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**PROPOSED CHANGES TO INTERNAL REVENUE CODE, SECTION 36B
REFUNDABLE CREDIT FOR COVERAGE UNDER A QUALIFIED
HEALTH PLAN**

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EXECUTIVE SUMMARY

Enacted as part of the *Affordable Care Act* (“ACA”), Internal Revenue Code (“IRC”) Section 36B provides eligible taxpayers a premium tax credit (“PTC”) that lowers their health insurance premiums. The PTC is generally available to taxpayers whose modified adjusted gross income (“MAGI”) is at least 100 percent but not more than 400 percent of the Federal Poverty Line (“FPL”). Taxpayers can elect to receive the PTC as an advanced payment (“APTC”). The APTC amount is based on taxpayers’ estimated MAGI for a taxable year and is paid directly to their health insurance provider. When taxpayers who qualified for advanced credits file their federal income tax returns, they must reconcile the PTC amount they are eligible for against the APTC they actually received. Generally, a taxpayer must pay back any excess amount of APTC, subject to certain limitations. The MAGI calculation includes the entire amount of any lump-sum Social Security Disability Insurance (“SSDI”) payment the taxpayer received in the current tax year. Although the APTC is a significant benefit to millions of taxpayers, the MAGI calculation can create unexpected and harsh results for the same low-income taxpayers the APTC is designed to help.

To get SSDI, recipients often endure a long application process with the Social Security Administration (“SSA”) to prove eligibility. Due to these delays, some SSDI recipients are issued a one-time retroactive lump-sum payment to cover the period from their initial application to the date of approval, which can span multiple tax years. For purposes of calculating MAGI, lump-sum SSDI payments are treated as received in a single tax year, even if such awards are attributable to multiple tax years. This results in some SSDI recipients (many of whom are low-income and dependent on the APTC for health insurance) discovering they are expected to repay some or all of their APTC payments because their MAGI was artificially inflated by the lump-sum SSDI payment.

The PTC is designed to assist low- and middle-income taxpayers, yet the application of IRC Section 36B can eliminate this assistance and produce a considerable, unexpected tax liability. SSDI recipients have no control over when they receive their SSDI one-time retroactive lump-sum payment, and the longer the SSA takes to approve an application, the larger the lump sum payment becomes. The delayed processing time of the SSA increases the likelihood that a one-time retroactive lump-sum SSDI payment will push a taxpayers’ MAGI above 400 percent of the FPL, rendering them ineligible for the PTC and creating a tax liability to repay excess APTC.

This paper reviews the PTC and comments on how the inclusion of one-time retroactive lump-sum SSDI payments in MAGI unfairly impacts vulnerable taxpayers. This paper proposes legislative changes to protect taxpayers from this inequitable result. SSDI applicants cannot anticipate when their SSDI payments will be received and are therefore blindsided by a resulting tax liability stemming from excess APTC. Ultimately, in these circumstances, the tax liability is arbitrary and unpredictable, as it depends on how quickly the SSA can process the taxpayer’s SSDI application.

DISCUSSION

I. BACKGROUND

A. The Affordable Care Act: IRC Section 36B

The ACA was signed into law on March 23, 2010.³ The “stated purpose of the [ACA] is to ‘improve access to and the delivery of health care services for all individuals, particularly low income, underserved, uninsured, minority, health disparity and rural populations.’”⁴ To help achieve these aims, the ACA mandates health insurance participation and provides subsidized insurance premiums, which are administered through the IRS.

The ACA created Section 36B of the IRC so that taxpayers meeting certain requirements are eligible for the PTC, which subsidizes the cost of their health insurance purchased through a health insurance exchange.⁵ The PTC can be claimed by taxpayers when they file their taxes, or a taxpayer can choose to receive PTC payments immediately by electing to receive the APTC whereupon monthly payments are made throughout the year directly from Treasury to the recipient’s insurer.⁶ The APTC is based on the taxpayer’s estimated income for the upcoming tax year, and the taxpayer must later reconcile the APTC amounts received with their actual income when they file their U.S. federal tax return for that tax year.

