

MEMORANDUM

March 14, 2014

To: House Committee on Energy and Commerce
[REDACTED]

From: Edward C. Liu, Legislative Attorney, [REDACTED]
Erika K. Lunder, Legislative Attorney, [REDACTED]

Subject: **Retroactive Advance Premium Tax Credits Under February 27, 2014, CCIIO Bulletin**

This memorandum responds to your request for a legal analysis of a February 27, 2014, bulletin¹ from the Center for Consumer Information and Insurance Oversight (CCIIO) describing the availability of retroactive advance premium tax credits (APTCs) and cost-sharing reductions (CSRs) under the Affordable Care Act (ACA)² in exceptional circumstances.³ Specifically, you have asked us to examine whether providing APTCs to enrollees in certain health insurance plans obtained outside of an Exchange⁴ that have been deemed by CCIIO to have been obtained through an Exchange is consistent with the statutory provisions authorizing the payment of APTCs, § 36B of the Internal Revenue Code (IRC) and § 1412 of the ACA.⁵

Summary of CCIIO Bulletin

The CCIIO Bulletin addresses the retroactive provision of APTCs and CSRs with respect to individuals who were unable to enroll in a qualified health plan (QHP)⁶ through the appropriate Exchange because of

¹ CCIIO, *CMS Bulletin to Marketplaces on Availability of Retroactive Advance Payments of the PTC and CSRs in 2014 Due to Exceptional Circumstances*, Feb. 27, 2014, hereinafter “CCIIO Bulletin,” available at [<http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/retroactive-advance-payments-ptc-csrs-02-27-14.pdf>].

² The ACA was signed into law on March 23, 2010 (P.L. 111-148). A week later, on March 30, 2010, the President signed the Health Care and Education Reconciliation Act (HCERA, P.L. 111-152), which amended multiple health care and revenue provisions in the ACA. All references to the ACA in this report refer to the law as amended by HCERA.

³ For more detailed information on APTCs and CSRs, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA)*, by Bernadette Fernandez.

⁴ The CCIIO Bulletin refers to an Exchange as a “Marketplace.” Because the underlying statutes and regulations use the term “Exchange,” this memorandum will use that term in place of “Marketplace” to avoid confusion.

⁵ IRC § 36B; 42 U.S.C. § 18082.

⁶ A qualified health plan (QHP) means a health plan that, among other things, has been certified by an Exchange to meet the standards required by the applicable Exchange in which it is offered. QHPs that have been certified by an Exchange may be made available through that Exchange, and an issuer of a QHP may offer an identical plan to enrollees outside of that Exchange. For purposes of the analysis below, it is assumed that a QHP which is offered by an issuer outside of the relevant Exchange is also offered to enrollees in that Exchange. 42 U.S.C. § 18021; 45 C.F.R. 155.20.

technical issues experienced by that Exchange's automated eligibility and enrollment functionality.⁷ The provision of retroactive APTCs and CSRs will not occur until an individual has been determined to be eligible for coverage through the Exchange.⁸

Two categories of affected individuals are described in the CCHIO Bulletin. First, individuals who have not been continuously enrolled in any coverage until they successfully enroll in coverage through the Exchange will be treated as having been enrolled in that QHP for all purposes retroactive to the date on which coverage would have been effective absent any technical issues with the Exchange.⁹ If the individual is determined to be eligible for APTCs and CSRs, CMS will make appropriate payments to the QHP issuer for any months that fall within that retroactive coverage period.¹⁰ The issuer will also be responsible for collecting and adjudicating any claims that occurred during the retroactive coverage period.¹¹

Second, affected individuals who enroll in a QHP *outside of an Exchange* will be deemed to have enrolled in that coverage *through* the Exchange once they have successfully received a determination of eligibility for coverage through the Exchange.¹² As with the first category of individuals, appropriate APTC and CSR payments will be made to the QHP issuer with respect to the retroactive coverage period.¹³

Analysis

Section 36B of the IRC provides eligible taxpayers with health insurance premium assistance in the form of a refundable tax credit. The amount of the credit is dependent upon the number of "coverage months" the taxpayer has during a given tax year. A "coverage month" is defined as follows:

The term "coverage month" means, with respect to an applicable taxpayer, any month if--

(i) as of the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in *through an Exchange* established by the State under section 1311 of the Patient Protection and Affordable Care Act, and

(ii) the premium for coverage under such plan for such month is paid by the taxpayer (or through advance payment of the credit under subsection (a) under section 1412 of the Patient Protection and Affordable Care Act).¹⁴

Similarly, § 1412 of the ACA authorizes the refundable tax credits authorized under § 36B of the IRC to be paid as APTCs directly to issuers of QHPs with respect to coverage in an Exchange "*through which* [an eligible] individual is enrolling."¹⁵

⁷ CCHIO Bulletin, *supra* note 1, at 1.

