June 9, 2020

The Honorable Steven Mnuchin
Secretary
Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Dear Secretary Mnuchin and Commissioner Rettig:

We write to you as representatives of the State Based Marketplaces (SBMs), whose mission is to offer high-quality, affordable health insurance products to the over 4 million Americans we serve each year. As we all wrestle with the economic and social impacts of the COVID-19 pandemic, the SBMs have been at the vanguard of ensuring that the millions of Americans experiencing disruption of their health insurance benefits have access to a stable and affordable source of insurance coverage. Since the onset of the pandemic, hundreds of thousands of individuals have come to our doors, most struggling with job loss or sudden, significant income changes.

We appreciate the Administration’s extraordinary efforts to support health coverage during the crisis, including signing into law legislation to increase federal support for Medicaid and through administrative actions like additional flexibility for tax-preferred health benefits, COBRA continuation coverage, and federal health care programs. These actions to support coverage are crucial to address the pandemic, protect consumers financially, and support front-line health care providers.

We write to ask for action to address a problem that threatens these goals. Specifically, a unique confluence of conditions creates acute risk for individuals seeking to purchase marketplace health insurance with the premium tax credit. Using the credit generally means projecting one’s income for the year – and owing money back at tax time if the prediction is off. Current conditions make such prediction infeasible for many taxpayers: employment prospects for the rest of the year are unknowable, and the CARES Act created new income rules that are complex and inconsistent with the long-standing rules reflected in the Marketplace applications. This difficulty predicting income means that taxpayers who receive advance tax credits risk substantial unexpected tax liability. This risk is inimical to our COVID efforts: it discourages taxpayers from enrolling in coverage and imposes potentially onerous tax liability in early 2021, just when the economy should be regaining its stride.

In light of these circumstances, we respectfully request that the IRS provide the maximum relief possible with respect to repayment of 2020 APTC. Such relief is clearly permissible under Treasury
and IRS authority granted by the Internal Revenue Code, and it is consistent with previous measures taken by the agencies.

**BACKGROUND**

The COVID-19 pandemic has resulted in over 40 million unemployment insurance filings across the United States – a number expected to rise. With about 15% of the nation out of work, people in our states are struggling to maintain health coverage. Already we have seen notable upticks in enrollment in coverage offered through our marketplaces as consumers seek out federal subsidies that aid in affording private health insurance coverage.

The main federal subsidy for marketplace coverage is the premium tax credit (PTC) – a refundable tax credit that is generally advanced to taxpayers by the marketplace. Advance PTC (APTC) must then be reconciled against actual PTC on the tax return. Liability for excess APTC is capped for individuals with incomes no more than 400 percent of the federal poverty level (FPL), but the caps run into the thousands of dollars. Because eligibility for the caps and the PTC itself cuts off at a cliff at 400 percent of the federal poverty level, a small difference between projected and actual income for the year can lead to substantial tax liability – in many cases far greater than the income change itself.

Under longstanding rules, eligibility for APTC/PTC, Medicaid, and the Children’s Health Insurance Program (CHIP) are all based on the same income measure, referred to as modified adjusted gross income, or MAGI. Like adjusted gross income, MAGI generally includes unemployment insurance (UI) benefits. However, the CARES Act changed this rule and delinked the income measures used by the programs. Specifically, the additional $600 per week in UI benefits under the CARES Act (referred to as Federal Pandemic Unemployment Compensation, or FPUC) is specifically excluded from income for purposes of Medicaid and CHIP – presumably with the goal of maximizing eligibility for these programs. But FPUC is included in income for PTC purposes, creating a disconnect. The CARES Act also provides a stimulus payment – generally $1,200 per adult and $500 per dependent child – that is excluded from income for all purposes.

**UNPRECEDENTED UNCERTAINTY AND CLAWBACK RISK**

In normal times, most taxpayers can more easily avoid substantial tax liability by basing their income projections on past experience. But the COVID crisis makes income prediction impossible for many taxpayers, for three key reasons.

First, income for previous years is not currently a good indicator of expected income for the year. This is especially true for those enrolling in or updating marketplace financial assistance mid-year, who are generally doing so because they have lost a job or other income.

Second, predicting income for late 2020 is extremely difficult, since no one knows what the economy will look like in August, let alone November. Taxpayers should not be expected to make predictions about the late-year economy when experts cannot agree.

Finally, the rules under CARES Act rules are novel, complicated, and not reflected in longstanding Marketplace application materials, including those developed by CMS. Taxpayers and enrollment assisters are accustomed to income being the same for Medicaid and APTC, and many do not understand the new rules. This confusion is likely to be exacerbated by the rules for the stimulus
payments, which are excluded for both purposes. Perhaps most concerning, the new rules are not accurately reflected in the architecture of our applications, which were built to reflect the complex set of long-standing rules for income counting. We are sprinting to make changes, but hundreds of thousands have already enrolled used application systems that did not reflect the new rules. Thus, it is likely that mistakes were made, and through no fault of the applicants.

In short, current conditions make it impossible for many taxpayers who receive APTC to avoid the risk of substantial unexpected tax liability.