1. PTC Eligibility

Taxpayers are generally eligible for the PTC if their household income is at least 100 percent but not more than 400 percent of the amount equal to the FPL for the tax year.⁷ Eligibility is also contingent on enrollment in a qualified health plan.⁸ For context, the FPL in 2022 for an individual living in one of the 48 contiguous States and the District of Columbia was \$12,880.⁹

A taxpayer who has claimed the PTC, or who received the APTC, files Form 8962 with their federal income tax return. For those taxpayers who claim the APTC, Form 8962 reconciles the amount of the PTC for which the taxpayer is eligible for in that tax year, against the amount of any APTC the taxpayer received for that tax year. If the APTC is more than what the taxpayer is eligible to receive as PTC, the taxpayer’s tax liability for such tax year is increased by this excess APTC amount (the “*excess APTC*”), subject to certain limitations. Depending on the taxpayer’s household income, the amount of excess APTC is capped at the following amounts:¹⁰

³ Pub. L. No. 111-148 (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010 (HCERA); Pub. L. No. 111-152.

⁴ Pub. L. No. 111-148, sec. 5001, 124 Stat. 119, 588 (2020). *See also* Title I of the ACA, which aims to make quality, affordable health care available for all Americans.

⁵ *See Abrego v. Commissioner* (T.C. Memo. 2020-87) (citing Treas. Reg. § 1.36B-2(a)).

⁶ *McGuire v. Commissioner*, 149 T.C. 254, 259- 262 (2017) (discussing eligibility requirements).

⁷ IRC § 36B(c)(1)(A) (all references to IRC are to Title 26 of the United States Code, unless otherwise stated).

⁸ IRC § 36B(b)(2)(A).

⁹ *See* Department of the Treasury, Internal Revenue Service, Instructions for Form 8962 (2022).

¹⁰ IRC § 36B(f)(2)(B)(i).

If the taxpayer’s household income (expressed as a percent of FPL) is:	The excess APTC dollar amount is capped to:
Less than 200%	\$600
At least 200% but less than 300%	\$1,500
At least 300% but less than 400%	\$2,500

i. *MAGI Calculation*

Household income for purposes of the PTC means the sum of the taxpayer’s MAGI plus the MAGI of family members: (1) for whom the taxpayer properly claims deductions for personal exemptions and (2) who are required to file a Federal income tax return under Section 1.¹¹ An individual’s MAGI is his or her AGI (within the meaning of Section 62, increased by: (1) amounts related to foreign earned income and housing costs which were excluded from gross income under Section 911, (2) tax-exempt interest, and (3) the amount of any Social Security benefits which were not included in gross income under Section 86.¹²

ii. *The Number of Taxpayers Who Benefit from the PTC*

Many taxpayers utilize the PTC (including the APTC). In the first half of 2020, more than 10.5 million people enrolled for the PTC, and 86.4 percent of those enrolled chose to receive the APTC.¹³

Because the APTC is based in part on the taxpayer’s expected annual income, many taxpayers later discover they are ineligible for some or all of the APTC when they file their federal income tax returns. Based on 2016 U.S. federal income tax filings:

- Around 5.3 million taxpayers claimed approximately \$19.2 billion in PTC (the average PTC credit was \$3,620).¹⁴
- Approximately 3.3 million taxpayers reported excess APTC. The average excess APTC amount to be repaid was \$870, for a total of \$2.9 billion. An estimated 50 percent of these filers reported owing an excess APTC repayment of less than \$500 and 75 percent reported owing less than \$1,000.¹⁵

¹¹ IRC § 36B(d)(2)(A) (*see also* Treas. Reg. § 1.36B-1(e)(1)).

¹² IRC § 36B(d)(2)(B) (*see also* Treas. Reg. § 1.36B-1(e)(2)).

¹³ Clifton Painter, Tax Foundation, Evaluating Trade-Offs of Expanded Premium Tax Credits as Enrollment Period Ends (August 16, 2021), <https://taxfoundation.org/expanded-premium-tax-credit-american-rescue-plan/>.

