely.<sup>19</sup>

To fix the death spiral problem, the government devised the second component for effective health care coverage in which everyone (healthy and not as healthy individuals) would have to acquire and maintain insurance coverage at all times.<sup>20</sup> This requirement is the health insurance coverage mandate or individual mandate.<sup>21</sup> Given rational adverse selection and resistance to this requirement, the government penalizes those that do not buy insurance.<sup>22</sup> While this might appear onerous, the government provides certain exceptions to the penalty, including financial hardships.<sup>23</sup> Indeed, the purpose of the penalty is to ensure that no one pays the penalty, by financially motivating individuals to avoid the penalty by obtaining health care coverage.<sup>24</sup> The government further ensures that all individuals obtain health care insurance by making it affordable.<sup>25</sup> The third component makes health insurance coverage affordable for everyone.<sup>26</sup> This component is a government subsidy to offset some of the cost of the health insurance premiums for lower and middle-income individuals, often delivered in the form of a tax credit.<sup>27</sup>

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19. *Id.*

20. Drew Altman, *At Tax Time No Public Backlash Over Obamacare's Individual Individual Mandate*, WALL ST. J.; WASH. WIRE (Apr. 21, 2015, 7:30 AM), <http://blogs.wsj.com/washwire/2015/04/21/at-tax-time-no-public-backlash-over-obamacares-individual-mandate/> [<https://perma.cc/68GG-75HL>].

21. “This central element of the ACA was included to help ensure that the individual insurance market would have balanced pools of healthier people and sicker people to help spread insurance risk and keep premiums reasonable. While most of the individual provisions of the ACA are popular, the mandate has always been decidedly unpopular; it is disliked by 65% of the public, according to the Kaiser Family Foundation’s December Health Policy Tracking Poll.” *Id.*

22. See *King*, 135 S. Ct. at 2486 (describing the penalty that must be paid to the Internal Revenue Service called the Shared Responsibility Payment set forth at 26 U.S.C. § 5000A); see also Francine J. Lipman and James Owens, *De/reconstructing the Individual Tax Penalty Under the Affordable Care Act*, GEORGETOWN J. POVERTY L. & POL’Y (forthcoming 2016) (describing the details regarding how the individual mandate does and does not work and restructuring the Shared Responsibility Payment to better achieve the goals under the Affordable Care Act).

23. *King*, 135 S. Ct., at 2486 (describing that in The Patient Protection and Affordable Care Act there is an exception for the Shared Responsibility Payment if insurance premiums exceed 8% of an individual’s household income); 26 U.S.C. § 5000A (e)(1)(A), (e)(1)(B)(ii) (2012).

24. See Lipman & Owens, *supra* note 22.

25. *King*, 135 S. Ct. at 2486 (describing Massachusetts’s health insurance tax credit).

26. *Id.*

27. *Id.* at 2487, 2493-94 (describing the refundable tax credit for families with household incomes between 100% and 400% of the poverty threshold underlying The Patient Protection and Affordable Care Act set forth in 26 U.S.C. § 36B. Also, citing studies indicating that if certain tax credits were eliminated premiums would rise by 47% and 35% and enrollment would drop by 70% and 69%, respectively); EVAN SALTZMAN & CHRISTINE EIBNER, RAND CORP., *THE EFFECT OF ELIMINATING THE AFFORDABLE CARE ACT’S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES* (2015), [http://www.rand.org/pubs/research\\_reports/RR980.html](http://www.rand.org/pubs/research_reports/RR980.html) [<https://perma.cc/B5XQ-TR6J>]; LINDA BLUMBERG ET AL., URBAN INSTITUTE, *THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING VS. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS* (2015), <http://www.urban.org/sites/files/alfresco/publications-pdfs/2000062-The-Implications-King-vs-Burwell.pdf> [<https://perma.cc/P2PF-NXJX>].

Governments have found that these three components are integral to effective universal health care. The first component providing “guaranteed coverage” with reasonable “community rating” can only be sustained with the second component of mandatory participation providing a large, broad and consistent pool.<sup>28</sup> The second component can only occur with a meaningful penalty that effectively forces everyone to participate.<sup>29</sup> But the penalty will only be effective if it can be meaningfully avoided by purchasing health care coverage.<sup>30</sup> Broad participation will only occur if the third component is in effect making health care coverage affordable for everyone.<sup>31</sup> The government ensures affordable health care coverage through a subsidy often delivered as a refundable tax credit.<sup>32</sup>

### C. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA)

Congress included all three of these components<sup>33</sup> in the ACA.<sup>34</sup> The ACA requires guaranteed coverage for all individuals irrespective of their health condition, and insurance premium pricing must reflect the community-at-large rather than an individual’s unique health condition.<sup>35</sup> However, the ACA does allow premium pricing to reflect the age of the insured.<sup>36</sup> The ACA also requires that all individuals have qualified health insurance, or they will be subject to a penalty, unless specifically exempt.<sup>37</sup> This ensures that the community pool of participants includes healthy individuals to keep costs down for the entire pool.<sup>38</sup>

The penalty is an additional annual tax paid to the Internal Revenue Service (IRS) on one’s individual income tax return as the Shared Responsibility Payment.<sup>39</sup> To mitigate hardships, there are exemptions from the Shared Responsibility Payment for certain individuals, including for individuals whose household income is less than their income tax filing

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28. *King*, 135 S. Ct. at 2487.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2486 (discussing the three interlocking health care insurance reforms in the ACA).

34. Patient Protection and Affordable Care Act, Pub. L., 11-148, 124 Stat. 119 (2010).

35. 42 U.S.C. §§ 300gg-1(a) (requiring that “each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual that applies for such coverage” and that insurers are barred from charging higher premiums based upon a person’s health).

36. Premiums for exchange plans can be age-adjusted to allow for a maximum 3:1 variation for adults between twenty-one and sixty-four years of age or older. For additional information about this and other rating restrictions, see ANNIE L. MACH & BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R42069, PRIVATE HEALTH INSURANCE MARKET REFORMS IN THE AFFORDABLE CARE ACT (ACA) (2016) (discussing additional information about this and other rating restrictions).

37. The coverage requirement is to ensure that the death spiral resulting from adverse selection does not undermine the success of the program. 42 U.S.C. § 18091(2)(I) (2010).

38. *Id.* (noting that mandatory participation is “essential to creating an effective health insurance markets”).

39. 26 U.S.C. § 5000A (2010).



threshold, as well as an 8%, indexed for inflation, relative price to household income exemption.<sup>40</sup> Moreover, individuals who do not qualify to purchase healthcare coverage under the ACA are excluded from the penalty including, for example, unauthorized immigrants and individuals who qualify for certain relief from deportation under the Deferred Action for Childhood Arrivals.<sup>41</sup>

Finally, to further ensure that everyone who is required to purchase and maintain health insurance coverage can afford it, Congress has authorized refundable tax credits for certain qualifying individuals to subsidize their health insurance premiums purchased through government exchanges.<sup>42</sup>

#### D. THE PREMIUM ASSISTANCE CREDIT (PTC)

The ACA makes available to certain middle and lower-income individuals a refundable tax credit designed to help them pay the premiums on their qualified health care plans.<sup>43</sup> To achieve Congress's goal of making

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40. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii) (other exemptions include categories of individuals who are not able to obtain health insurance under the programs such as undocumented individuals or temporarily authorized immigrants). For 2016, the lack of affordability exemption percentage after inflation indexing is 8.13% of household income. *Health coverage exemptions, forms & how to apply*, HEALTHCARE.GOV, <https://www.healthcare.gov/health-coverage-exemptions/forms-how-to-apply/>. See detailed descriptions of the uninsured individuals who have been subject to the individual penalty under the ACA at Kaiser Foundation Organization. Mathew Rae, et al., *The Cost of the Individual Mandate Penalty for the Remaining Uninsured*, HENRY J. KAISER FAMILY FOUND. (Dec. 9, 2015), <http://kff.org/health-reform/issue-brief/the-cost-of-the-individual-mandate-penalty-for-the-remaining-uninsured/> [<https://perma.cc/GY5Y-3UGS>].

41. 26 U.S.C. § 5000A(d)(3) (excluding from the penalty unauthorized immigrants); see also 45 CFR 152, available at <https://www.regulations.gov/#!documentDetail;D=CMS-2012-0138-0001> (describing that unauthorized immigrants who qualify for certain relief under the Deferred Action for Childhood Arrivals are not eligible for health insurance coverage through the Exchange and, therefore, should not be subject to the individual mandate or the penalty for not having qualified coverage under the ACA).

42. 26 U.S.C. § 36B (2011). The actual language in the statute, 26 U.S.C. § 36B(b)(2), promulgated by Congress says the amount of the PTC is determined in part by the amount of the monthly premium offered "through an Exchange established by the State under 1311 the Patient Protection and Affordable Care Act." Thus, the language fails to specifically reference the Federal exchange. Treasury Regulations underlying the statute issued by the Internal Revenue Service do specifically reference that the term "exchange" includes any exchange created under the ACA, that is, both the Federal and State exchanges. 45 C.F.R. § 155.20 (2014) (defining an exchange as one serving the individual market, regardless of having been established by a State or HHS); 26 C.F.R. § 36B-2 (2013) (stating that a taxpayer is eligible for the PTC if she enrolled in an insurance plan through the Exchange); Federally-Facilitated Exchange, 77 Fed. Reg. 30378 (May 23, 2012). As a result of this language and split decisions in the Fourth Circuit and the Federal Circuit as to whether or not individuals buying their insurance coverage through the Federal exchange qualify for the PTC, the U.S. Supreme Court heard this issue on March 4, 2015. On June 25, 2015, the Court held that individuals who purchase insurance from either the Federal or a State exchange qualify for the PTC. The Court reasoned that Congress passed the ACA to improve health insurance coverage, not to destroy it. *King v. Burwell*, Sec. of Health and Hum. Servs., 135 S. Ct. 2480, 2496 (2015).

43. 26 U.S.C. § 36B (setting forth the refundable premium assistance credit that is integral to the success of the ACA); *King*, 135 S. Ct. at 2487; § 1401(a), §§ 10105(a)-(c), 10108(h)(1), Mar. 23, 2010, 124 Stat. 213, 906, 914; Pub. L. No. 111-152, §§ 1001(a), 1004(a)(1)(A), (2)(A), (c), 124 Stat. 1029, 1030, 1034, 1035 (2010); Pub. L. No. 111-309,

health insurance affordable, the PTC is most often provided directly to an individual's insurance provider each month in advance of actually claiming the PTC on the individual's year-end annual tax return.<sup>44</sup> Of the almost twelve million individuals who have enrolled in health insurance through the federal and state health exchanges in 2015, 85% of these individuals receive the advanced PTC (APTC).<sup>45</sup> In the federal health exchange, the APTC averaged \$268, covering 72% of the \$374 average monthly premium, resulting in \$106 net monthly payments per individual, or \$1,272 annually.<sup>46</sup>

The amount of the APTC is based upon an estimate of an individual's household income to be earned for the tax year in which she is entitled to claim the credit.<sup>47</sup> However, the allowable PTC that any individual may receive is based upon the individual's actual "household income"<sup>48</sup> for that tax year.<sup>49</sup> An individual's household income is in turn dependent upon her "modified adjusted gross income" from the tax return upon

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§ 208(a),(b), 124 Stat. 3285, 3291-92 (2010); Pub. L. No. 112-9, § 4(a), 125 Stat. 36, 36-37 (2011); Pub. L. No. 112-10, § 1858(b)(1), 125 Stat. 38, 168 (2011). Three Percent Withholding Repeal and Job Creation Act, Pub. L. No. 112-56, § 401(a), 125 Stat. 711, 734 (2011); See § 1253, § 1255, 124 Stat. at 162, 895; §§ 1401(e), 1501(d), 124 Stat. at 220, 249. The PTC is available to certain individuals "whose household income for the taxable year equals or exceeds 100%, but does not exceed 400% of an amount equal to the poverty line for a family of the size involved." 26 U.S.C. § 36B (c)(1)(A) (defining who is and who is not an applicable taxpayer under the PTC).

44. 42 U.S.C. §§ 18081, 18082 (2010); see also, *King*, 135 S. Ct. at 2487. As specified under § 1412(a)(3) of the ACA, advanced credits are provided from the Treasury Department to insurers. The Department of Health and Human Services (HHS) provides payment information to Treasury. Treasury then processes the Electronic File Transfer and sends credit payments directly to the insurer's financial institution. See BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R43945, HEALTH INSURANCE PREMIUM CREDITS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA) IN 2015 3, n. 18 (2015); 26 U.S.C. § 36B(f) (describing that any advance payments are offset against the PTC for the tax year down to, but not below, zero).

45. *March Effectuated Enrollment Consistent with Department's 2015 Goal*, U.S. DEP'T HEALTH AND HUM. SERVS. (June 2, 2015), <http://www.hhs.gov/about/news/2015/06/02/march-effectuated-enrollment-consistent-with-departments-2015-goal.html> [https://perma.cc/HC97-4HPV]; see also Haeyon Park et al., *Health Exchange Enrollment Climbs in Second Year*, N.Y. TIMES (Mar. 10, 2015), <http://www.nytimes.com/interactive/2015/03/10/us/health-exchange-enrollment-climbs-in-second-year.html> [https://perma.cc/4HAH-A4GX].

