

# Legislative Proposal

By: Joshua Brooker

October 2nd, 2024

**Mission:** To help the 4.2 Million self-employed and small business owners navigating ACA Health Insurance Markets

Recommendation: shift business owners to using their prior income to access affordable health options. Let's shift away from individuals guessing the future income of their business to receive premium tax credits and remove the risk of owing the IRS.



## Executive Summary

This proposal advocates for transitioning the administration of health insurance subsidies under the Affordable Care Act (ACA), from an IRS-governed Premium Tax Credit (PTC) system, to a Health and Human Services (HHS)-governed income-adjusted subsidy system. The primary objective is to base subsidies on prior-year income to reduce income misreporting, improve program integrity, and stabilize subsidy amounts. It is estimated that over 5 million individuals misrepresented their income on ACA Marketplace applications in 2023, contributing to a \$54 billion budget shortfall, due to inaccurate projections of Premium Tax Credits (PTC).

Additionally, with the expiration of the Inflation Reduction Act's (IRA) enhanced tax credits in 2025 and the removal of the 400% Federal Poverty Level (FPL) cap, this proposal becomes timely and essential for sustaining the health insurance subsidy system and ensuring stability for consumers in the individual market.

I recommend that Congress request a Congressional Budget Office (CBO) score to evaluate the fiscal impact of this proposal, ensuring that it supports both consumers and long-term budgetary sustainability.

# About The Author

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## Joshua Brooker

### Health Insurance Broker and Healthcare Policy Advocate

Joshua Brooker has been actively involved in healthcare policy, since the inception of the Affordable Care Act (ACA). His journey into the health insurance industry began after a personal experience of being double-billed during the birth of his now eldest son, which motivated him to help consumers navigate the complexities of healthcare coverage. Armed with a Bachelor of Science in Finance, and a strong background in economics, Joshua has applied his formal education both to directly assist consumers at the “tip of the spear”, and to address broader macro-level health policy issues.



Throughout his career, Joshua has worked closely with key federal agencies such as CMS (Centers for Medicare and Medicaid Services), CCIIO (Center for Consumer Information and Insurance Oversight), IRS (Internal Revenue Service), and OMB (Office of Management and Budget), as well as members of Congress, contributing to high-level discussions on healthcare policy reform. His insights and expertise have been recognized in major media outlets, including the Wall Street Journal (WSJ), Kaiser Family Foundation (KFF), Associated Press (AP), NPR, and U.S. News, where he has been cited for his contributions to the evolving healthcare landscape.

Joshua’s unique blend of firsthand consumer advocacy and macro-level policy work provides him with a deep understanding of the challenges and opportunities within the healthcare system. His work reflects a commitment to improving the sustainability and integrity of the health insurance subsidy system, ensuring that both consumers and the federal government benefit from transparent and equitable policies.

## Current Challenges

### 1. Impact of the Expiration of Inflation Reduction Act Credits:

The enhanced tax credits provided by the IRA, which made premiums more affordable for millions of Americans, are set to expire in 2025. Along with the removal of the 400% FPL limit, this could lead to significant increases in out-of-pocket costs for many consumers. Additionally, the Congressional Budget Office (CBO) estimates that 7 million people<sup>2</sup> will lose marketplace coverage, and 4 million people will become uninsured altogether.

Without these enhanced credits, premium tax credits will revert to the prior system, leading to higher premiums and even more uninsured individuals. The current system of real-time income projections is not equipped to handle these changes effectively, making this proposal both timely and substantial.

### 2. Reporting and Reconciliation Burden:

Under the current system, consumers are required to estimate their expected income for the upcoming year before enrolling in coverage. This estimate is then reconciled with their actual income when filing taxes—after their coverage has already expired. In many cases, this results in substantial repayments if the projected income was inaccurate.

Accurately forecasting income is a challenge for many, as it requires not only insight into future earnings but also a solid understanding of taxation. There is a reason over 800,000<sup>3</sup> individuals are certified as tax preparers, yet we expect consumers, insurance agents (who are explicitly advised by CMS not to offer tax advice), and government call center representatives—who often receive limited training on income matters—to project this income with precision.

There have been numerous reports over the years of inaccurate guidance provided to consumers. For example, a Healthcare.gov call center representative was documented advising an individual to deduct child support payments from household income, which is not permitted under current regulations. Tax professionals frequently encounter cases where they must inform households that they owe significant sums—sometimes exceeding \$10,000—to the IRS due to miscalculated premium tax credits based on incorrect income projections. These instances place a financial burden on consumers and increase the administrative workload for both CMS and the IRS.