⁸ *Id.*

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Individuals in this category will also have a special enrollment period (SEP) upon successfully enrolling through the Exchange, during which they may select a different QHP for prospective coverage.

¹⁴ I.R.C. § 36B(c)(2) (emphasis added).

In light of the plain text of these provisions, which initially suggests that APTCs are available only with respect to coverage that has been obtained “through” an Exchange, you have asked CRS to provide an analysis of whether the provision of APTCs to QHP issuers for coverage provided outside of an Exchange is consistent with the statutory language. In answering this question, we first look at whether the plain text of the statute should control in this particular case. We then also examine whether any administrative flexibility exists that could independently justify the changes described in the CCIIO Bulletin.

Applicability of the Plain Meaning Rule

The first question is whether the statutes should be read to prohibit APTCs where coverage has not been obtained “through” an Exchange. A literal application of the language in § 36B of the IRC and § 1412 of the ACA would initially seem to be incompatible with the provision of APTCs to issuers for coverage that was not provided “through” an Exchange. The refundable credit under § 36B is calculated based on “coverage months” which are defined as months during which the taxpayer was enrolled in coverage “through an Exchange.”¹⁶ Applied literally, this provision would exclude months in which the taxpayer was enrolled in coverage not obtained through an Exchange. Since the APTC is premised on a taxpayer’s eligibility for a credit under § 36B, the issuer of the plan in which the taxpayer was enrolled would not appear to be eligible for an APTC with respect to that coverage under § 1412 of the ACA.¹⁷

However strong the plain language may be, the Supreme Court has noted that “it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”¹⁸ Though relatively rare, it is not unprecedented for lower courts applying this principle to reject the literal application of a statute in favor of a construction that may ignore portions of the statutory text. For example, In *Wassenaar v. Office of Personnel Management*, the Court of Appeals for the Federal Circuit held that the surviving spouse of a 47-year-old federal law enforcement officer was entitled to an annuity under a formula established by federal statute, notwithstanding the fact that the plain text of that formula stated that it was applicable only to federal employees who were at least 50 years of age.¹⁹ In construing the statute to remove that age limitation, the court relied upon the fact that a strict application of the formula would mean the surviving spouse of the deceased federal employee would not be eligible for any annuity. Given that the purpose of the statute was to provide some annuity to the surviving spouses of federal employees that died before retirement, the court held that “such an illogical result could not have been intended by Congress.”²⁰

Similarly, in *Rod Warren Ink v. Commissioner*, the Court of Appeals for the Ninth Circuit refused to apply a provision of the Internal Revenue Code (IRC) where such application would be “inequitable and absurd.”²¹ This case dealt with a corporate taxpayer that discovered in 1981 that it had been the victim of

(...continued)

¹⁵ 42 U.S.C. § 18082(c)(1) (emphasis added).

¹⁶ I.R.C. § 36B(c)(2)(A)(i).

¹⁷ 42 U.S.C. § 18082(c)(1) (authorizing payments only for refundable credits allowed under § 36B of the IRC).

¹⁸ *California Federal Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987) (citing *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892))).

¹⁹ *Wassenaar v. OPM*, 21 F.3d 1090 (Fed. Cir. 1994). See also, *Brown v. Secretary of the Air Force*, 2000 U.S. App. LEXIS 14541 (4th Cir. Va. June 23, 2000) (unpublished opinion) (rejecting a literal application of a federal statute that would limit enforcement of spousal support orders that were originally issued before a statutorily imposed date because doing so “produces an absurd result”).

²⁰ *Wassenaar v. OPM*, 21 F.3d at 1094.