46. Arpit Misra & Thomas Tsai, *Health Insurance Marketplace 2015: Average Premiums After Advance Premium Tax Credits Through January 30 in 37 States Using the Health-care.gov Platform*, DEP'T OF HEALTH AND HUM. SERVS. (Feb. 9, 2015), [http://aspe.hhs.gov/health/reports/2015/MarketPlaceEnrollment/APTC/ib\\_APTC.pdf](http://aspe.hhs.gov/health/reports/2015/MarketPlaceEnrollment/APTC/ib_APTC.pdf) [https://perma.cc/XBS7-D3F3]. As of March 31, 2015, approximately 85% of enrollees received an average APTC of \$272. *The Affordable Care Act is Working*, DEP'T OF HEALTH AND HUM. SERVS., <http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-is-working/index.html> [https://perma.cc/84CN-69NE]. As of January 30, 2015, approximately 87% of enrollees through the federal health care insurance exchange or almost 7.5 million individuals received an average APTC of \$268 covering about 72% of the cost of their monthly health insurance premiums. Misra, *supra* note 46.

47. See Affordable Care Act, § 1411, 124 Stat. at 224-25; 42 U.S.C. § 18081 (2010) (setting forth procedures for estimating eligibility for and amount of the PTC).

48. 26 U.S.C. § 36B(d)(2)(A) (defining "household income").

49. 26 U.S.C. §§ 36B(a)-(b) (describing that the PTC is determined based upon, among other factors, the taxpayer's household income for the taxable year).

which she is claiming the credit.<sup>50</sup> Therefore, the amount of the PTC an individual is entitled to for any given year cannot be determined until the individual has completed her federal income tax return for that year. For example, the amount of an individual's PTC for 2014, the first year the credit was available,<sup>51</sup> is determined by the income as shown on her individual 2014 federal income tax return, which was not prepared until early 2015.<sup>52</sup>

In most cases, the estimated APTC used to subsidize health insurance premiums during the tax year will differ from the actual PTC as finally determined when the individual files her annual income tax return.<sup>53</sup> Through the end of October 2015, taxpayers filed 143 million 2014 income tax returns, including 3.5 million 2014 income tax returns of the 4.8 million expected tax returns with 2014 PTC.<sup>54</sup> These tax returns reported \$11.3 billion of the \$15.5 billion 2014 APTC.<sup>55</sup> If the actual PTC is less than the APTC, taxpayers will have to pay the difference when they file their tax return, which would increase the amount of tax owed or decrease the amount to be refunded.<sup>56</sup> Approximately 51% of the 2014 returns, or 1.8 million returns filed, reported APTC in excess of the actual PTC by an average of \$860 for the year.<sup>57</sup> About 61% of these taxpayers still reported a refund.<sup>58</sup> If the actual PTC is greater than the APTC, the difference will be refunded or applied against other taxes that the taxpayer might owe.<sup>59</sup> Approximately, 40% of the 2014 returns filed, or 1.3 million returns, reported PTC in excess of any APTC by an average amount of \$600.<sup>60</sup>

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50. 26 U.S.C. § 36B(d)(2)(B) (defining "modified adjusted gross income").

51. The PTC was effective as of January 1, 2014. *See* § 1253, § 1255, 124 Stat. at 162, 895; §§ 1401(e), 1501(d), 124 Stat. at 220, 249.

52. 26 U.S.C. § 6072(a) (2015) (setting forth the due date of an income tax return as the 15th day of April in the year following the relevant tax year).

53. This is because the estimate for household income is predominately based upon income from the prior year; for most individuals household income fluctuates annually due to countless reasons (raises, pay cuts, unemployment, job changes, etc.). This is likely more true for lower-income households who generally have a more transitory work history. Ninety percent of the 2014 PTC income tax returns filed in 2015 through the end of June 2015 reported an APTC amount that was different than the actual PTC. *See* Letter from John Koskinen, IRS Comm'r, to Congress (Jul. 17, 2015).

54. *See* Letter July 17, 2015, *supra* note 53 (reporting that through such date approximately 3.2 million of the 4.8 million expected PTC tax returns had been filed claiming \$10 billion of the \$15.5 billion 2014 APTC representing 7 million); *Results of the 2015 Filing Season*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. (Aug. 31, 2015), <https://www.treasury.gov/tigta/auditreports/2015reports/201540080fr.html#implementation> [<https://perma.cc/YT4E-RN3H>].

55. Letter July 17, 2015, *supra* note 53.

56. 26 U.S.C. § 36B(f)(2) (describing that the APTC is offset against the PTC to zero and that any allowable excess (not otherwise limited under 26 U.S.C. § 36B(f)(2)(B)) is added to the tax liability for the tax year).

57. *See* Letter July 17, 2015, *supra* note 53; *see also Results of the 2015 Filing Season*, *supra* note 54; Letter from John Koskinen, IRS Comm'r, to Congress (Jan. 08, 2016).

58. Letter Jan. 08, 2016, *supra* note 57.

59. Letter Jan. 08, 2016, *supra* note 57.

60. Letter Jan. 08, 2016, *supra* note 57.

While the PTC is a fully refundable tax credit and can be paid directly to insurance providers in advance, it can also be applied like more traditional income tax credits.<sup>61</sup> Most tax credits are claimed on an individual's year-end income tax return, serving as a reimbursement of expenses paid by the taxpayer months, or even more than a year, before the credit is received.<sup>62</sup> Similarly, qualifying individuals have the option of paying their monthly health insurance premiums in full without any subsidy and waiting until they file their federal income tax return to claim any PTC.<sup>63</sup> This approach is consistent with most other refundable and nonrefundable federal income tax credits including the child tax credit,<sup>64</sup> dependent-care credit,<sup>65</sup> adoption expense credit,<sup>66</sup> lifetime learning credit,<sup>67</sup> HOPE scholarship and American Opportunity tax credits,<sup>68</sup> and earned income tax credit.<sup>69</sup> If the taxpayer owes no other taxes, the government will refund the PTC in full.<sup>70</sup> If the taxpayer owes other taxes, the PTC will offset any tax liability due, and the taxpayer will receive a refund of any balance in excess of the tax liability.

This Article will explain the details of the PTC focusing on the unusual and complicated reconciliation process for individuals receiving the APTC.<sup>71</sup> Given the recent implementation of the PTC and the first reconciliation experience for taxpayers in 2015,<sup>72</sup> there is a dearth of scholarship on this topic. Despite the enactment of the ACA in 2010, academics

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61. *Questions and Answers on the Premium Tax Credit*, IRS, <http://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Questions-and-Answers-on-the-Premium-Tax-Credit> [<https://perma.cc/NS8K-GNVJ>]. Traditionally, income tax credits are determined and paid on one's annual income tax return often well after the original expenditure has been made by the taxpayer. *Id.*

62. A refundable tax credit for coverage under a qualified health plan is allowed as a cash refund beyond the amount of any federal income tax due on an individual's annual federal income tax return. Refundable credit for coverage under a qualified health plan; 26 U.S.C. § 36B.

63. *Questions and Answers*, *supra* note 61.

64. 26 U.S.C. § 24 (2015) (setting forth the potentially refundable child tax credit).

65. 26 U.S.C. § 21 (2007) (setting forth the nonrefundable credit for expenses for household and dependent care services necessary for gainful employment).

66. 26 U.S.C. § 23 (2013) (setting forth the credit for qualified adoption expenses).

67. 26 U.S.C. § 25A(c) (2015) (setting forth the lifetime learning tax credit for qualified tuition and related expenses).

68. 26 U.S.C. § 25A(b) (setting forth the HOPE scholarship credit for qualified tuition and related expenses).

69. 26 U.S.C. § 32 (2015) (setting forth the refundable earned income credit).

70. *Questions and Answers*, *supra* note 61.

71. 26 U.S.C. § 36B (f).

72. Taxpayers who receive the APTC must reconcile their APTC with their actual PTC as computed based upon their actual income for the tax year by filing a tax return (even if otherwise not required) and including a Form 8962. *Premium Tax Credit: Claiming the Credit and Reconciling Advance Credit Payments*, IRS, <https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Premium-Tax-Credit-Claiming-the-Credit-and-Reconciling-Advance-Credit-Payments> [<https://perma.cc/EK97-F6EF>]; see 26 U.S.C. § 36B(f) (setting forth the requirement that taxpayers must reduce the PTC by the PTC as computed). If taxpayers fail to reconcile the APTC with their actual PTC they will not receive APTC to subsidize their Marketplace health insurance coverage in future years and the Service may contact the taxpayers to pay back some or all of the advance credit payments that are made on behalf of the taxpayer or an individual in her family. *Premium Tax Credit*, *supra* note 72.

have neither presented nor analyzed the detailed complexity of this unusual prepaid refundable tax credit for middle and lower-income taxpayers. This Article will fill this void by describing the many details of PTC using a variety of examples to expose the significant complexities inherent in this critical health care subsidy. This deconstruction of the PTC and its requisite reconciliation will serve as a platform for subsequent scholarship that will serve to enhance the PTC to better achieve Congress's goal of providing access to affordable health care for all Americans.

## II. THE PTC: WHO QUALIFIES?

### A. THE BASICS

For 2014 and subsequent years, to qualify for the PTC, individuals must (1) file a federal income tax return,<sup>73</sup> (2) purchase health insurance through the federal or state health care insurance exchanges,<sup>74</sup> (3) have an modified adjusted gross income (MAGI) of at least 100% and no more than 400% of the federal poverty line for their family size,<sup>75</sup> (4) not be

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73. 26 U.S.C. § 36B(a) (setting forth that the PTC is provided as an offset (fully refundable) against the taxpayer's income taxes for the taxable year). This requirement applies even if the taxpayer receives an APTC. *Premium Tax Credit: Claiming the Credit and Reconciling Advance Credit Payments*, IRS, <http://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Premium-Tax-Credit:Claiming-the-Credit-and-Reconciling-Advance-Credit-Payments> [<https://perma.cc/HA88-BEW4>]. The consequence of not filing a federal income tax return reconciling or claiming the PTC is that the taxpayer will either not receive the APTC in the future or the taxpayer will not receive the PTC. *Id.* For example, taxpayers who claimed the APTC in 2014 and never filed a tax return reconciling the APTC with the PTC on Form 8962 have been denied the APTC for their 2016 health care coverage through the Exchange. *Health Reform FAQs*, HENRY J. KAISER FAMILY FOUND., <http://www.kff.org/health-reform/faq/health-reform-requently-asked-questions> [<https://perma.cc/977F-Z97F>]. Under regulations issued by the Department of Health and Human Services, taxpayers must reconcile their APTC to receive future APTCs. *Questions and Answers*, *supra* note 61. As of mid-2015, the IRS was contacting almost 1.6 million taxpayers who had received the APTC, but had not yet filed their APTC reconciliation and thus were at risk of losing their 2016 APTC. *See* Statement of John Koskinen, IRS Comm'r, to Congress (July 17, 2015), <http://www.irs.gov/pub/irs-utl/CommissionerLetterwithcharts.pdf> [<https://perma.cc/YTV4-RAPV>] (regarding update of Affordable Care Act provisions).

74. 26 U.S.C. §§ 36B (b)(1), (c)(2), (c)(3)(A) (describing that the PTC applies for "applicable taxpayers" for each "coverage month" during the taxable year and defining "coverage month" as any month when the taxpayer, the taxpayer's spouse, or qualifying dependent is enrolled in a qualified health plan through the health care exchange). *See* King v. Burwell, Sec. of Health and Hum. Servs., 135 S. Ct. 2480, 2495-96 (2015). Individuals who are incarcerated or who are unlawfully present in the United States are not eligible to purchase insurance through the Exchange and, therefore, are not eligible for the PTC. 26 U.S.C. § 36B(e). However, their family members may receive the PTC if otherwise qualified. *See* Patient Protection and Affordable Care Act of 2010 § 1312(f)(3), 42 U.S.C. 18032(f)(3); (discussing "[i]ndividuals not lawfully present or incarcerated") Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30387 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1, 602).