¹⁴ IRS, IRS Commissioner John Koskinen updated members of Congress regarding 2016 tax filings related to Affordable Care Act provisions (January 9, 2017) (“*Letter to Congress*”), <https://www.irs.gov/pub/newsroom/commissionerletteracafileingseason.pdf>.

¹⁵ *Id.*

- Approximately 921,000 taxpayers (about 28 percent of those who reported excess APTC) were subject to the statutory repayment caps.¹⁶

In the 2020 tax year, approximately 4.4 million tax returns indicated receipt of the APTC, representing \$32.2 billion in tax credits. Of those 4.4 million tax returns, approximately 1.7 million taxpayers received excess APTC amounts.¹⁷

One reason some taxpayers find they are no longer eligible for the PTC is the inclusion of SSDI lump-sum payments in their MAGI, as discussed below.

B. Social Security Disability Insurance: The Application Process

SSDI recipients endure a long application process to prove SSDI eligibility; sometimes SSDI applications can take several years to be approved, which includes an appeals process and a hearing where applicants often engage an attorney to represent them. Due to these delays, some SSDI recipients will be issued a one-time retroactive lump-sum payment to cover the period from their initial SSDI application to the date of approval. This lump-sum payment can therefore cover multiple tax years.

SSDI is part of the *Social Security Act*. SSDI eligibility requires applicants to be unable to do any substantial work because of their medical condition(s), and such medical condition(s) must have lasted, or be expected to last, at least 1 year, or be expected to result in death.¹⁸

Between 2011 and 2020, the overall acceptance rate for SSDI applicant claims averaged around 31 percent.¹⁹ The percentage of applicants awarded SSDI on their initial claim averaged 21 percent over this same period.²⁰ Applicants who have had their initial claim denied may request reconsideration with another hearing officer, and if this reconsideration claim is rejected, the applicant may appeal before an Administrative Law Judge;²¹ only 2–8% of applicants are awarded SSDI on reconsideration and/or appeal of their claim.²²

After an SSDI applicant submits a claim, it is forwarded by the SSA to medical and vocational experts “who contact [the SSDI applicant’s] doctors and other places where [they] received treatment to get [their] medical records.”²³ In addition, the SSDI applicant may be required to provide more forms, evidence, and submit to further medical examinations or tests.²⁴

¹⁶ *Id.*

¹⁷ Congressional Research Service, Health Insurance Premium Tax Credit and Cost-Sharing Reductions, January 17, 2023, at 9 (available at <https://crsreports.congress.gov/product/pdf/R/R44425>).

¹⁸ Social Security Administration (SSA), What You Should Know Before You Apply for Social Security Disability Benefits (“*Fact Sheet*”), <https://www.ssa.gov/disability/Documents/Factsheet-AD.pdf>.

¹⁹ SSA, Annual Statistical Report on the Social Security Disability Insurance Program, 2021 (October 2022) (“*2021 Report*”), at 159, https://www.ssa.gov/policy/docs/statcomps/di_asr/2021/di_asr21.pdf.

²⁰ *Id.*

²¹ 20 C.F.R. § 404.966-67 (2019).

²² 2021 Report, at 159.

²³ See Fact Sheet.

²⁴ *Id.*

The SSA website indicates it can take on average 3 to 5 months to get an initial determination of an SSDI claim, but acknowledges “the exact time depends on how long it takes to get your medical records and any other evidence needed to make a decision.”²⁵ The average processing time for disability claims in 2022 was 183 days, approximately 6 months.²⁶ Yet, according to the American Association of Retired Persons, in November 2022 the average processing time for an SSDI application was 204 days, roughly 7 months.²⁷ And if an SSDI applicant appeals, the average wait time before a hearing is held can range from 9 to 25 months based on location.²⁸ Thus, an SSDI claim may take over a year to be approved, a timeline that is largely outside of the applicant’s control.