²¹ *Rod Warren Ink v. Comm’r*, 912 F.2d 325 (9th Cir. 1990).

embezzlement from 1978 through 1981.²² Upon discovery of this theft, the corporate taxpayer sought to deduct the annual amounts stolen from the corporation's income during the respective tax years.²³ However, the Internal Revenue Service (IRS) denied the deductions noting that the IRC requires losses arising from theft to "be treated as sustained *during the taxable year in which the taxpayer discovers such loss*."²⁴ Additionally, because the corporation was a personal holding company, it was prohibited from carrying back losses in one tax year to earlier years.²⁵ Under the literal application of the IRC, the taxpayer was required to recognize income in previous tax years that it never actually received, on the theory that such amounts had been embezzled, and was further prohibited from taking a deduction in the years necessary to offset that income. In the court's view, this result was "contrary to the purposes and spirit" of the IRC provision permitting such deductions for losses arising from theft.²⁶ That provision had been enacted as "a taxpayer relief measure," but the literal application of it here would "unduly penalize the taxpayer."²⁷ Consequently, the court allowed the taxpayer to deduct the losses in prior years, notwithstanding the plain text of the IRC.²⁸ The court limited its construction of the IRC to taxpayers in this particular set of facts, and did not change the temporal restrictions on loss deductions arising from theft for all other taxpayers.²⁹

With respect to the question that this memorandum addresses, the Supreme Court has recognized that the aim of the ACA was to "increase the number of Americans covered by health insurance and decrease the cost of health care."³⁰ To the extent that APTCs were denied to individuals who are seeking coverage through an Exchange solely because technical issues with that Exchange prevented timely validation of the individuals' eligibility, it could be argued that such a result would "unduly penalize" the taxpayer, and is at odds with the purpose and spirit of the ACA. Specifically, such a construction either prevents individuals from obtaining coverage or requires that they do so at a higher cost as a result of technical problems the taxpayer had no control over. Therefore, there appears to be a sufficient legal basis upon which a court could conclude that the statute should be read in a way that avoids such an "illogical result." More specifically, the cases cited above would arguably support a construction of the ACA and IRC that permits APTCs to be retroactively provided for coverage that was not obtained through an Exchange. Furthermore, in light of the *Rod Warren Ink* decision, it would not be unprecedented if this construction were limited to only those taxpayers who were impacted by the technical issues described in the CCIIO Bulletin.

Administrative Flexibility

Notwithstanding the discussion above, if a court were to conclude that the statute should be read literally, the next question is whether Congress can be said to have expressly given the Executive the flexibility to make the changes described in the CCIIO Bulletin, despite the plain language of the statute. A potential threshold issue is that IRC § 36B is administered by the Treasury Department/Internal Revenue Service (IRS), but the Bulletin was issued by CCIIO. Since the Bulletin states that it is anticipated that

²² *Id.* at 326.

²³ *Id.*

²⁴ I.R.C. § 165(e) (emphasis added).

²⁵ *Rod Warren Ink v. Comm'r*, 912 F.2d at n.2 (discussing I.R.C. § 545(b)(4)).

²⁶ *Id.* at 327.

²⁷ *Id.* at 328.

²⁸ *Id.*

²⁹ *Id.* 328.

³⁰ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

Treasury/IRS will be issuing guidance relating to this issue,³¹ it is assumed for purposes of the following discussion that the Treasury/IRS guidance will track the CCIIO Bulletin. If Treasury/IRS does not issue guidance, it might then be questioned whether CCIIO has the authority to take the actions outlined in the Bulletin without any corresponding action by Treasury/IRS.

In response to questions about the authority to provide transition relief delaying other provisions of the IRC added by ACA, Treasury has cited IRC § 7805(a), which provides the Treasury Secretary with the authority to promulgate “all needful rules and regulations for the enforcement of” the IRC.³² If Treasury/IRS were to issue guidance interpreting § 36B to permit retroactive APTCs to QHP issuers for coverage provided outside of an Exchange, it might be argued by the agency that such an interpretation was within the authorities provided by § 7805(a).³³ The agency might argue this is an appropriate use of its rulemaking authority, noting the statement made by the Supreme Court when examining such authority that “Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight,” and so “it relies on the administrators and on the courts to implement the legislative will.”³⁴ The agency might characterize the situation here as exemplifying the type of problem identified in the Court’s language: Congress could not be expected to foresee the technical issues that have led to the problem which the guidance intends to fix, and thus this is the type of issue it left to Treasury/IRS to address by providing the agency with its rulemaking authority. It might therefore be argued by the agency that it would be appropriate for Treasury/IRS to use its rulemaking authority to fill a gap in the statute by addressing the issue of deemed enrollment for certain individuals,³⁵ particularly those facing what the Bulletin describes as “exceptional circumstance[s].”³⁶ The agency might also argue that while the legislative history of ACA is silent on this matter, allowing the retroactive APTCs for individuals affected by the technical issues is consistent with the recognized legislative intent of ACA to “increase the number of Americans covered by health insurance and decrease the cost of health care,”³⁷ and thus is implementing Congress’ will.