75. 26 U.S.C. §§ 36B(c)(1), (d)(2) (defining an "applicable taxpayer" with respect to any taxable year, as a taxpayer whose household income for the taxable year equals or exceeds 100% but does not exceed 400% of an amount equal to the poverty line for a family of the size involved and further defining "household income" as modified adjusted gross income of the taxpayer plus all parties included to determine the taxpayer's family size); 26 U.S.C. § 36B(d)(1) (defining family size to include all the individuals the taxpayer is allowed to claim as an exemption deduction under 26 U.S.C. 151); FERNANDEZ, *supra*

eligible for affordable coverage through an eligible employer plan that provides minimum value,<sup>76</sup> (5) not be eligible for coverage through a government program, including among other plans Medicaid, Medicare, CHIP, and TRICARE,<sup>77</sup> (6) not be claimed as a dependent on another person's tax return,<sup>78</sup> and (7) not file their income tax return as married filing separately, unless they meet the requirements allowing certain victims of domestic abuse or spousal abandonment to claim the PTC while filing under this classification.<sup>79</sup>

## B. TAXPAYERS MUST FILE A FEDERAL INCOME TAX RETURN

### 1. PTC is a Federal Subsidy Delivered or Reconciled Through the Federal Income Tax System

The PTC is a federal health insurance premium subsidy delivered through the federal income tax system. Therefore, to receive the benefit an individual must file a federal income tax return to claim the PTC or to reconcile the APTC.<sup>80</sup> Because the APTC is necessarily based on estimates, taxpayers are likely to have some reconciliation and must file a federal income tax return even if they would not otherwise be required to file a return.<sup>81</sup>

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note 44, at 5, n. 25. (noting that the households towards the lower end will not qualify for the PTC if the state they reside in expands its Medicaid coverage so that the state receives the federal subsidy and the household receives qualifying health care coverage at no cost).

76. 26 U.S.C. §§ 36B(c)(2)(B),(C) (explaining that a “coverage month” does not include a month in which the taxpayer, her spouse, or dependent qualifies for minimum essential coverage under affordable employer-provided plans).

77. 26 U.S.C. § 36B(c)(2)(B)(i); 26 U.S.C. § 5000A (f)(1)(A) (defining “coverage month” as not including a month in which the taxpayer, her spouse, or dependent qualifies for minimum essential coverage under one of the listed government programs). FERNANDEZ, *supra* note 44, at 6.

78. 26 U.S.C. § 36B(c)(1)(D) (setting forth that “applicable taxpayer” does not include an individual who is claimed as a dependent on another’s income tax return). The “applicable taxpayer” is able to receive the PTC for the dependent on her income tax return. 26 U.S.C. § 36B(b)(2) (2012).

79. 26 U.S.C. § 36B(c)(1)(C); I.R.S. Notice 2014-23 (Apr. 14, 2014), [https://www.irs.gov/irb/2014-16\\_IRB/ar02.html](https://www.irs.gov/irb/2014-16_IRB/ar02.html) [<https://perma.cc/T7B8-ZL6A>]; Sally Schreiber, *Abuse Victims Who File Separate Returns Are Eligible for Premium Tax Credit*, J. ACCOUNTANCY (Mar. 26, 2014), <https://www.journalofaccountancy.com/news/2014/mar/20149864.html> [<https://perma.cc/U5FA-K9YS>] (describing the procedures to be used for married individuals who file separately claiming the PTC for 2014). *See also* Temp. Treas. Regs. § 1.36B-2T(b)(2) (2014) (setting forth temporary regulations for determining a domestic abuse and abandonment exception to the requirement to file joint tax returns if a taxpayer is married to qualify for the PTC).

80. Treas. Reg. § 1.6011-8(a) (2012) (setting forth that a taxpayer who receives an APTC must file her tax return by the fifteenth day of the fourth month after the close of the tax year).

81. 26 U.S.C. § 36B(a), (f) (describing the PTC as an offset against a taxpayer’s income tax for the taxable year and the required reconciliation for the APTC); Treas. Reg. § 1.6011-8(a) (2012) (setting forth that a taxpayer who receives an APTC must file her tax return by the fifteenth day of the fourth month after the close of the tax year).

## 2. *Ban On and Exceptions for Married Filing Separate Filing Status*

Generally, individuals who are married<sup>82</sup> as of the last day of the tax year and file federal income tax returns separately from their spouse will not be eligible for the PTC.<sup>83</sup> However, certain married victims of domestic abuse or spousal abandonment may claim the PTC, even if they do not file a joint federal income tax return with their spouse.<sup>84</sup> Temporary Treasury Regulations define domestic abuse for this purpose to include physical, psychological, sexual, or emotional abuse, including efforts attempting to control, isolate, humiliate, and intimidate, or to undermine the ability of the victim to reason independently.<sup>85</sup> Determining whether an individual is the victim of abuse is determined by considering all of the facts and circumstances in the case, including the effects of alcohol or drug abuse by the victim's spouse.<sup>86</sup> Abuse of the victim's child or other family members living in the household may also constitute abuse of the victim.<sup>87</sup> Also for this purpose, an individual is a victim of spousal abandonment if, after exercising reasonable diligence under the facts and circumstance, the individual is unable to locate his or her spouse.<sup>88</sup> This exception to the bar on filing separately from one's spouse only applies for three tax years.<sup>89</sup> Therefore, Congress seems to require that individuals will obtain a divorce during this four-year period or no longer qualify for the PTC if they are married and are not able to file jointly with their spouse.<sup>90</sup>

### C. INCOME LIMITATIONS

Generally, individuals may be eligible for the PTC if their household income is between 100% and 400% of the federal poverty line<sup>91</sup> for their

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82. 26 U.S.C. § 7703 (setting forth the definition of married for federal income tax purposes); 26 U.S.C. § 7703(b) (noting that a taxpayer who is living apart from her spouse for the last six months of the tax year and otherwise qualifies may file as unmarried under the head of household filing status); 26 U.S.C. §§ 2(b), (c) (2012) (defining head of household filing status).

83. 26 U.S.C. § 36B(c)(1)(C).

84. Temp. Treas. Regs. § 1.36B-2T(b)(2) (2014). See *Questions and Answers*, *supra* note 61 (questions 5 and 9 provide procedural explanation of how to file a "married filing separately" tax return under these circumstances).

85. Temp. Treas. Reg. § 1.36B-2T(b)(2)(iii) (2014).

86. *Id.*

87. *Id.*

88. Temp. Treas. Reg. § 1.36B-2T(b)(2)(iv) (2014).

89. Temp. Treas. Reg. § 1.36B-2T(b)(2)(v) (2014).

90. Given that the determination of whether or not someone is married is assessed on the last day of the tax year, a taxpayer could use this exception for three years and obtain a divorce effective as of December 31 of the fourth year. See *id.*

91. Treas. Reg. § 1.36B-1(h) (2015) (setting forth the definition of the Federal poverty line as "the most recently published poverty guidelines (updated periodically in the Federal Register by the Secretary of Health and Human Services under the authority of 42 U.S.C. § 9902(2)) as of the first day of the regular enrollment period for coverage by a qualified health plan offered through an Exchange for a calendar year. Thus, the Federal poverty line for computing the premium tax credit for a taxable year is the Federal poverty line in effect on the first day of the initial or annual open enrollment period preceding that taxable year. See 45 CFR 155.410. If a taxpayer's primary residence changes during a taxable

family size, provided they meet the other eligibility requirements.<sup>92</sup> For this purpose, household income is the individual's modified adjusted gross income, plus the MAGI of every other person in the family for whom the individual can claim a dependent exemption deduction, provided that dependent is also required to file a federal income tax return.<sup>93</sup> Congress defines MAGI as the adjusted gross income reported on the taxpayer's federal income tax return, plus nontaxable Social Security retirement benefit income and tier 1 railroad retirement benefits, excluded tax exempt interest, and foreign earned income.<sup>94</sup>

The federal government publishes poverty guidelines on a combined basis for the forty-eight contiguous states, including Washington, D.C., and separately for Hawaii and Alaska<sup>95</sup> at the beginning of each calendar year. However, because health care enrollment occurs at the end of one calendar year for the next calendar year before the government issues these calendar year guidelines, the applicable guidelines necessarily must be the guidelines that are available at the time of enrollment.<sup>96</sup> Accordingly, the income limitations for receiving the PTC in 2014 are based on the poverty guidelines for 2013, the limitations for 2015 are based on the poverty guidelines for 2014, and the limitations for 2016 are based on the poverty guidelines for 2015, etc.<sup>97</sup> Because inflation has been negligible for the last several years, the guidelines have not been meaningfully increased annually.<sup>98</sup> For example, the federal poverty guideline issued on January 25, 2016, for a single person in one of the contiguous forty-eight states and Washington, D.C. is \$11,880, and the same amount for 2014 was \$11,670 or less than a 1% increase for each year of the two year period.<sup>99</sup> Federal poverty guidelines for 2013 and 2014 are presented in Tables I and II below:

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year from one state to a state with different Federal poverty guidelines or married taxpayers reside in separate states with different Federal poverty guidelines (for example, Alaska or Hawaii and another state), the Federal poverty line that applies for purposes of section 36B and the associated regulations is the higher Federal poverty guideline (resulting in a lower percentage of the Federal poverty line for the taxpayers' household income and family size)").

92. 26 U.S.C. § 36B(c)(1)(A).

93. 26 U.S.C. § 36B(d)(2)(A) (defining household income as including MAGI of the taxpayer and of any dependents required to file a tax return).

94. *See* 26 U.S.C. § 36B(d)(2)(B).

95. *2015 Poverty Guidelines*, U.S. DEP'T HEALTH AND HUM. SERVS. (Sept. 3, 2015), <http://aspe.hhs.gov/poverty/figures-fed-reg.cfm> [<https://perma.cc/GL9V-8ATX>] (setting forth the poverty guidelines for 1982-2015) [hereinafter *2015 Poverty Guidelines*].

96. 26 U.S.C. § 36B(d)(3)(B).

97. *See id.*

98. For example, the 2016 guidelines issued in January 2016, set forth an \$11,880 single person amount as compared to the \$11,670 single person amount for January 2014, or only a \$210 increase for the two-year period, that is less than 1% per year. *See 2014 Poverty Guidelines*, U.S. DEP'T HEALTH AND HUM. SERVS. (Dec. 1, 2014), <https://www.aspe.hhs.gov/2014-poverty-guidelines> [<https://perma.cc/YLT8-BDN7>] [hereinafter *2014 Poverty Guidelines*].

99. *Questions and Answers*, *supra* note 61; *see also* *2016 Poverty Guidelines*, *supra* note 98; *2014 Poverty Guidelines*, *supra* note 98.



TABLE I<sup>100</sup>  
FEDERAL POVERTY GUIDELINE  
2014

Family Size	48 Contiguous States and DC*	Hawaii**	Alaska***
1	11,670	13,420	14,580
2	15,730	18,090	19,660
3	19,790	22,760	24,740
4	23,850	27,430	29,820
5	27,910	32,100	34,900
6	31,970	36,770	39,980
7	36,030	41,440	45,060
8	40,090	46,110	50,140

\*Add \$4,060 for each additional family member beyond 8.

\*\*Add \$4,670 for each additional family member beyond 8.

\*\*\*Add \$5,080 for each additional family member beyond 8.

TABLE II<sup>101</sup>  
FEDERAL POVERTY GUIDELINE  
2013

Family Size	48 Contiguous States and DC*	Hawaii**	Alaska***
1	11,490	13,230	14,350
2	15,510	17,850	19,380
3	19,530	22,470	24,410
4	23,550	27,090	29,440
5	27,570	31,710	34,470
6	31,590	36,330	39,500
7	35,610	40,950	44,530
8	39,630	45,570	49,560

\*Add \$4,020 for each additional family member beyond 8.

\*\*Add \$4,620 for each additional family member beyond 8.

\*\*\*Add \$5,030 for each additional family member beyond 8.

D. EMPLOYEES ARE ELIGIBLE FOR THE PTC EVEN IF THEY  
OTHERWISE QUALIFY UNDER AN EMPLOYER'S HEALTH  
PLAN UNDER CERTAIN CIRCUMSTANCES

1. *Employer-Provided Health Plan Is Not Affordable*

When Congress enacted the ACA, it was focused on ensuring that affordable, as well as adequate, health insurance coverage would be available to all individuals. Under some circumstances, employees that qualify under an employer-sponsored health plan may still qualify for the PTC to subsidize their health care costs in lieu of otherwise unaffordable em-

100. 2013 Poverty Guidelines, U.S. DEP'T HEALTH AND HUM. SERVS. (Dec. 1, 2013), <https://www.aspe.hhs.gov/2013-poverty-guidelines> [<https://perma.cc/4W9E-5W9C>].

101. 2014 Poverty Guidelines, *supra* note 98. The 2015 poverty guidelines will be used for the 2016 PTC. 2015 Poverty Guidelines, *supra* note 95. The 2016 poverty guidelines will be used for the 2017 PTC. *See* 2016 Poverty Guidelines, *supra* note 98.

ployer-provided health care coverage.<sup>102</sup> If employees or retirees enroll in an employer-sponsored health plan, they are not eligible for the PTC or the APTC, even if the plan is determined to lack affordability or minimum value.<sup>103</sup>

An employer-sponsored health plan is not affordable if the premium that the employee has to pay is more than 9.5% of the individual's household income for 2014<sup>104</sup> (adjusted annually to reflect the excess of the rate of premium growth over the rate of income growth for the preceding year, to 9.56% for 2015 and 9.66% for 2016).<sup>105</sup> The affordability test applies only to the premium for self-only coverage options and does not include the additional premiums for family coverage.<sup>106</sup> If the employer offers multiple plan options, the affordability test applies to the lowest cost option that also satisfies the minimum value requirement.<sup>107</sup> Similarly, employees may qualify for the PTC if their employer provides a health plan that is not affordable because the plan does not provide adequate coverage or minimum value.<sup>108</sup> An employer plan provides minimum value if it covers at least 60% of the expected total allowed costs for covered services.<sup>109</sup>

## 2. Employers Must Provide Health Plan Information

Congress understood that these measures would be challenging for an employee to determine. Therefore, it shifted the reporting burden to employers that have access to their health plan information. Beginning in 2014, employers must provide employees with a summary of benefits and coverage document, which also states whether the plan provides minimum value.<sup>110</sup> Additionally, the Fair Labor Standards Act requires most employers to provide their employees with a notice explaining their options in the health insurance marketplace and their potential eligibility for a PTC.<sup>111</sup>

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102. If you enroll in an employer-sponsored plan, including retiree coverage, you are not eligible for the premium tax credit even if the plan is unaffordable or fails to provide minimum value. See *Questions and Answers*, *supra* note 61 (answer to Question 10); 26 U.S.C. §§ 36B(c)(2)(C)(i)-(iii).