C. Inclusion of SSDI in MAGI Creates Inequitable Results and Impacts Low Income Taxpayers

For purposes of calculating MAGI, the IRS treats a SSDI lump-sum payment as income in the year received, regardless if such payment covers multiple tax years. The result being some SSDI recipients, many of whom are low-income and dependent on the APTC to get health insurance, discover their MAGI is artificially inflated above the FPL thresholds in the tax year they receive the lump-sum SSDI payment. Such taxpayers may have to repay some or all of their APTC payments.

The Taxpayer Advocate Service (“*TAS*”) estimates it received 14,820 cases in 2021 involving the ACA, which would include cases involving the PTC; this represents 5.6 percent of all cases received by the TAS.²⁹ The TAS further estimates more than 234,000 taxpayers were impacted by the inclusion of lump-sum SSDI in their MAGI in the 2019 tax year, thus disqualifying such taxpayers from receiving the PTC.³⁰ Yet more than 53,000 of those taxpayers would have been below 100 percent of the FPL but for their receipt of the lump-sum SSDI payment.³¹ SSDI is granted to persons unable to do any substantial work because of their medical condition(s), so the inclusion of SSDI in MAGI is impacting the low income taxpayers the APTC is aimed to help.

²⁵ *Id.*

²⁶ SSA Annual Data for Disability Reconsideration Average Processing Time (excludes technical denials), https://www.ssa.gov/open/data/disability_reconsideration_average_processing_time.html#programDescription (this is for both SSDI and the Supplemental Security Income program, and is the cumulative number of elapsed days from the date of filing through the date payment is made or the denial notice is issued for all reconsideration claims).

²⁷ AARP, How long does it take for Social Security disability benefits to start? (December 20, 2022), <https://www.aarp.org/retirement/social-security/questions-answers/how-long-does-it-take-for-disability-benefits-to-start.html>.

²⁸ SSA, Average Wait Time Until Hearing Held Report (For the Month of March 2023), https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html.

²⁹ Internal Revenue Serv. Pub. No. 55-B, Data Book 2021 (2022), <https://www.irs.gov/pub/irs-pdf/p55b.pdf>

³⁰ National Taxpayer Advocate Service, NTA Blog: Inconsistent Tax Treatment Causes Draconian Results for Low- and Middle-Income Purchasers of Marketplace Health Insurance (July 20, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-inconsistent-tax-treatment-causes-draconian-results-for-low-and-middle-income-purchasers-of-marketplace-health-insurance/>.

³¹ *Id.*

1. *Judicial Holdings*

The Tax Court is the only forum to grapple with this problem facing thousands of taxpayers. Professor Bryan Camp succinctly summarized the Court's view of taxpayers' predicament – “too bad, so sad”.³² The Court has confirmed that Section 36B requires lump-sum SSDI payments to be included in MAGI in the year received.

In *Johnson v. Commissioner*, the taxpayer received a \$26,280 lump-sum payment of Social Security benefits in 2014.³³ Of that payment, \$11,902 was attributable to 2013 and \$14,278 to 2014. During 2014, he also received a total of \$4,460 in APTCs based on his eligibility at the time.

On his 2014 return, Mr. Johnson reported \$24,450 in wages and only \$7,509 in taxable Social Security benefits. He did not report any excess APTC and did not file the required IRS Form 8962, Premium Tax Credit (PTC). The Commissioner determined a deficiency consisting of the requirement to repay the \$4,460 of excess APTC.

The central issue in *Johnson* was the interpretation of the related Section 86(e) election which states MAGI is the taxpayer's adjusted gross income plus, in pertinent part, “an amount equal to the portion of the taxpayer's social security benefits (as defined in Section 86(d)) which is not included in gross income under Section 86 for the taxable year.”³⁴

Mr. Johnson filed an amended 2014 tax return and made an 86(e) election. He argued that his Section 86(e) election allowed him to exclude from his 2014 MAGI all the Social Security benefits attributable to 2013 or, alternatively, the Social Security benefits attributable to 2013 except the portion of his 2013 benefits included in his 2014 gross income. Thus, he reported \$31,137 of adjusted gross income, consisting of \$24,450 of wages and \$6,687 of taxable Social Security benefits. On his Form 8962, he reported MAGI of \$38,728, which included his Social Security benefits relating to 2014 and a portion relating to 2013. He also reported an excess APTC repayment of \$1,250 on his amended return and Form 8962.