On the other hand, it could be argued that if Treasury/IRS were to issue guidance adopting the CCIIO Bulletin’s framework, it would be overstepping its bounds in light of the statute’s plain language.³⁸ As one federal court of appeals noted in the context of § 7805(a) “[a]lthough this Court owes deference to the agency construction of a regulation ... we also recognize that the agency regulation may not amend the

³¹ CCIIO Bulletin, *supra* note 1, at 3.

³² Letter from Assistant Secretary Mark J. Mazur to Chairman Fred Upton, July 9, 2013, available at [<http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>].

³³ *See, also*, I.R.C. § 36B(g) (“The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section, including 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 [ACA]”).

³⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 597 (1983) (upholding IRS rulings that prohibited § 501(c)(3) charitable organizations from engaging in racially discriminatory admissions practices since such practices violated public policy).

³⁵ *See, e.g., E.I. Du Pont de Nemours & Co. v. Comm’r*, 102 T.C. 1 (1994) (taxpayer’s argument that IRS had overstepped its authority when promulgating regulations on a matter upon which the statute was arguably silent “has a major weakness in its foundation, namely, the assumption that Congress, when enacting [the statute at issue] had a definite intention regarding” its application,” which “ignore[s] the possibility that Congress was willing to defer to the Treasury on the matter”); *Peterson Marital Trust v. Commissioner*, 102 T.C. 790, 798-799 (1994) (“While we acknowledge the normal importance of the statutory language,” the statute by itself did “not provide specific guidance” as to whether a lapse of a general power of appointment was a constructive addition to a trust corpus since the statute did not define “added to the trust” nor “explicitly include[] nor exclude[] constructive additions,” and thus the court rejected the argument that the regulation’s constructive addition provision was inconsistent with the statute’s plain meaning).

³⁶ CCIIO Bulletin, *supra* note 1, at 2.

³⁷ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

³⁸ *See, e.g., Hope v. United States*, 803 F.2d 816 (5th Cir. 1986).

statute.”³⁹ How a court might evaluate the merits of the agency’s assertion that the authority exists for such an interpretation may be difficult to predict at this time because of two threshold questions. The first is whether any person would have standing to bring suit to challenge such guidance as it may not be clear whether anyone would be personally injured—a necessary prerequisite to have standing—by an interpretation allowing retroactive APTCs.⁴⁰ The second question relates to what level of deference might be given by a court when examining whether the agency had acted in excess of its delegated statutory authority.⁴¹ For example, if Treasury/IRS were to issue a regulation subject to notice and comment rulemaking, a court might afford it the highest level of deference. Under that deferential review, if the court determined that the statute did not directly address the issue, the court would sustain the agency’s interpretation so long as it was reasonable.⁴² If Treasury/IRS were to issue less formal guidance, it would likely receive less deference, which could focus on such things as “the degree of the agency’s care, its consistency, formality, and relative expertness, and ... the persuasiveness of [its] position.”⁴³

³⁹ *Id.* (internal citations omitted).

⁴⁰ See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344-45 (2006) (individuals generally do not have standing in their status as taxpayers to bring suit for allegedly unlawful taxation because any injury is too generalized and remote). *But*, see, *Halbig v. Sebelius*, 2014 U.S. Dist. LEXIS 4853 (D.D.C. 2014) (finding that an individual plaintiff had standing to challenge an IRS rule that allowed APTCs to be made available with respect to coverage purchased in an Exchange established by the federal government and not the state).

⁴¹ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

⁴² See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“The principles underlying our decision in *Chevron* apply with full force in the tax context.”).

⁴³ *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (the weight afforded to agency’s interpretation of a statute depends on “all those factors which give it power to persuade,” including “the validity of its reasoning”); *Omohundro v. United States*, 300 F.3d 1065, 1067-68 (9th Cir. 2002) (examining revenue ruling under the *Skidmore* standard); see also *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 477 (1979) (IRS interpretation should be upheld if it “harmonizes with the plain language of the statute, its origin, and its purpose,” looking to such factors as its contemporaneity with the statute’s enactment, its evolution and age, and its consistency). The validity of *National Muffler* after *Mayo*, *supra* note 26, is not clear.