103. See *Questions and Answers*, *supra* note 61 (answer to Question 13).

104. 26 U.S.C. § 36B(c)(2)(C) (describing that an individual would be considered eligible for the PTC if her employer-sponsored plan required premium contributions to exceed 9.5% of her household income).

105. 26 U.S.C. § 36B(c)(2)(C)(iv) (requiring indexing); Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (providing the 2015 indexed values); Rev. Proc. 2014-62, 2014-50 I.R.B. 848 (providing the 2016 indexed values).

106. Treas. Reg. § 1.36B-2 (c)(3)(v)(A)(1) (2015); 26 U.S.C. § 5000A(f)(2).

107. See *Questions and Answers*, *supra* note 61 (answer to Question 11).

108. 26 U.S.C. § 36B(c)(2)(C)(ii).

109. *Id.*

110. See *Questions and Answers*, *supra* note 61 (answer to Question 9).

111. *Id.*

### III. HOW IS THE PTC CALCULATED?

#### A. EXTREMELY COMPLICATED AND UNUSUALLY DESIGNED TAX PROVISION

The calculation of an individual's PTC depends upon one's annual household income, family size, and the cost of the second lowest cost silver plan (SLCSP) for the region in which someone resides.<sup>112</sup> Unlike other tax credits that are based upon annual information, the PTC is determined based, in part, upon the relevant facts for each month and upon year-end information.<sup>113</sup> Individuals must determine their "premium assistance amount" for each "coverage month" based upon annualized household income and year-end family size.<sup>114</sup> Once the monthly premium assistance amount is determined, a taxpayer adds these amounts to derive the PTC for the tax year.<sup>115</sup> This adds enormous complexity because eligibility for health care coverage may change throughout the year as a result of marriage, divorce, death, and the birth or adoption of children.<sup>116</sup> In addition to the possibility of monthly changes in family size, many households experience changes in enrollment in health insurance plans due to changes in jobs, unemployment, and many other life circumstances and factors.

This complexity is exacerbated with the use of the APTC necessarily based upon estimates of each of these factors during the tax year. Because the relevance of changes in family size, enrollment, and household income for the PTC may not be readily known or understood, it may not be communicated to the health care provider in a timely manner or at all. Nevertheless, the APTC must be reconciled with the PTC when individuals file their annual federal income tax return.<sup>117</sup> This reconciliation may result in an overpayment of the APTC that must be paid back as an additional tax or an underpayment that results in a tax refund or reduction of other taxes due.<sup>118</sup> Given that 2014 tax returns prepared in 2015 were the first year for this reconciliation, the Treasury Department acknowledged the potential for hardship by abating 2014 underpayment and related tax penalties.<sup>119</sup>

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112. 26 U.S.C. § 36B(b)(1), (2), (3)(B).

113. 26 U.S.C. § 36B(b)(1), (2) (describing the computation for a premium assistance amount for each "coverage month" and then determining that all such amounts are added together to compute the PTC).

114. Treas. Regs. § 1.36B-4 (a)(2) (2014) (describing the reconciliation process).

115. 26 U.S.C. § 36B(b)(1).

116. Treas. Regs. § 1.36B-4 (setting forth dozens of examples of reconciliation examples to account for filing status and health care enrollment changes during the tax year).

117. 26 U.S.C. § 36B(f); Treas. Reg. § 1.36B-4(a)(1)(i).

118. Treas. Reg. § 1.36-4(a)(1)(i).

119. I.R.S. Notice 2015-9, 2015-6 I.R.B. 590 (Feb. 9, 2015), [https://www.irs.gov/irb/2015-6\\_IRB/ar12.html](https://www.irs.gov/irb/2015-6_IRB/ar12.html) [<https://perma.cc/B8ZL-PVA7>].

## B. BASICS FOR COMPUTING THE PTC

### 1. SLCSP Benchmark for PTC

The PTC is structured to allow an individual to buy coverage under the SLCSP, which provides a 70% actuarial value.<sup>120</sup> A 70% actuarial value means that the plan will typically cover 70% of the costs for covered medical services with beneficiaries paying, on average, the remaining 30%.<sup>121</sup> Congress determined that taxpayers with household income levels below 250% of the poverty line would not be able to afford to pay the 30% uncovered medical services, so the ACA provides them with an additional subsidy.<sup>122</sup> This is accomplished through lower cost sharing for these individuals or actual coverage of up to 94%, for the same premium that they would have paid for SLCSP.<sup>123</sup>

The amount of a taxpayer's monthly PTC is determined by the premium for the SLCSP in the household's region.<sup>124</sup> If the family moves from one pricing region to another or if one or more family members reside in a different region, the SLCSP could be different, which would affect the amount of the monthly PTC.<sup>125</sup> The PTC can never exceed the actual monthly cost of health insurance premiums. Therefore, the monthly PTC is capped at the actual health care premiums purchased through the health care exchange for the taxpayer, the taxpayer's spouse,

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120. Affordable Care Act of 2010 § 1302(d)(1)(B), 42 U.S.C. § 18022(d)(1)(B) (2012) (setting forth the description of the second lowest cost silver plan).

121. *Id.*

122. 26 U.S.C. § 36B(b)(3)(A)(i) (2012); 45 C.F.R. § 156.42 (2012) (setting forth the cost-sharing percentages for households with incomes below 250% of the poverty line).

123. See *infra* Table III; 26 U.S.C. § 36B(b)(3)(A)(i); FERNANDEZ, *supra* note 44, at 18. While a SLCSP is designed to pay 70% of an individual enrollee's expected medical costs (enrollee expected to pay the 30% balance), the healthcare provider must cover a greater percent of the cost for individuals whose household income is less than 250% of the poverty line. See *infra* Table III. For these households, the SLCSP that can enroll are designed to pay a greater percentage of their health care costs. One way of accomplishing this would be to require a lower co-payment amount on every medical expense allowed under the SLCSP. For example, if a taxpayer needed a required drug prescription that cost \$100, his co-payment would be \$13 versus \$30. If he needed a covered physical therapy treatment costing \$1,000, his co-payment would be \$130 rather than \$300. While this system might work for these minor health costs, the co-payment for a lengthy stay in a hospital or a surgery costing thousands, tens of thousands, or even hundreds of thousands of dollars, would be beyond the ability of the enrollee to pay. Therefore, a second insurance calculation is necessary. The health care provider has statistics regarding the average cost of insurance for an average enrollee of a certain age group. Historically, these statistics have allowed the provider to determine the applicable premium to charge for a specified enrollee. Therefore, in place of unlimited liability to the 13%, the percent the enrollee must pay is applied to the average cost for her age and is paid through co-pays on a list of items, such as prescription drugs, and a deductible. To illustrate, let us assume that, in the case of Jane Doe, the expected average annual cost of care for her household income and age is \$5,000. Her 13% share would be \$650, which could be satisfied by a \$500 deductible and a co-payment requirement of \$10 for each drug prescription or visit to a healthcare facility. Assuming an average of fifteen of these expected events each year, she would satisfy the other \$150 of her requisite 13% cost share.

124. 26 U.S.C. § 36B(b)(2)(B)(i).

125. Treas. Regs. § 1.36B-3(f)(4) (2016) (reserving space in the regulations for an explanation regarding how the PTC is calculated for family members residing in different locations).

and any qualifying dependents.<sup>126</sup>

Table III, below, is a partial illustration of premium and cost sharing subsidies under the ACA for 2014.<sup>127</sup>

TABLE III  
PREMIUM AND COST SHARING SUBSIDIES UNDER BY THE  
ACA FOR 2014<sup>128</sup>

Household MAGI		Required Premium Contribution		Actuarial Value of Coverage
Percentage of Poverty line	Annual dollar amount	Percentage of income	Monthly dollar amount	
<b>Individual</b>				
100 – 133%	11,490 – 15,282	2%	\$ 19 - \$ 25	94%
133 – 150%	15,283 – 17,235	3-4%	\$ 38 - \$ 57	94%
150 – 200%	17,325 – 22,980	4-6.3%	\$ 57 - \$121	87%
200 – 250%	22,980 – 28,725	6.3-8.05%	\$121 - \$193	73%
250 – 300%	28,725 – 34,470	8.05-9.5%	\$193 - \$273	70%
300 – 350%	34,470 – 40,215	9.5%	\$273 - \$318	70%
350 – 400%	40,215 – 45,960	9.5%	\$318 - \$364	70%
<b>Family of Two</b>				
100 – 133%	15,510 – 20,628	2%	\$ 26 - \$ 34	94%
133 – 150%	20,629 – 23,265	3-4%	\$ 52 - \$ 78	94%
150 – 200%	23,265 – 31,020	4-6.3%	\$ 78 - \$163	87%
200 – 250%	31,020 – 38,775	6.3-8.05%	\$163 - \$260	73%
250 – 300%	38,775 – 46,530	8.05-9.5%	\$260 - \$368	70%
300 – 350%	46,530 – 54,285	9.5%	\$368 - \$430	70%
350 – 400%	54,285 – 62,040	9.5%	\$430 - \$491	70%
<b>Family of Four</b>				
100 – 133%	23,550 – 31,322	2%	\$ 39 - \$ 52	94%
133 – 150%	31,323 – 35,325	3-4%	\$ 78 - \$118	94%
150 – 200%	35,325 – 47,100	4-6.3%	\$118 - \$247	87%
200 – 250%	47,100 – 58,875	6.3-8.05%	\$247 - \$395	73%
250 – 300%	58,875 – 70,650	8.05-9.5%	\$395 - \$559	70%
300 – 350%	70,650 – 82,425	9.5%	\$559 - \$652	70%
350 – 400%	82,425 – 94,200	9.5%	\$652 - \$746	70%

## 2. Calculating the PTC

The PTC for each month is determined by taking the benchmark premium for the SLCSP for the region where the taxpayer resides and reducing it by the amount the insured is expected to contribute to the

126. 26 U.S.C. § 36B(b)(2).

127. See 45 C.F.R. 155.305(g) (2012); 45 C.F.R. 155.305(g) (2012).

128. *Explaining Health Care Reform: Question About Health Insurance Subsidies*, HENRY J. KAISER FAMILY FOUND. (Oct. 27, 2014), <http://kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health/> [https://perma.cc/HN9R-AGRC] (setting forth the premium contribution percentages as indexed for 2014 and 2015); see also Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (providing indexed amounts for 2015); Rev. Proc. 2014-62, 2014-50 I.R.B. 948 (providing indexed amounts for 2016). For a similar table using 2015 percentages and dollar amounts, see Appendix A. The appended table sets forth the premium contribution percentages as indexed for 2014 and 2015.

taxpayer's health care.<sup>129</sup> The net amount is the government subsidy or the PTC. The amount the insured is expected to contribute to her health care is equal to the "applicable percentage" of the insured's household income.<sup>130</sup> The applicable percentage is derived from a schedule of contribution rates based upon the percentage of the taxpayer's household income to the relevant poverty line for the taxpayer's family size.<sup>131</sup> The higher the percentage of the poverty line from 100% up to 400%, the higher the taxpayer's contribution rate for her health care costs or the applicable percentage.<sup>132</sup> The applicable percentages are indexed for the excess of the growth in premium rates over the growth in income through 2018, when an additional indexing adjustment applies under certain circumstances.<sup>133</sup>

While taxpayers can choose to purchase insurance that is more or less expensive than the SLCSP because the coverage is more or less comprehensive, this will effectively increase (or decrease) their actual contribution to their health care costs relative to the applicable percentage.<sup>134</sup> The SLCSP premium is merely the benchmark used to determine the PTC—the government's health care coverage subsidy; the PTC is determined by reducing the SLCSP by the amount the government expects the taxpayer to contribute.<sup>135</sup> However, under no circumstances can taxpayers receive a greater PTC than they actually paid to obtain a qualified health plan coverage purchased through an exchange.<sup>136</sup>

The PTC calculation is best understood through detailed fact patterns and numerical examples.

a. Single Individual, Self-Employed, Age 53

Consider Jaime Hidalgo, age fifty-three, self-employed, who had an adjusted gross income (AGI)<sup>137</sup> on his 2013 federal income tax return of \$20,000. Because he had no tax-exempt interest, Social Security retirement benefit, or foreign earned income, this dollar amount was used as

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129. 26 U.S.C. § 36B(b)(2)(B).