The Commissioner took the position that Section 36B is clear and that Mr. Johnson's Section 86(e) election had no effect on the computation of his 2014 MAGI. The Court agreed and held the election merely determines the lump-sum payment amount that should be included in gross income for 2014, the year of receipt. The Court bolstered its conclusion by reference to the legislative history. The Court noted that the ACA initially did not require the inclusion of nontaxable Social Security benefits in MAGI. However, Congress amended the statute in 2011, redefining MAGI to specifically include the full amount of a taxpayer's Social Security benefits.

³² Bryan T. Camp, *The Sharp Corners of ACA Premium Tax Credit Provisions*, 163 Tax Notes 2001 (June 24, 2019).

³³ *Johnson v. Commissioner*, 152 T.C. 121 (2019).

³⁴ Section 86(e) allows a taxpayer who receives a lump-sum payment of social security benefits in a single year that relates to prior years to only include the amount relating to the current tax year, plus the taxable portion of the amounts from the prior years, in determining taxable social security income. The statute places the burden on the taxpayer to make this 86(e) election on the current year tax return.

The Tax Court has consistently decided all subsequent cases involving this issue.³⁵ The Court has repeatedly indicated, “we cannot ignore the law to achieve an equitable end.”³⁶ And, “[w]hile we are sympathetic to petitioner’s situation, his MAGI exceeded eligible levels, and we are bound by the statute as written.”³⁷ This sentiment does little to help taxpayers struggling with severe financial hardship.

2. *Other IRS Guidance*

i. *IRS Office of Chief Counsel*

In 2019, the IRS Office of Chief Counsel issued guidance in response to a request from the Taxpayer Advocate concerning the authority of the IRS to relieve taxpayers of the tax imposed on the excess APTC amount arising from the receipt of lump-sum Social Security benefits.³⁸ Specifically, the Taxpayer Advocate inquired whether Executive Order (“*EO*”) 13765 provided the IRS with authority to provide taxpayers with such relief. Chief Counsel, citing *Johnson*, concluded that 36B statutorily requires the inclusion of lump-sum benefits in MAGI. Moreover, Chief Counsel noted EO 13765 merely allowed departments and agencies in the executive branch to exercise authority and discretion to minimize burdens imposed by the ACA only “[t]o the maximum extent permitted by law” Thus, the IRS had no authority to provide relief that exceeds the requirements of 36B.

ii. *Taxpayer Advocate Recommendation*

The Taxpayer Advocate has repeatedly identified this issue as one of the “most-serious problems” taxpayers have been encountering in recent years.³⁹ After years of reporting the problem to Congress, the Taxpayer Advocate made a legislative recommendation for curing the problem.⁴⁰

The Taxpayer Advocate acknowledged some fixes in the works,⁴¹ and that the IRC contemplates multiple options for computing the taxable portion of lump-sum Social Security

³⁵ See *Monroe v. Commissioner*, 117 T.C.M. (CCH) 1226; *Heston v. Commissioner*, T.C. Summary Op. 2021-13; *Knox v. Commissioner*, 122 T.C.M. (CCH) 296.

³⁶ *Johnson v. Commissioner*, 128-29.

³⁷ *Id.*

³⁸ C.C.A. 201949001.

³⁹ National Taxpayer Advocate, Annual Report to Congress 2015, Most Serious Problem #15: Affordable Care Act (ACA) – Individuals: The IRS Is Compromising Taxpayer Rights As It Continues to Administer the Premium Tax Credit and Individual Shared Responsibility Payment Provisions. page 176; https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_MSP_15_ACA-Individuals.pdf; National Taxpayer Advocate, Fiscal Year 2017 Objectives Report to Congress, Area of Focus #9: As the IRS Has Gained Experience in Administering the Individual Provisions of the Affordable Care Act, It Has Addressed Some Previous Concerns But a Few Still Remain, page 136; https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Area_of_Focus_9.pdf.