**HARM FROM CURRENT POLICY**

In addition to being manifestly unfair, the current dynamic harms the COVID response in several ways.

**Discourages health care enrollment.** Given the high risk of owing unexpected tax liability, taxpayers facing the current dynamic may simply choose not to enroll in coverage. Without health insurance, individuals face greater risk to both their health and their finances.

**Large repayment liability could stall economic recovery.** Taxpayers who do accept renewed employment and owe back APTC will face tax bills in early 2021 that could amount to many thousands of dollars, just when they and the economy are getting back on their feet.

These dynamics run counter to federal efforts to expand coverage, contain the spread of the virus, and support economic recovery.

**RECOMMENDATION**

Fortunately, these harmful dynamics can be averted through straightforward action by the IRS and Treasury Department.

**IRS and Treasury Should Immediately Announce Relief from 2020 APTC Clawback for those Affected by the COVID Emergency**

In light of the emergent circumstances of the pandemic, we respectfully request that the IRS and Department of the Treasury act to provide temporary relief with respect to APTC repayment. Specifically, given the extraordinary difficulty of projecting 2020 income, taxpayers who receive APTC should be protected from repayment. This relief should be announced as soon as possible to quickly eliminate any disincentive to enroll due to fear of repayment.

We recommend applying this relief broadly given the broadly applicable challenges in predicting income and the importance of administrative simplicity. However, this relief could be limited in a number of ways. For example, relief could be limited to one of the following conditions:

- Individuals who attest at tax filing that they have been adversely affected by the COVID crisis;
- Individuals who received FPUC and therefore were directly affected by the sudden onset of the complex new eligibility rules;
- Individuals who attest at tax filing to having made a good-faith effort to project their income.

**LEGAL GROUNDS AND PRECEDENTS FOR RELIEF**

The National Academy for State Health Policy (NASHP), is a non-profit, non-partisan organization representing an independent academy of state health policymakers. For questions, contact Trish Riley triley@nashp.org
The relief described above is within the scope of the Treasury Department’s rulemaking authority under the Internal Revenue Code and is consistent with other measures Treasury and IRS have taken over the years and in response to the COVID crisis.

The Code includes both general authority for temporary relief and also specific authority in section 36B. Section 7805(a) of the Code provides broad rulemaking authority to promulgate rules and regulations to support the functioning of the Code. It authorizes the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of [the Tax Code].” It also specifically calls out authority for “rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue," such as the one created by the CARES Act.

Treasury and IRS have used this authority on numerous occasions to provide temporary relief from the enforcement of tax provisions that were premature or unfair. For example, Treasury relied on this authority in 2013 when it delayed the effective date of three major ACA tax provisions: the employer shared responsibility provision under Code section 4980H, the employer reporting requirement under section 6056, and the coverage reporting requirement under section 6055.

In justifying that action at the time, the Department recounted a long list of similar actions over the years. The list includes actions undertaken by numerous administrations of both parties.¹

In responding to the COVID crisis, Treasury and the IRS have asserted similar broad authority to provide temporary relief. For example, Notice 2020-15 permits HSA-eligible high-deductible health plans (HDHPs) to cover COVID testing and treatment pre-deductible, even though section 223 generally permits HDHPs to cover only preventive care pre-deductible. Notice 2020-15 identifies no specific statutory basis for this change, instead explaining that the relief is necessary “[d]ue to the unprecedented public health emergency, and the need to eliminate potential administrative and financial barriers to testing for and treatment of COVID-19.” Notices 2020-29 and 2020-33 similarly provide extraordinary temporary relief given COVID’s exigent circumstances. These extraordinary actions show that Treasury appreciates the severity of the crisis and understands its authority to respond with strong temporary action. Similar reasoning is applicable here.

Code Section 36B, which authorizes the premium tax credit, provides additional authority for actions of this sort. Section 36B(g) provides general authority for PTC rulemaking (“The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section…”). And section 36B(g)(1) specifically authorizes regulations to address disconnects between APTC and PTC, calling for “regulations which provide for…the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act.”

Flexibility over reconciliation will prevent undue financial hardship and assist Americans in obtaining and retaining health coverage during and after the COVID-19 public health emergency. This aligns with the collective mission of the SBMs and federal actors to increase access to coverage while also

¹ See Testimony of J. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, before the House Energy and Commerce Subcommittee on Oversight and Investigations, July 18, 2013, available at https://www.govinfo.gov/content/pkg/CHRG-113hhrg86396/html/CHRG-113hhrg86396.htm. A similar explanation and list were included in a letter dated July 9, 2013 from Assistant Secretary Mark Mazur to House Energy and Commerce Chairman Fred Upton.
enabling consumers to focus their limited dollars on stimulating our economy rather than risk on unexpected tax liability.

We thank you in advance for considering our recommendation and we would be pleased to provide any assistance or information that could support your decision making on this important topic.

Sincerely,

Marlene Caride
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New Jersey Department of Banking and Insurance

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Chief Executive Officer
MNsure

Michele Eberle
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The National Academy for State Health Policy (NASHP), is a non-profit, non-partisan organization representing an independent academy of state health policymakers. For questions, contact Trish Riley triley@nashp.org