130. 26 U.S.C. § 36B(b)(3).

131. *Id.*; 26 U.S.C. § 36B(b)(3)(A)(i).

132. 26 U.S.C. § 36B(b)(3)(A)(ii).

133. *Id.* For example, the 9.50 maximum contribution percentage rate for 2014 and 2013 was increased to 9.56% for 2015 and 9.66% for 2016. *See* Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (adjusting to the 9.56% for plan years beginning in 2015); Rev. Proc. 2014-62, 2014-50 I.R.B. 948 (adjusting to the 9.66% for plan years beginning in 2016).

134. *Premium Tax Credits, Answers to Frequently Asked Questions*, CTR. BUDGET & POL'Y PRIORITIES 2,6 (July 2013), <https://www.cbpp.org/sites/default/files/default/files/atoms/files/QA-on-Premium-Credits.pdf> [<https://perma.cc/2W94-XJ9Q>] (describing the bronze, silver, gold and platinum coverage plans that households can purchase).

135. 26 U.S.C. § 36B(b)(2)(B) (defining the premium assistance amount as the excess of the SLCSP over the household income multiplied by the monthly "applicable percentage").

136. 26 U.S.C. § 36B(b)(2)(A) (defining the premium assistance amount as the lesser of the monthly premium amount or the excess of the SLCSP over the taxpayer's health insurance coverage contribution).

137. 26 U.S.C. § 62 (defining adjusted gross income as gross income less a list of enumerated deductions).

an estimate for his 2014 MAGI for purposes of determining the monthly APTC that he was eligible to use to offset his health care premiums during 2014. Using this estimated MAGI of \$20,000 to determine Jamie's poverty line rate for a one-person household, we determine that his household income is 174% of the poverty line.<sup>138</sup> As Table III above indicates, his contribution rate will be about 87% and his premium contribution rate will be 5.1%,<sup>139</sup> calculated linearly from the statutory range of 4%-6.3%.<sup>140</sup> Taxpayers must apply their household contribution rate (here, 5.1%) to their household income to determine their annual contribution and divide that number by 12 to determine their monthly contribution.<sup>141</sup> Jaime's expected share of his monthly health care premium is \$85 [ $(\$20,000 \times .051 = \$1,020) / 12$ ].

During the open enrollment period for 2014, Jaime enrolled with a health care provider through Covered California, California's health insurance marketplace exchange.<sup>142</sup> Although it was not required, Jaime decided to sign up for the benchmark SLCSP so that his maximum contribution would be consistent with the statutory determination. Based upon his age and his region, his SLCSP had a monthly premium of \$500.<sup>143</sup> Therefore, his monthly APTC was \$415 ( $\$500 - \$85$ ). If he had opted for a health care plan with lower deductibles and co-payments,<sup>144</sup> the monthly insurance premium would likely be higher than \$500, and his contribution amount would also be higher than \$85; because his APTC is based upon the premium for his applicable SLCSP, it remains stable at \$415. Similarly, if he had opted for a plan with higher deductibles and co-payments, his monthly contribution would have been lower. Because his household size, marital status, and coverage remained constant throughout the en-

138. Poverty line for a household of one in California is \$11,490. *See supra* Table II.  $\$20,000/\$11,490 = 174\%$

139. *See supra* Table II (the 5.1% is determined on a linear basis = 4.0 beginning of range from Table III + 1.1;  $1.1 = \$2,675*/5,655** \times 2.3***$ ;  $*\$2,675 = \$20,000 \text{ MAGI} - 17,325$  (beginning of range);  $**\$5,655$  total range =  $\$22,980 - 17,325$ ;  $***6.3 - 4.0 = 2.3$  or household contribution range.).

140. *See supra* Table III; 26 U.S.C. § 36B(b)(3).

141. 26 U.S.C. § 36B(b)(2)(B) (describing the premium assistance amount calculation).

142. California is one of thirteen states that elected to use a state health care exchange. *See About Covered California*, COVERED CALIFORNIA, <http://www.coveredca.com> [<https://perma.cc/MQ58-4FPZ>] (noting that California is one of thirteen states that elected to use a state health care exchange); *State Decisions on Health Insurance Marketplaces and the Medicaid Expansion*, HENRY J. KAISER FAMILY FOUND., <https://www.kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicare> [<https://perma.cc/AB7Z-QMQ7>].

143. An example of the SLCSP: "2016 benchmark silver rates for a 40 year old will range from \$183 per month in Albuquerque, NM to \$719 per month in Anchorage, Alaska before accounting for the tax credit. If this 40 year old makes \$30,000 per year, the premium paid by the consumer after the tax credit would range from \$163 per month in Anchorage, Alaska to \$206 per month in most of the country." *See Analysis of 2016 Premium Changes in the Affordable Care Act's Health Insurance Marketplace*, HENRY J. KAISER FAMILY FOUND. (Oct. 27, 2016) <http://kff.org/health-reform/fact-sheet/analysis-of-2016-premium-changes-in-the-affordable-care-acts-health-insurance-marketplaces/> [<https://perma.cc/3VPW-RWL2>].

144. *See* FERNANDEZ, *supra* note 44, at 1 (detailed discussion of the levels of plans including platinum, gold, silver, and bronze).

tire year, his APTC remained constant. However, because Jaime didn't understand that his annual income retroactively impacted his monthly APTC, he did not notify Covered California when his income increased near the end of the year.<sup>145</sup> If he had contacted Covered California during the year regarding the increase in his estimated household income, it would have reduced his APTC consistent with his higher contribution rate, and he would have had to pay more toward his health insurance coverage monthly for the remainder of the year.<sup>146</sup>

When Jaime filed his 2014 federal income tax return in February of 2015, his AGI was \$34,000. Because he had received \$500 of tax-exempt interest income from a California school bond that he had inherited from his grandmother, his MAGI was \$34,500.<sup>147</sup> Recalculating Jaime's share of the monthly health care premium based on his actual 2014 MAGI [ $(\$34,500 \times .095 = \$3,278) / 12$ ], his monthly contribution should have been \$273 instead of \$85, or an annual contribution of \$3,276 (9.5% of his household income in accordance with Table III based upon his actual household income) versus only \$1,020 (5.1% of his household income in accordance with Table III based upon his estimated household income).<sup>148</sup> Congress understood that the APTC, which is based necessarily on income estimates because it is paid in advance, would not likely equal the reconciled PTC.<sup>149</sup> As such, taxpayers receiving the APTC must reduce their PTC by their APTC, and any excess APTC over the PTC would increase their tax imposed for the taxable year.<sup>150</sup> In Jamie's case, the excess of his APTC over his PTC is \$2,256 [ $(\$273 - \$85) \times 12$ ]. However, Congress understood that this additional (and perhaps) unexpected tax burden might itself create a financial hardship.<sup>151</sup>

### 3. Reconciling the PTC and the APTC

Without a limit on the amount of APTC that must be paid back, household income increases even if occurring unexpectedly at the end of the tax year, as compared to estimates used to determine the APTC, could

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145. See I.R.S. Notice 2015-9, 2015-6 I.R.B. 590 (Feb. 9, 2016), [https://www.irs.gov/irb/2015-6\\_IRB/ar12.html](https://www.irs.gov/irb/2015-6_IRB/ar12.html) [<https://perma.cc/B8ZL-PVA7>] (describing limited relief from underpayment of tax and late payment penalties for taxpayers having to pay tax as a result of the reconciliation of the APTC and their PTC); see also Fernandez, *supra* note 44 (describing the limited penalty relief for taxpayers having to pay back an overpayment of their APTC).

146. *Report Changes to the Marketplace as They Happen*, IRS Publication 5152 (2016), <http://www.irs.gov/pub/irs-pdf/p5152.pdf> [<https://perma.cc/3QS8-GKXP>].

147. 26 U.S.C. § 36B(d)(2)(B)(ii) (describing MAGI as including tax-exempt interest income).

148. See *supra* Table III (setting forth contribution percentages for household income levels).

149. See 26 U.S.C. § 36B(f); Treas. Regs. § 1.36B-4(a)(3) (as amended in 2014) (setting forth limitation on additional tax due to excess APTC over PTC).

150. See 26 U.S.C. §§ 36B(f)(1)- (2)(A) (providing that the PTC must be reduced by the APTC but not below zero; however, any excess APTC would be added to the tax due for the tax year).

151. See 26 U.S.C. § 36B(f)(2)(B)(i) (setting forth a limit on the additional tax due to the reconciliation).



result in thousands of dollars of additional taxes, resulting in financially challenging circumstances. Because the APTC is paid directly to the insurance provider to subsidize health care insurance, the taxpayer has not actually received a cash overpayment that could be saved and perhaps more readily be paid back.<sup>152</sup> This in-kind benefit of insurance coverage has necessarily been consumed and must be paid back whether or not it was actually accessed and whether or not it might not have otherwise been acquired or retained had taxpayers known that they would have to pay it back in cash. Year-end increases in household income such as a bonus, raise, significant overtime, second job, gambling winnings, or even debt cancellation could cause a taxpayer to exceed 400% of the poverty line for the year and no longer qualify for any amount of PTC.<sup>153</sup> Inconsistent with most tax credits, the PTC is calculated monthly based upon the relevant facts for each coverage month, but uses annual household income, which is prorated, retroactively to determine the amount of the monthly household income to determine the monthly amount of PTC.<sup>154</sup> Accordingly, under some circumstances, APTC in excess of PTC may be an unexpected, unintentional, and significant financial hardship. As a result taxpayers, especially from lower-income households, may not have the wherewithal to pay the resulting tax burden.<sup>155</sup> Moreover, APTC received during months when the taxpayer was actually suffering low (and qualifying) household income levels may not be perceived by the taxpayer as an overpayment just because her household income rose by the end of the year. Congress provides some relief for excess APTC by limiting the tax increase due to APTC in excess of the PTC for taxpayers with household incomes that are less than 400% of the poverty line.<sup>156</sup> In 2015, the repayment caps affected approximately 463,000 taxpayers, and about 26% of those taxpayers reported excess APTC, reducing the amount they would have otherwise been required to pay back by approximately \$394 million.<sup>157</sup>

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152. See generally *Questions and Answers*, *supra* note 61.

153. See *id.*; see also *Explaining Health Care Reform*, *supra* note 128.

154. *Explaining Health Care Reform*, *supra* note 128.

155. Consider, for example, that the IRS excludes from gross income certain items that are considered to be government benefits for families under its “general welfare exclusion.” See Alice Abreu & Richard Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 308 (describing the IRS’ “general welfare exclusion” as excluding certain accessions to wealth such as medical services under Medicaid).

156. 26 U.S.C. § 36B(f)(2)(B)(i).

157. See Letter from John Koskinen, IRS Comm’r, to Congress (Jan. 8, 2015), [https://www.irs.gov/pub/newsroom/irs\\_letter\\_aca\\_stats\\_010816.pdf](https://www.irs.gov/pub/newsroom/irs_letter_aca_stats_010816.pdf) [<https://perma.cc/H8UJ-R7L3>]; Letter from John Koskinen, IRS Comm’r, to Congress (July 17, 2015), <http://www.irs.gov/pub/irs-utl/CommissionerLetterlwithcharts.pdf> [<https://perma.cc/VG2J-B9FG>]; see generally *Results of the 2015 Filing Season*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. (Aug. 31, 2015), <https://www.treasury.gov/tigta/auditreports/2015reports/201540080fr.html#implementation> [<https://perma.cc/4T2S-QPRW>].

TABLE IV  
LIMITATION ON TAX INCREASE DUE TO EXCESS APTC<sup>158</sup>

If the household income (expressed as a poverty line) is:	The applicable dollar percent of amount is:	
	(1) Individual	(2) or more
Less than 200%	\$300	\$600
At least 200% but less than 300%	\$750	\$1,500
At least 300% but less than 400%	\$1,250	\$2,500

In Jamie's case, the excess of his APTC over his PTC is \$2,256 [(\$273 – \$85) x 12]. However, because his household income for 2014 was only 300% of the poverty line (\$34,500 / \$11,490 = 300), the increase to his tax will be limited to \$1,250. Moreover, for 2014 he will not be subject to underpayment penalties on this additional tax.<sup>159</sup>

Now consider if Jamie's MAGI had been at the very top of the qualifying threshold, or \$45,960. As a result of this level of MAGI, his applicable percentage would be 9.5% and his monthly contribution would be \$364 [(\$45,960 x .095)/12].<sup>160</sup> If Jaime had been able to estimate this household income amount during his enrollment at the end of 2013, his APTC would have been \$136 (\$500 - \$364) each month and his PTC at the end of the year would have been zero (because all of it was paid in advance; that is, there was no excess (or shortage) of APTC over PTC). Alternatively, if he had estimated his 2014 household income at \$20,000, the excess of his APTC over his PTC would be \$3,348 [(\$364 - \$85) x 12]. Moreover, because his household income for 2014 was 400% of the poverty line (\$45,960 / \$11,490 = 400), he would not qualify for the limit and would owe the entire \$3,348 as an overpayment of the APTC.<sup>161</sup> If his household income had been below 400% of the poverty line, his additional tax would be limited to \$1,250.<sup>162</sup>

Quite dramatically, if Jaime's household income had been greater than 400% of the poverty line or \$46,100 in 2014, he would no longer qualify for the PTC.<sup>163</sup> By using his estimate of \$20,000 for 2014, the excess of his APTC of \$4,980 [(\$500 - \$85 = \$415 monthly) x 12] over his PTC (\$0) would be \$4,980. Moreover, because his household income was 400%

158. 26 U.S.C. § 36B(f)(2)(B)(i) (explaining that the dollar amounts were indexed for inflation after 2014, but did not increase for 2015 or 2016 except to the extent that the amount of \$2,500 is increased to \$2,550 for 2016); 26 U.S.C. § 36B(f)(2)(B)(ii) (explaining the 2016 premium tax credit limits on payback amounts as indexed for inflation); see Rev. Proc. 15-53, 2015-44 I.R.B. 619.