⁴⁰ National Taxpayer Advocate, 2022 Purple Book, Legislative Recommendation #61: Amend IRC § 36B(d)(2) to Prevent Individuals From Losing Some or All of Their Premium Tax Credits When Receiving Lump-Sum Social Security Benefits Attributable to a Prior Year page 127; https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_08_MiscRecs_61.pdf.

⁴¹ Congress has made a going forward correction to the problem in Section 9661 of the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, 135 Stat. 4, 182-83 (2021), which allows taxpayers with household incomes

benefits received in one year. However, the problem persists that “36B(d)(2)(B) does not allocate a multiyear lump-sum payment when computing [MAGI] for PTC purposes.”⁴²

The Taxpayer Advocate’s recommendation is to “[a]mend IRC [Section] 36B(d)(2) to exclude from MAGI any portion of a lump-sum Social Security benefits payment attributable to a prior year pursuant to IRC [Section] 86 for purposes of determining whether a taxpayer is eligible for a PTC and, if eligible, the amount of PTC allowed.”⁴³

3. *Arbitrary Results*

i. *Compliant Taxpayers Are Not Prepared For Liability*

SSDI recipients have no control over when they receive their SSDI one-time lump-sum payment, yet the timing of their payments may create an unexpected tax liability. The longer the SSA takes to approve an application, the larger the lump-sum payment will become, thus increasing the likelihood that such payment will push taxpayers’ MAGI above 400 percent of the FPL. This renders them ineligible for the PTC and creates a tax liability to repay excess APTC. SSDI applicants cannot anticipate when their SSDI payments will be received and are therefore blindsided by a resulting tax liability stemming from excess APTC. Ultimately, in these circumstances, the tax liability is arbitrary and unpredictable, as it depends on how quickly the SSA can process the taxpayer’s SSDI application.

ii. *Taxpayer Confusion*

The process of how the PTC and APTC are administered creates confusion among taxpayers. The APTC payments are never in the taxpayer’s possession. All APTC payments are made directly to the taxpayer’s health insurance providers. Because they never received the dollar amount in their pockets, taxpayers struggle to understand how they received the benefit of the APTC and why they have to pay all or a portion of these APTC payments back to the IRS. In addition, some taxpayers find it difficult to understand how MAGI is different from the taxable income reported on their tax returns, and why nontaxable amounts of their SSDI payments are included in determining their MAGI.

The PTC was created to help taxpayers afford healthcare. Yet taxpayers who are disabled and who, arguably, need this assistance the most are being disadvantaged. The inclusion of SSDI benefit payments in the PTC eligibility calculation works against the goal of the ACA. The following examples illustrate how the pre-2020 rules continue to impact taxpayers who received lump-sum SSDI payments.⁴⁴

over 400 percent of the Federal Poverty Level to be eligible for a PTC, but only for tax years beginning in 2021 and 2022.

⁴² National Taxpayer Advocate, 2022 Purple Book, Legislative Recommendation #61, page 127.

⁴³ *Id.*

⁴⁴ These examples are based on the true stories of taxpayers who are experiencing financial hardships caused by the pre-2020 rules. Their names have been changed for this paper.

Example 1

A husband and wife, John and Mary, joint filing taxpayers, received the benefit of the APTC for several years without issue. John then suffered medical complications rendering him unable to work. In 2019, 4 years after submitting his SSDI application, the husband received a lump-sum back-payment of \$56,000.

Solely because this lump-sum SSDI payment was paid in one tax year, the taxpayers' MAGI exceeded 400% of the FPL in 2019. Under the current 36B rule, these taxpayers were required to repay an excess APTC amount of approximately \$15,000, which was reflected as a tax liability on their 2019 tax return.

The taxpayers submitted an Offer in Compromise ("**OIC**"), Doubt as to Collectability. The OIC officer determined John and Mary's net monthly income was negative \$1,900, but denied the OIC because the taxpayers' potentially have \$100,000 of equity in their modest family home—their sole asset. The OIC Appeals officer sustained the OIC denial.