159. See I.R.S. Notice 15-9, 2015-6 I.R.B. 590-91 (Feb. 9, 2015) [https://www.irs.gov/irb/2015-6\\_IRB/ar12.html](https://www.irs.gov/irb/2015-6_IRB/ar12.html) [<https://perma.cc/B8ZL-PVA7>] (abating underpayment tax penalties for certain underpayments of the PTC for 2014 given that the ACA has only recently been implemented).

160. See *supra* Table III; 26 U.S.C. § 36B(b)(2)(B).

161. See *supra* Table IV; 26 U.S.C. § 36B(f)(2)(B) (noting that taxpayers with household income at 400% of the poverty line qualify for the PTC, but they only qualify for the limitation on the excess of APTC over PTC if their household income is below 400% of the poverty line).

162. See *supra* Table IV; 26 U.S.C. § 36B(f)(2)(B).

163. 26 U.S.C. § 36B(c)(1)(A); see *supra* Table III.

above the poverty line, there would be no limitation on his additional tax.<sup>164</sup> Therefore, he would have to repay his \$4,980 APTC in its entirety. However, for 2014 he would not be subject to underpayment penalties on this additional tax.<sup>165</sup>

Even though Jamie's level of household income is marginally above the qualifying range and intentionally excluded from any subsidy, this penalty "cliff" could cause a financial hardship.<sup>166</sup> This additional tax results even if the increased household income occurred unexpectedly on the last day of the tax year due to a gambling windfall, year-end bonus or prepaid rent, fee or other income, or even phantom income, such as cancellation of debt. Moreover, the dramatic, almost 400% increase of the additional tax, as evidenced here from \$1,250 to \$4,980 due to a small amount of additional household income, seems unfair at best and likely to cause unexpected financial hardship at worst. Further, this benefit that must now be repaid in cash was received as an in-kind, consumed benefit likely without meaningful transparency as to this potential result.<sup>167</sup> This seems inconsistent with the Congressional goal of making access to healthcare coverage an affordable and attractive benefit.

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164. 26 U.S.C. § 36B(f)(2)(B)(i) (setting forth limits on any additional tax due to excess APTC over PTC).

165. See generally I.R.S. Notice 2015-9, 2015-6 I.R.B. 590-91 (Feb. 9, 2015) [https://www.irs.gov/irb/2015-6\\_IRB/ar12.html](https://www.irs.gov/irb/2015-6_IRB/ar12.html) [<https://perma.cc/B8ZL-PVA7>] (abating underpayment tax penalties for certain underpayments of the PTC for 2014 given that the ACA was recently implemented).

166. See *supra* Table III (showing there is a potentially harsh penalty for small increases in income at the lowest end of the household income). Households with income levels below 100% (or 133% for states that expanded Medicaid coverage) percent of the poverty line do not have to contribute at all to their health care costs because they receive free coverage. *Answers to Frequently Asked Questions*, HEALTH REFORM: BEYOND THE BASICS <http://www.healthreformbeyondthebasics.org/question-of-the-day/> [<https://perma.cc/4PLR-X3CH>] (describing the consequences for residents in states without Medicaid coverage expanded up to 133% of the poverty line). As household income increases just marginally above this range (e.g., one dollar), the taxpayers are required to contribute 2% of their household income versus zero percent. See *supra* Table III (explaining one dollar of annual household income increase increases annual contribution from zero to \$468 (\$39 per month for twelve months) for a family of four). In addition, as household income moves marginally above 133%, the applicable contribution percentage jumps from 2% to 3%. In terms of dollars this is a \$312 [\$26 [\$78 - \$52] x 12] annual increase due to one dollar of household income increase. See *supra* Table III. These dramatic increases in costs as household income increases have been a systemic problem termed "benefit cliffs" in other contexts for families trying to lift themselves out of poverty; this is one reason poverty is so "sticky" and difficult to escape. *Punishing Hard Work*, CHILDREN'S HEALTH WATCH 2, 4 (Dec. 2013), [http://www.childrenshealthwatch.org/wp-content/uploads/cliffeffect\\_report\\_dec2013.pdf](http://www.childrenshealthwatch.org/wp-content/uploads/cliffeffect_report_dec2013.pdf) [<https://perma.cc/J47R-5YNG>]; Jana Kasperkevic, *The Benefits Cliff*, THE GUARDIAN (Jul. 20, 2014 12:00 PM) <http://www.theguardian.com/money/2014/jul/20/benefits-cliff-minimum-wage-increase-backfire-poverty> [<https://perma.cc/HL4J-7ZY7>]; Greg Kaufman, *This Week in Poverty: The Expert Testimony of Tianna Gaines-Turner*, THE NATION (Aug. 9, 2013), <http://www.thenation.com/article/week-poverty-expert-testimony-tianna-gaines-turner/> [<https://perma.cc/ZB4J-WXF9>] (discussing the slippery poverty cliff and the harsh consequences of non-prorated reduced benefits with increased income levels).

167. See generally Alice G. Abreu & Richard K. Greenstein, *The Rule of Law As a Law of Standards: Interpreting the Internal Revenue Code*, 64 DUKE L.J. ONLINE 53, 68-71 (describing that tax law can be interpreted based upon evolving social standards).

a. Mandatory Information Reporting by Exchanges

While Congress has placed the burden of reconciling the PTC and the APTC on taxpayers, Congress requires each exchange to provide certain information to the Secretary of the Treasury and the taxpayer to facilitate the reconciliation.<sup>168</sup> The required information includes the aggregate amount of APTC, amount of the premiums paid, and other information necessary to allow taxpayers to determine if they have received excess APTC.<sup>169</sup> The IRS has provided Form 1095-A for this purpose.<sup>170</sup> Each exchange must provide Form 1095-A to the IRS and individual taxpayers by January 31 in the tax year following the year of coverage.<sup>171</sup>

b. Married Couple With Dependents

Now consider Janet Olson and Linda Larson who were married on January 1, 2014, and reside in St. Paul, Minnesota.<sup>172</sup> Janet, age fifty-five, is a self-employed CPA and reported an AGI<sup>173</sup> of \$26,300 on her 2013 federal income tax return. Her wife, Linda, age forty-two, works for Woods Company and reported an AGI of \$20,450 on her 2013 federal income tax return. Because neither of them had any tax-exempt interest, Social Security retirement benefits, or foreign earned income in 2013, their combined 2013 AGI of \$46,750 was used as an estimate of their 2014 MAGI for purposes of determining their monthly APTC to subsidize their 2014 health care premiums. Their required monthly contribution of \$370 is derived by multiplying their applicable percentage of 9.5%<sup>174</sup> by their estimated MAGI of \$46,750 and dividing by 12 [(\$46,750 x .095 = \$4,441) / 12].

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168. 26 U.S.C. § 36B(f)(3) (requiring exchanges to provide information reports including the level and time period of coverage, total premiums, aggregate APTC, name, address, and TIN of all insureds; information provided to the exchange regarding change of circumstances; and information to help determine excess APTC).

169. *Id.*

170. Form 1095-A, IRS 2, <http://www.irs.gov/pub/irs-pdf/f1095a.pdf> [<https://perma.cc/2ZJH-38H9>] (providing a form for exchanges to deliver information to taxpayers and the Secretary of the Treasury); *How to Use Form 1095-A*, HEALTHCARE.GOV, <https://www.healthcare.gov/taxes/marketplace-health-plan/#1095A> [<https://perma.cc/7ZHK-8QT7>].

171. *See Instructions for Form 1095-A*, IRS 1 (Sept. 8, 2015), <http://www.irs.gov/pub/irs-pdf/i1095a.pdf> [<https://perma.cc/7AV9-H7B9>] (describing the purpose of the form, who must file the form, and when it must be filed as well as line by line instructions).

172. On June 26, 2013, in *United States v. Windsor*, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), finding that it violated the equal protection guarantees of the Fifth Amendment. *U.S. v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Section 3 had required that, for purposes of federal enactments, marriage be defined as the union of one man and one woman. *Id.* at 2683. In light of this ruling, HHS issued guidance that stated same-sex spouses will be treated just like opposite-sex spouses for premium credit eligibility purposes. *See Guidance on Internal Revenue Ruling 2013-17 and Eligibility for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions*, CTR MEDICARE & MEDICAID SERVS. 2 (Sept. 27, 2013), <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/marketplace-guidance-on-irs-2013-17.pdf> [<https://perma.cc/UA69-UA4T>].

173. 26 U.S.C. § 62(a) (defining adjusted gross income).

174. *See supra* Table III, for a family of two with household income of \$46,750.

During the open enrollment period for 2014, Janet and Linda acquired health care insurance from a provider through the health insurance marketplace. They enrolled in the SLCSF offered by that provider that had a monthly family premium cost of \$800. Therefore, their monthly APTC is \$430 (\$800 - \$370). If they had acquired insurance coverage of a more significant level, their APTC would remain the same but their monthly contribution would increase by the additional premium expense. Although Linda became pregnant in October, for insurance purposes, their family size did not change during 2014 and their SLCSF premiums, APTC, deductibles, and copayments remained the same.

When Janet and Linda filed their 2014 federal income tax return in February of 2015, the AGI on their return was \$37,775. Since Linda had earned \$1,000 of tax-exempt interest from a Minnesota Highway Improvement Bond that she received as a gift, their MAGI was \$38,775. After deriving and applying the actual applicable percentage to their actual MAGI, their required monthly health care contribution [ $(\$38,775 \times .0805^{175} = \$3,121) / 12$ ] was only \$260 instead of their estimated \$370. Because their actual household income was less than their estimated household income, their monthly contribution amount decreased and their PTC increased. Therefore, their monthly PTC was \$540 (\$800 - 260) rather than \$430 as estimated and paid in advance as an APTC. This monthly increase in their PTC resulted in an annual PTC of \$6,480 (12 x \$540), which is reduced by their APTC of \$5,160 (12 x \$430).<sup>176</sup> Janet and Linda received a Form 1095-A in late January 2015 from their exchange, which included the aggregate amount of their APTC of \$5,160, their aggregate health insurance premiums paid of \$9,600, and the family plan SLCSF in their region, St. Paul, Minnesota, which was also \$9,600. From this information and their MAGI, they were able to compute the \$1,320 excess of their \$6,480 PTC over their \$5,160 APTC.<sup>177</sup> The \$1,320 PTC was included as a refundable tax credit on their 2014 federal income tax return. This amount would offset any taxes due on the return or increase their 2014 tax refund.<sup>178</sup>

During the open enrollment period for 2015, Janet and Linda discussed the anticipated change in their family size with their health care insurance provider. They were told, at that time, that they must initially calculate the APTC for 2015 as a family of two. When their baby was born, they would notify their insurance provider, add the baby to their coverage, and recalculate their APTC for the balance of 2015. Their share of the 2015 monthly premium went up slightly because their estimated household in-

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175. See *supra* Table III, for a family of two with household income of \$38,775.

176. 26 U.S.C. § 36B(f)(1).

177. Taxpayers use the information from Form 1095-A to complete IRS Form 8962 to claim and reconcile their PTC. Form 8962, IRS, <http://www.irs.gov/pub/irs-pdf/f8962.pdf> [<https://perma.cc/B47X-5Y7R>] (last visited Apr. 4, 2016). Form 8962 is attached to your annual federal income tax return. See generally *Instructions for Form 8962*, IRS, <http://www.irs.gov/pub/irs-pdf/i8962.pdf> [<https://perma.cc/3HNC-52G5>].

178. See 26 U.S.C. § 36B(a) (describing the credit as an offset against taxes due).

come was higher and the applicable percentage is indexed annually.<sup>179</sup> The resulting required contribution was calculated at \$274 [(\$40,000 x .0822) / 12].<sup>180</sup> Because their monthly health insurance premium increased to \$820, their monthly APTC was \$546 (\$820 - \$274) until their coverage changed with the birth of their children.

On August 1, Linda delivered not only a beautiful little girl who they named Zoe, but also a twin boy named Jack. They reported the change in family size to their insurance provider and their monthly premium increased to \$1,000. The amount of their monthly APTC and contribution also changed in accordance with their family size and household income level changes.