Example 2

In 2016, Heather—who had been unable to work for over 2 years due to physical disability—was finally deemed eligible for SSDI. She received a lump-sum SSDI payment of over \$40,000 as back payment, such amount covering three tax years. While her SSDI application was pending, as part of her employer's private disability insurance plan ("Employer Insurance Plan"), Heather received monthly benefit payments from her employer. Pursuant to this Employer Insurance Plan contractual agreement, Heather paid the entirety of her lump-sum SSDI payment to her employer. In 2016, like in prior years, Hannah chose to receive the APTC, but her SSDI lump-sum payment inflated her MAGI so that she was deemed ineligible for the entire APTC amount she received that year. Heather is reliant solely on her SSDI to pay for her necessary living expenses. She is currently pursuing an OIC to resolve her remaining \$4000 tax liability, which is solely attributable to her being deemed ineligible for the APTC. An otherwise fully compliant taxpayer, Heather has struggled to comprehend why she has any tax liability in 2016, her confusion compounded by the fact she had to repay her lump-sum SSDI payment to her employer—thus she had no windfall in 2016.

iii. 2020 Tax Year Excess Repayment Suspension

For tax year 2020, the *American Rescue Plan Act of 2021*, enacted on March 11, 2021, suspended the requirement that taxpayers needed to repay any excess APTC. Thus, any taxpayer fortunate to have received lump-sum SSDI payments in the 2020 tax year did not have to reconcile their APTC at the end of the year. This suspension is completely unconnected to the purpose of the tax credit and highlights how random the PTC rules are. This suspension rule, in particular, creates extremely unfair results. To illustrate, if there were two identical taxpayers, but one received her SSDI lump-sum payment in 2019 and the other received her lump-sum payment in 2020, only the first taxpayer would potentially have a tax liability as a result of the SSDI payment. Overall, the PTC creates drastically different outcomes for similarly situated individuals depending on unreasonable rules.

D. SSDI Taxpayers Unable to Pay Excess APTC Have Limited and Uncertain Options to Resolve Their Tax Liability

For those SSDI recipients who become ineligible for the APTC (referred to herein as “*SSDI Taxpayers*”), and who cannot afford to repay the excess APTC, their recourse is to request a collection alternative in the form of an offer-in-compromise or an installment agreement (“*IA*”) with the IRS.

1. *The Offer-in-Compromise process*

The IRS may accept a taxpayer’s OIC to reduce an unpaid tax liability, including penalties and interest, if it determines that full collection is “unlikely,” and the amount offered by the taxpayer adequately reflects the taxpayer’s collection potential.⁴⁵ To request an OIC, SSDI Taxpayers file IRS Form 656 with the IRS requiring them to gather and submit significant financial information to prove their inability to pay their taxes.⁴⁶ If rejected, the taxpayer has 40 days from the denial letter to appeal, at which point Appeals may hold a settlement conference with the taxpayer.⁴⁷

The success of an OIC is uncertain and the majority are denied. In 2021 the IRS received 49,285 OICs, yet only accepted 15,154.⁴⁸ In 2020, the IRS received 44,809 OIC applications, and accepted only 14,288.⁴⁹

The IRS does not indicate how long it takes to process an initial OIC application. Yet, the IRS states “[y]our offer is automatically accepted if the IRS doesn’t make a determination within two years of the IRS receipt date (this does not include any Appeal period.)”⁵⁰ Thus, the IRS anticipates it could take up to 2 years to make an initial OIC determination. All the while, interest still accrues until the OIC is accepted. Thus, SSDI Taxpayers are potentially further penalized due to administrative delays.

For our husband and wife, John and Mary, in the time it has taken for their OIC to be reviewed and ultimately rejected, their tax liability has increased by over \$1,000 in accrued interest. They are also bewildered, given their age and personal circumstances, that they may have to sell their home to pay the excess APTC.

2. *Installment Agreement process*

An IA is an arrangement allowing taxpayers to pay their tax liabilities over time. In 2021, the IRS established 3,891,791 IAs. Generally the maximum repayment period is 72 months, and payments are due monthly. An IA can help alleviate some of the financial strain of

⁴⁵ Treas. Reg. § 301.7122-1(b)(2), and Internal Revenue Manual (“IRM”) 5.8.1.2.2(1) (Apr. 20, 2021).

⁴⁶ See IRS Form 656 Booklet, Offer in Compromise (April 2022), <https://www.irs.gov/pub/irs-pdf/f656b.pdf>.

⁴⁷ Treas. Reg. § 301.7122-1(f)(5)(i); IRM 8.23.1.3(1).

⁴⁸ *Id.*

⁴⁹ Internal Revenue Serv. Pub. No. 55-B, Data Book 2021 (2022), <https://www.irs.gov/pub/irs-pdf/p55b.pdf>.

⁵⁰ IRS, Offer in Compromise, <https://www.irs.gov/payments/offer-in-compromise#:~:text=You%20don%27t%20have%20to%20make%20payments%20on%20an%20existing,not%20include%20any%20Appeal%20period.>

paying a tax liability, but penalties and interest continue to accrue until the balance due has been paid in full.

For SSDI Taxpayers, pursuing an OIC or an IA is not only inefficient due to the length of time it takes to prepare an OIC/IA application, it may also result in a higher tax liability due to the length of time it takes for the IRS to process their claim.

II. PROPOSED SOLUTION

A. Statutory Change is Needed as the IRS Has No Discretion

The initial version of the ACA did not require the inclusion of nontaxable Social Security benefits in calculating MAGI. The ACA was amended in 2011 and the definition of MAGI was changed to include the full amount of a taxpayer's Social Security benefits. Notwithstanding the amendment, the legislative history does not include any discussion or reference to the sometimes harsh consequence of including lump-sum payments for Social Security disability in the calculation of MAGI.

Although this issue has received some notice from US Senators, attention to this matter appears to have paused. Meanwhile, low-income taxpayers are still being disadvantaged. In 2018, Senators Angus King (ME) and Marco Rubio (FL) proposed legislation to fix the tax result, but that bill has stalled in Congress. The proposed amendment is very simple:

(a) IN GENERAL.—Section 36B(d)(2) of the Internal Revenue Code of 1986 is amended by inserting at the end the following new subparagraph:

“(C) EXCLUSION OF CERTAIN AMOUNTS RECEIVED AS LUMP-SUM PAYMENT.—For purposes of subparagraph (B), such amount shall not include any portion of a lump-sum payment of disability insurance benefits under section 223 of the Social Security Act (42 U.S.C. 423) which is—

“(i) received during the taxable year, and “(ii) attributable to prior taxable 20 years.”

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2018.⁵¹

The authors posit implementing this amendment to Section 36B is the best solution for relieving this small group of taxpayers who have been arbitrarily and unfairly disadvantaged by the then-existing Section 36B. Making the amendment retroactive for years beginning after December 31, 2016 will relieve such taxpayers of this arbitrary financial hardship.

B. Eliminating SSDI lumpsum payment covering multiple tax years inclusion is equitable.

The inclusion of lump-sum social security benefits in MAGI unfairly impacts low-income taxpayers, who are dependent on the APTC to subsidize their healthcare. Not only may these taxpayers be unable to repay the excess APTC, the timing of when an SSDI application is

⁵¹ See S. 3326, 115th Cong., 2d Sess., <https://www.congress.gov/bill/115th-congress/senate-bill/3326?s=1&r=61>.

approved and paid is outside of their control, thus the requirement to repay any excess APTC is unexpected and arbitrary.

C. Feasibility of statutory change

The removal of the SSDI lump-sum payments covering prior taxable years is an efficient statutory change that will ensure the intended beneficiaries of the ACA actually benefit, as opposed to being thrust into further financial hardship. It is clear that the federal budget impact of the ACA did not contemplate financial savings by forcing recipients of lump-sum SSDI payments for prior taxable years to reimburse such payments. While the statutory amendment will result in the IRS compromising or refunding some portion of the excess APTC that was previously required to be paid back by taxpayers, this is not an additional expense to the government. This is merely an expense originally contemplated in the enactment of the ACA and Section 36B.