Although Linda had taken a maternity leave of absence from Woods Company, Janet's accounting business income had increased substantially, and they estimated that their MAGI for 2015 would be \$50,000. Based on this increased estimate for their 2015 MAGI and the applicable percentage share for a family of four, they find that their portion of the insurance premium increased to \$279 [(\$50,000 x .0669 = \$3,345) / 12].<sup>181</sup> Additionally, their monthly APTC increased to \$721 (\$1,000 - \$279) for the balance of 2015.

Assume that when Janet and Linda filed their 2015 federal income tax return in early 2016, their actual MAGI was \$70,000. Most of the increase was due to several new clients who were seeking additional tax assistance due to the ACA making Janet's accounting practice much more profitable in the last month of the year. They must now recalculate their PTC using \$70,000 as their household income and four as their family size to determine their applicable percentage.<sup>182</sup> The revised applicable percentage using \$70,000 and a family of four is higher than originally estimated so that their monthly insurance premium contribution is \$547 per month for the entire year [(\$70,000 x .0938 = \$6,566) / 12].<sup>183</sup> This revised contribution amount applies even during the months when their monthly income was actually lower and their family size was only two. As a result of this change, their monthly PTC is \$273 (\$820 - \$547) for the first seven

179. Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (setting forth indexing adjustments for 26 U.S.C. §§ 36B, 5000A) *see also* Rev. Proc. 2014-62, 2014-50 I.R.B. 948 (setting forth indexing amount for 2016).

180. \$40,000 household income/\$15,730 poverty line for family of two in Minnesota in 2014 (Table I) = 254%;  $254-250 = 4/300-250 = 50 \times 9.56-8.10 = 1.46\% = 4/50 * 1.46\% = .12 = 8.10 + .12 = 8.22$ . *See* Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (setting forth indexed applicable percentage ranges for 2015).

181. \$50,000 household income/\$23,850 poverty line for family of four in Minnesota in 2014 (Table I) = 210%;  $210-200 = 10/200-250 = 50 \times 8.10-6.34 = 1.76\% = 10/50 * 1.76\% = .35 = 6.34 + .35 = 6.69$ . *See id.* (setting forth indexed applicable percentage ranges for 2015).

182. Treas. Reg. § 1.36B-4(a)(2) (as amended in 2014) (describing the reconciliation process of the PTC as using the household income and family size as of the end of the taxable year).

183. \$70,000 household income/\$23,850 poverty line for family of four in Minnesota = 294%;  $294-250 = 44/300-250 = 50 \times 44/50 \times 9.56 - 8.10 = 1.46\% = 44/50 * 1.46\% = .35 = 8.10 + 1.28 = 9.38\%$ . *See* Rev. Proc. 2014-37, 2014-33 I.R.B. 363 (setting forth indexed applicable percentage ranges for 2015).

months and their PTC is \$453 (\$1,000 - \$547) for the remaining months. Therefore, the PTC for 2015 is \$4,176 [(7 x \$273) + (5 x \$453)]. Because the APTC that they received during the year was \$7,427 [(7 x \$546) + (5 x \$721)], they are potentially liable for a repayment of \$3,251. However, because their household income for their family size at the end of the year is less than 400% of the poverty line, or 294% of the poverty line, taking into account their family size and geographic location, they only have to repay \$1,500 of their \$3,251 excess APTC.<sup>184</sup> As a result, their annual premiums were \$10,740 [(\$820 x 7) + (\$1,000 x 5)] and they only had to pay \$4,813 [(\$274 x 7) + (\$279 x 5) + \$1,500], which was \$1,751 less than their required annual contribution amount of \$6,564 because of the overall limitation on the additional tax.<sup>185</sup>

c. Family with an Undocumented Member

Now consider Jordan Williams, who came from England on a student visa in 1984 and earned an MBA degree in finance at Harvard University. Because he had worked as a teaching assistant during this period, he had applied for and received a valid Social Security number. At that time, the Social Security Administration did not require proof of citizenship or legal residency to issue a Social Security number. Instead of returning to England after he graduated, Jordan stayed in the U.S. and earned a living as a self-employed financial advisor and independent insurance agent. He married Rose in 1995. From that time on, Rose worked with him equally in the finance and insurance business, and by 2013 they had three children, David (age 17), Anne (age 15), and Hyman (age 13).

During the ACA open enrollment period, when Jordan and Rose attempted to purchase insurance coverage for their family of five, they were told that Jordan could not participate in the ACA because he was not legally present in the United States.<sup>186</sup> Rose, however, was allowed to enroll in a SLCSP family plan for her and the children because they were all U.S. citizens by birth. Because Jordan was not eligible for insurance under the ACA, he had to obtain separate health insurance through an individual private plan at a significantly higher cost.

Because Rose's MAGI for her family was less than 400% of the poverty line for a family of four (Jordan had to be excluded from the measurement of family size because he is undocumented),<sup>187</sup> she was told by

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184. See *supra* Table IV; Treas. Reg. § 1.36B-4(a)(2) (as amended in 2014) (describing that household income and family size as of the last day of the tax year are used for purposes of determining the applicable percentage or the household's annual contribution for the entire tax year).

185. See 26 U.S.C. § 36B(f)(2)(B).

186. See 45 C.F.R. § 155.305(a)(1) (2013) (describing that only citizens or nationals of the United States (or non-citizens who are lawfully present in the United States, and are reasonably expected to be a citizen, national, or a non-citizen who are lawfully present for the entire period for which enrollment is sought) are eligible under the ACA).

187. See 26 U.S.C. § 36B(e)(1) (describing the method to be used to determine household income and family size if one of the members of the household is not lawfully present).

the insurance provider that she could apply for an APTC, which would subsidize her current \$1,200 monthly insurance premium. Because she was unsure about the subsidy, Rose decided not to take advantage of any APTC, but paid her monthly premiums in full and would claim any PTC when she and Jordan filed their joint federal income tax return for 2014.

In April of 2015, Rose and Jordan filed a joint 2014 federal income tax return. Although Jordan was not eligible for health insurance through the ACA, because Rose was married and did not meet the facts and circumstances to qualify for the exception to the ban on married filing separately, Rose's claim for the PTC could only be made on a married filing jointly tax return.<sup>188</sup> Nevertheless, the amount of PTC that Rose claimed was based on a pro-rated MAGI, a family size excluding Jordan, and the benchmark SLCSP for the region in which the family resided. The AGI reported on Rose and Jordan's federal income tax return for 2014 was \$50,000.

Rose's son, David—a full-time high school student who worked part-time at Burger Queen during 2014 and earned \$3,500—as well as \$1,500 in interest income from his college savings account for total 2014 income of \$5,000—was still a qualifying dependent with a federal income tax filing requirement,<sup>189</sup> therefore, his AGI was included in the family MAGI for purposes of calculating the PTC.<sup>190</sup> However, because Jordan was not lawfully present, he not only had to be excluded from the number of family members in calculating the PTC, but his household income had to be excluded also. The exclusion is determined as follows: the unadjusted household income of \$55,000 (\$50,000 + \$5,000) is reduced by a fraction, the numerator is the poverty line for the family's size excluding individuals who are not lawfully present and the denominator is the poverty line for the family's size including individuals who are not lawfully present.<sup>191</sup> The calculation is shown in Table V below:

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188. See Temp. Treas. Reg. § 1.36B-2T(b)(2) (2014) (setting forth temporary regulations for determining a domestic abuse and abandonment exception to the requirement to file joint tax returns if a taxpayer is married to qualify for the PTC).

189. 26 U.S.C. §§ 151 (2013), 152 (2008) (setting forth the requirements and the deductions for claiming a dependent for federal income tax purposes).

190. See 26 U.S.C. § 36B(d)(2)(A) (describing household income as including MAGI from dependents with a tax return filing requirement); see also IRS Publication 929, [https://www.irs.gov/publications/p929/ar02.html#en\\_US\\_2015\\_publink1000203738](https://www.irs.gov/publications/p929/ar02.html#en_US_2015_publink1000203738) (setting forth the filing requirement for dependents with earned income in excess of the standard deduction amount and unearned income in excess of the threshold amount of \$1,000 in 2014 and \$1,050 for 2015 and 2016).

191. See 26 U.S.C. § 36B(e)(1)(B) (describing the pro ration formula for households with a member who is not lawfully present).



TABLE V  
PRORATION OF HOUSEHOLD INCOME WITH FAMILY MEMBER  
WHO IS NOT LAWFULLY PRESENT IN THE UNITED STATES

Size of Family:	2013	2014	Applicable Ratio
	Poverty Line	Household Income	
After Exclusion: 4	\$23,550	\$46,980	[\$55,000 x (23,550/ 27,570) = .85419]
Before Exclusion: 5	\$27,570	\$55,000	

Using the applicable 6.28%<sup>192</sup> for the pro-rated household income derived in Table V of \$46,980, Rose calculated that her share of the monthly SLCSP premium was \$246 [(\$46,980 x .0628 = \$2,950) / 12]. Their monthly PTC is the difference between the benchmark SLCSP premium of \$1,200 and Rose's calculated contribution of \$246 or \$954. Because this monthly amount did not change during the year, the total PTC claimed on Rose's 2014 federal tax return filed jointly with her husband would be \$11,448 (subsidizing her \$14,400 annual health care premiums the family paid for her and her children). This amount of refundable tax credit would offset other taxes due or would be refunded in full in addition to any other tax refunds.<sup>193</sup>

d. Married Taxpayers, Retired and Claiming Social Security Benefits

Now consider Eric, age sixty-two, and Paula Johnson, age sixty-three, who are retired and living on a small pension from Eric's job at J&B Creamery and their Social Security retirement benefits. Because they are not yet sixty-five, they do not qualify for Medicare health coverage.<sup>194</sup> During the open enrollment period for 2014, they acquired a SLCSP health insurance policy from their state exchange with an age adjusted monthly premium payment of \$1,300. While it would not be possible for

192. The 6.28% is determined on a linear basis = 4.0 beginning of range from Table III + 2.28; 2.28 = \$11,655\*/\$11,775\*\* x 2.3\*\*\*; \$46,980 MAGI - 35,325 (beginning of range) = \*\*\$11,655; total range = \$47,100 - 35,325 = \*\*\$11,775; 6.3 - 4.0 = \*\*\*2.3 or household contribution range.

193. 2014 Tax Return calculation for Jordan and Rose

Gross Income from Self-employment	\$53,800
Less: 1/2 Self-employment FICA Taxes	(3,800)
Adjusted Gross Income	\$50,000
Less Standard Deduction	(12,400)
Exemptions (5)	(19,750)
Taxable Income	\$17,850
Income Tax	\$1,785
Self-employment FICA Taxes	7,600
Less Child Tax Credits	(2,000)
Tax Liability before PTC	7,385
<b>Less PT (Fully-refundable)</b>	<b>(11,448)</b>
Tax Refund	(\$4,063)

194. Centers for Medicare & Medicaid Services, *Enrolling in Medicare Part A & Part B*, DEP'T HEALTH & HUM. SERVS. 5, <http://www.medicare.gov/pubs/pdf/11036.pdf> [https://perma.cc/5YNS-3WC7].

them to pay such a large premium out of their moderate monthly income, by offsetting the APTC directly against the monthly premiums, these premiums were affordable.

Paula and Eric Johnson's anticipated MAGI for 2014 is presented in Table VI, below:

TABLE VI  
CALCULATION OF THE JOHNSON'S  
2014 AGI AND MAGI

	<b>MAGI</b>	<b>AGI</b>
J&B Pension	\$23,530	\$23,530
Eric's Social Security Retirement Benefit	15,000 <sup>195</sup>	1,515 <sup>196</sup>
Paula's Social Security Spousal Benefit	8,000	
MAGI and AGI	\$46,530	\$25,045

Based on their MAGI of \$46,530 and the applicable 9.5 percent from Table III, the Johnson's share of their monthly premium is \$368 [ $(\$46,530 \times .095) / 12$ ] and their monthly APTC is \$932 ( $\$1,300 - \$368$ ).

e. Taxpayers Who Marry During the Taxable Year

Ishmael, age fifty-three, and Isaac, age fifty-two, were married on June 1, 2014. Ishmael is self-employed and reported an AGI on his 2013 federal income tax return in the amount of \$20,000. Because he had no tax-exempt interest, Social Security retirement, or foreign earned income, this amount was used as an estimate of his 2014 MAGI for purposes of determining his monthly APTC during 2014. Multiplying the estimated MAGI by 5.10% and dividing by 12, we find that Ishmael's share of his monthly health care premium is \$85 [ $(\$20,000 \times .051 = \$1,020) / 12$ ].<sup>197</sup> During the open enrollment period for 2014, Ishmael enrolled with a health care insurance provider through the exchange. He signed up for the SLCSP offered by that provider, which had a monthly premium cost of \$487. Therefore, Ishmael's monthly APTC of \$402 ( $\$487 - \$85$ ) was paid directly to the provider, significantly subsidizing his monthly health care premium.

At the same time, Isaac, who had an estimated MAGI of \$15,283, enrolled with the same insurance provider that offered him the same SLCSP that Ishmael had enrolled in for the same monthly premium cost of \$487.

195. In computing MAGI for the PTC, nontaxable Social Security benefits must be added to AGI. See 26 U.S.C. § 36B(d)(2)(B)(iii).

196. The amount of taxable Social Security benefits that the Johnson's must include in their AGI is calculated as follows: Add 50% of their aggregate Social Security benefits to their gross income; to the extent that this exceeds \$32,000, 50% will be taxable Social Security benefits [ $[(\$23,530 + (\$23,000 / 2)) - \$32,000 = \$3,030] \times .50 = \$1,515$ ]. 26 U.S.C. § 86(a)(1), (b)(1) (2005) (describing the calculation for determining the amount of taxable Social Security benefits).

197. The 5.1% is determined on a linear basis = 4.0 beginning of range from Table III + 1.1;  $1.1 = \$2,675 / \$5,655 \times 2.3$ ;  $\$2,675 = \$20,000 \text{ MAGI} - 17,325$  (beginning of range);  $\$5,655$  total range =  $\$22,980 - 17,325$ ;  $6.3 - 4.0 = 2.3$  or household contribution range.

Enjoying an APTC of \$449 (\$487 – \$38), Isaac's share of the monthly premium was only \$38 [(\$15,283 x .03<sup>198</sup> = \$458) / 12].

On June 1, Isaac and Ishmael returned to their insurance provider and exchanged their two single policies for a family policy covering both of them. The family policy was also the SLCSP offered by the provider and the monthly premium cost was \$800. Recalculating their monthly APTC with a married filing jointly status, Isaac and Ishmael discovered that their share of the new monthly premium was \$214 [(\$35,283 x .0726<sup>199</sup> = \$2,562) / 12], with the APTC subsidizing the balance of \$586 (\$800 - \$214) each month.

In April 2015, when they filed their 2014 federal income tax return as married filing jointly, their AGI was the same as their MAGI of \$45,960. Upon recalculating the required monthly contribution with this increased joint household income, their actual required monthly contribution is \$360 [(\$45,960 x .0939<sup>200</sup> = \$4,316) / 12]. Accordingly, the monthly PTC after they were married should have been only \$440 (\$800 – 360) instead of \$586. The aggregate APTC that they received in 2014 was \$8,357 [(5 x \$402) + (5 x \$449) + (7 x \$586)]. With a claimed monthly PTC of \$440 for the entire year, it would appear that they have excess APTC in the amount of \$3,077 [\$8,357 – (\$5,280 = 12 x 440)], which if they had been married for the entire year would increase their federal income tax liability, subject to any applicable limitations.<sup>201</sup> However, Treasury Regulations provide that taxpayers who marry during the year and file a joint return may compute any additional tax using an alternative computation.<sup>202</sup> The alternative computation, however, cannot be used to increase the additional tax.<sup>203</sup>

The additional tax liability using the alternative computation is equal to the excess of the taxpayer's APTC payments, \$8,357 in the present hypothetical, over the amount of the alternative marriage year credit.<sup>204</sup> The alternative marriage year credit is the sum of the premium assistance amounts for the marriage months (\$440 x 7 = \$3,080) and the sum of both taxpayers' PTC for the pre-marriage months.<sup>205</sup> However, for purposes of this calculation they each must use exactly one-half of the joint MAGI (\$45,960 / 2 = \$22,980) to recalculate their PTC during these non-mar-

198. See *supra* Table III.

199. The 7.26% is determined on a linear basis = 6.3 beginning of range from Table III + 0.96; 0.96 = \$4,263\*/7,755\*\* x 1.75\*\*\*; \*\$4,263 = \$35,283 MAGI – 31,020 (beginning of range); \*\*\$7,755 total range = \$38,775 – 31,020; \*\*\*8.05 – 6.3 = 1.75% household contribution range.

200. The 9.39% is determined on a linear basis = 8.05 beginning of range from Table III + 1.34; 1.34 = \$\*7,185/7,755\*\* x 1.45\*\*\*; \*\$7,185 = \$45,960 MAGI – 38,775 (beginning of range); \*\*\$7,755 total range = \$46,530 – \$38,775; \*\*\*9.5 – 8.05 = 1.45% household contribution range.

201. See 26 U.S.C. § 36B(f)(1)–(2); *but see* Treas. Reg. § 1.36B-4(b)(2)(ii) (2014) (setting forth the alternative method for taxpayers who marry during the tax year).

202. Treas. Reg. § 1.36B-4(b)(2) (2014).

203. Treas. Reg. § 1.36B-4(b)(2)(ii) (2014).

204. See *id.*

205. See *id.*

riage months.<sup>206</sup> For Ishmael, this revised amount is \$1,830 determined as follows ( $(\$22,980 \times .063^{207} = \$1,448) / 12 = \$121$ );  $(\$487 - \$121 = \$366) \times 5 = \$1,830$ . For Isaac, this revised amount is determined as follows ( $\$22,980 \times .063 = \$1,448$ ) / 12 = \$121);  $(\$487 - \$121 = \$366) \times 5 = \$1,830$ . Both of these calculations are identical only because they had no other family members during the non-marriage months. With dependent children, parents, siblings, or others, the calculation would have been different because the household sizes and corresponding applicable percentages would be different.

Finally, the actual APTC that Ishmael and Isaac received during the taxable year of \$8,357 is reconciled with the alternative recalculation of their PTC of \$6,740 ( $\$3,080 + \$1,830 + \$1,830$ ) to determine a potential increase to their tax liability of \$1,617. Notably, this amount is significantly less than the \$3,077 determined under the traditional method. In addition, because the couple's MAGI is less than 400 percent of the poverty line, or 292 percent<sup>208</sup> of the poverty line, the overall statutory limit will further reduce their additional tax amount to \$1,500.<sup>209</sup>

#### f. Taxpayers Who Divorce During the Taxable Year

Finally, consider Don and Debby who had been married for twenty-five years, but because of irreconcilable differences Debby filed for divorce on July 1, 2014. Since Don and Debby will not be married as of the last day of the tax year, they must file as unmarried taxpayers for the entire tax year with a filing status as either single or head of household.<sup>210</sup> Up until they were divorced, Don and Debby were enrolled in the same qualified healthcare plan. Therefore, they "must allocate the premium for the applicable benchmark plan, the premium for the plan in which" they were enrolled (if different), and the APTC for the period that they were married.<sup>211</sup> They may allocate these items to each other in any proportion that they agree on, or as adjudicated during their divorce settlement.<sup>212</sup> However, all of the items must be allocated in that same proportion.<sup>213</sup> If the taxpayers cannot agree on an allocation, 50% of these items will be allocated to each taxpayer.<sup>214</sup> Alternatively, if a qualified plan covered only one of the spouses for any period during the taxable year, the items for that period would be allocated entirely to that spouse.<sup>215</sup> Family law-

206. Treas. Reg. § 1.36B-4(b)(2)(ii)(B) (2014).

207. See *supra* Table III.

208.  $\$45,960 / \$15,730$  from Table I sets the poverty line for a family of two at 292%.

209. See 26 U.S.C. § 36B(f)(2)(B) (describing the limitation on additional taxes paid due to an excess of APTC over the PTC); see also *supra* Table IV.

210. See 26 U.S.C. §§ 7703(a)-(b) (describing that marital status is determined at the close of the taxable year and listing the requirements for head of household filing status).

211. See Treas. Reg. § 1.36B-4(b)(3) (2014) (describing the method of reconciling the PTC and the APTC for taxpayers who are married during the tax year, but are not married at the end of the tax year).

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.*

yers should consider these issues when counseling clients with respect to marital dissolution matters.

The foregoing examples cover a broad range of issues that lower and middle-income taxpayers are facing and will continue to face as they access affordable health care coverage with the government subsidy delivered through the income tax system via the PTC. This unique refundable tax credit is estimated and delivered in advance as the APTC, but must be reconciled more than a year later on a taxpayer's annual income tax return. Because the PTC is determined based upon a taxpayer's actual annual household income, but relies upon estimated monthly APTC, the annual reconciliation is challenging at best. When the reconciliation includes the various circumstances of life, including, but not limited to marriage, births, mixed immigration status families, fluctuating taxable and nontaxable income, and divorce, as described in the examples above, the calculations are painfully complicated worthy of Albert Einstein, the renowned physicist's infamous decree.

## V. CONCLUSION

"The hardest thing in the world to understand is the income tax."<sup>216</sup> And in 2014, despite zealous political contention, Americans on all sides of the political spectrum agree and have agreed for decades that our income tax system is too complicated.<sup>217</sup> This complexity is evidenced most profoundly in the data demonstrating that even before the PTC, almost 70% of working lower and middle-income Americans use paid preparers to prepare their annual income tax returns despite rising income, wealth inequality, and wage stagnation.<sup>218</sup> As this Article has evidenced through detailed examples, the PTC adds painful complications to this already meaningful burden. This Article adds to the existing literature regarding the PTC by laying out detailed examples of the complex mechanics of this new refundable tax credit. This foundation should provide assistance to those who hope to improve the credit, as well as those who are trying to understand it to better serve individuals who are subject to its complexity.

Notably, the PTC suffers from heightened complexity as a result of admirable Congressional goals to make healthcare insurance coverage uni-

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216. *Tax Quotes*, IRS, <http://www.irs.gov/uac/Tax-Quotes> [<https://perma.cc/9Y3Z-ZNNA>].

217. See Chuck Grassley, *Survey Paints a Big Picture: Simplify the Tax Code*, GASSLEY.SENATE.GOV (Apr. 20, 2015), <http://www.grassley.senate.gov/news/commentary/survey-paints-big-picture-simplify-tax-code> [<https://perma.cc/VEE3-RKW3>] (describing that a majority of respondents to a survey on income taxes agreed that simplification was necessary); see also Jeffrey Porter, *Tax Reform Fatigue Got You Down?*, AICPA (Jun. 11, 2015), <http://blog.aicpa.org/2015/06/tax-reform-fatigue-got-you-down.html#sthash.9Uey8kJj.dpbs> [<https://perma.cc/84LP-C9JN>] (describing fatigue on its and others persistent and long-term ongoing efforts for tax simplification and reform).

218. See *Paying the Price? Low-Income Parents and the Use of Paid Tax Preparers*, URBAN INSTITUTE 3 (Feb. 2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411145-paying-the-price-.pdf> [<https://perma.cc/PC3Q-EKP2>] (describing that in 2002 about two-thirds of families below twice the poverty line used paid tax return preparers).

versal. Congress had to ensure that healthcare insurance coverage was affordable and broadly accessible when it made health insurance coverage mandatory.<sup>219</sup> This goal is contingent upon the advance payment of the PTC through the APTC to directly subsidize monthly insurance premiums. Because the amount of the APTC is dependent upon estimates of household income and family size at the end of the following tax year, individuals who use the APTC to make their insurance affordable and accessible must reconcile their APTC with their PTC. As the above examples indicate, this can be a very complicated computation.

Moreover, because of certain benefit cliffs inherent in the design of the PTC and APTC, under certain circumstances the repayment of the PTC itself might cause financial hardship. APTC in excess of the PTC must be paid back in cash as an additional tax. While Congress has mitigated this hardship for certain lower and middle-income households, the detailed examples above demonstrate that challenges inherent in the design of the PTC and the APTC remain. Notably, the uniqueness of the advanced subsidy based on estimates; the non-cash, in-kind, immediately consumed benefit received that may have to be paid back in cash; as well as the lack of transparency and multi-party institutional players (e.g., state or federal exchange, health insurance provider, and IRS) involved in the PTC make it ripe for future improvements. Similar to other social benefit programs, it suffers from a design that increases household costs as household income increases. While at certain levels of household income these increased costs can be managed, at or near the poverty line these additional costs can send one sliding back into poverty. The ebb and flow of benefits and costs at the margin need to be carefully evaluated as more information becomes available to determine whether the design is functioning as Congress intended. This Article should provide transparency into the nuances and subtleties of these as well as related problems and serve as a catalyst for future statutory and procedural progress.

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219. *See King v. Burwell*, Sec. of Health and Hum. Servs., 135 S. Ct. 2480, 2486-87 (2015) (describing the interlocking requirements for successful comprehensive health coverage).

## APPENDIX A

TABLE 2: PREMIUM CAP, BY INCOME IN 2014 AND 2015

INCOME % POVERTY	Premium Cap max % of income for 2nd lowest silver plan	
	2014	2015
Under 100%	No Cap	No Cap
100% – 133%	2%	2.01%
133% – 150%	3% – 4%	3.02% – 4.02%
150% – 200%	4% – 6.3%	4.02% – 6.34%
200% – 250%	6.3% – 8.05%	6.34% – 8.1%
250% – 300%	8.05% – 9.5%	8.1% – 9.56%
300% – 400%	9.5%	9.56%
Over 400%	No Cap	No Cap

NOTES: Alaska and Hawaii have different poverty guidelines. Note that tax credits for the 2015 benefit year are calculated using 2014 federal poverty guidelines, while tax credits for the 2014 benefit year are calculated using 2013 federal poverty guidelines.

SOURCE: Kaiser Family Foundation