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<sup>2</sup> Congressional Budget Office. [Health Insurance Coverage for the U.S. Population, 2024 to 2034](#). June 18, 2024

<sup>3</sup> IRS. [Return Preparer Office federal tax return preparer statistics](#)

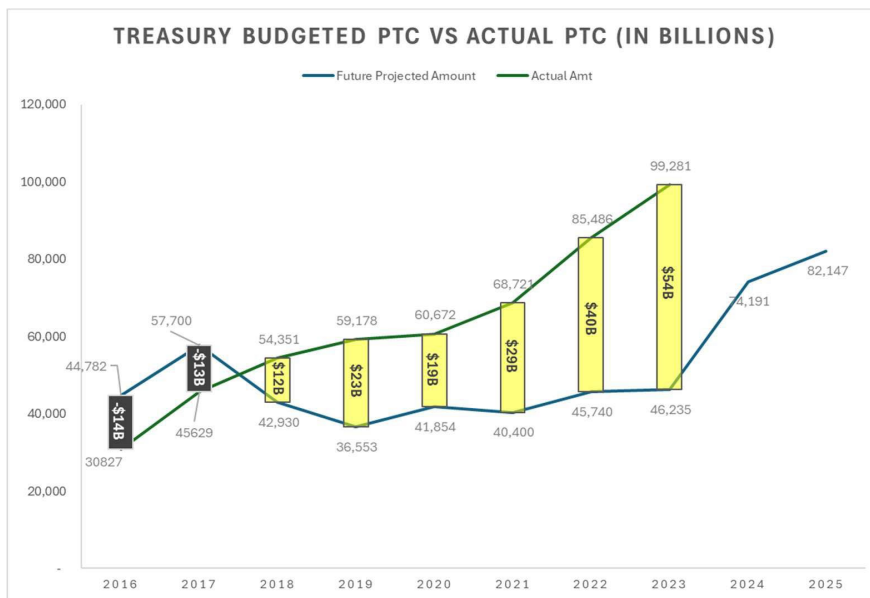
### 3. Misrepresented Income:

A study by the Paragon Institute highlights that up to 5 million enrollees may have deliberately misrepresented their income on ACA Marketplace applications to qualify for higher subsidies<sup>4</sup>. This misrepresentation exacerbates reconciliation issues during tax season and inflates federal costs.

### 4. Treasury’s Budget Discrepancies:

Department of the Treasury’s data for 2023, as outlined in Figure 1 and Supplement B in this report, showed a \$54 billion shortfall between the IRS budget projected PTC costs and their actual spending. In 2022, for the 2023 Budget, the Treasury projected government spending for 2023 to be \$46 billion<sup>5</sup> on Reimbursable Premium Tax Credits. The reality? The actual cost was \$99 billion<sup>6</sup>. This is due to the reliance on income projections rather than verified prior-year income, which leads to reconciliation challenges and budget uncertainty.

**Figure 1:** Department of Treasury actual versus projected Premium Tax Credits  
As reported in annual “Budget-in-Brief” from 2016 – 2025.



<sup>4</sup> Paragon Health Institute. [Unpacking The Great Obamacare Enrollment Fraud](#). August 2024

<sup>5</sup> Department of Treasury. [FY 2023 Budget-In-Brief | Mandatory Funding Levels for the FY 2023 President’s Budget – Treasury Chapter](#)

<sup>6</sup> Department of Treasury. [FY 2025 Budget-In-Brief | Mandatory Funding Levels for the FY 2025 President’s Budget – Treasury Chapter](#)

## Proposal Details

### **1. Amend Section 36B of the Internal Revenue Code (IRC):**

- Remove the APTC calculation from the tax code and transfer it to HHS under 42 U.S.C., aligning it with payments to Medicare Advantage plans (42 CFR 422.304)
- Subsidies would be based on prior-year income, similar to Medicare's Income-Related Monthly Adjustment Amount (IRMAA), ensuring consistency across federal health programs like Medicare and Medicaid that use actual income when determining eligibility.

### **2. Use of Prior-Year Income Data:**

- CMS currently pulls prior-year IRS income data to verify whether Marketplace applicants' projected income aligns with previous filings. This proposal would make prior-year income the standard for determining subsidies, reducing opportunities for income manipulation, minimizing reconciliation, and enhancing program integrity.

### **3. Program Integrity and Fraud Prevention:**

- Basing subsidies on actual prior-year income would significantly reduce the risk of income misrepresentation, estimated to involve 5 million enrollees<sup>7</sup>, which has contributed to the ACA's growing reconciliation problems. It would also minimize fraud, ensuring that subsidies are allocated fairly and accurately.

### **4. Reduce Administrative Burdens and Improve Transparency:**

- Shifting administration to HHS would enhance transparency by requiring HHS to report the true cost of subsidies in its budget. This would mitigate budget discrepancies, such as the \$54 billion shortfall seen in 2023, and allow for better federal oversight.

To ensure the long-term financial viability and positive impact of these proposed changes, a CBO score is recommended. This analysis would assess the costs and savings associated with transitioning from an IRS-administered tax credit system to an HHS-administered subsidy program.

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<sup>7</sup> Paragon Health Institute. [Unpacking The Great Obamacare Enrollment Fraud](#). August 2024

## Key Legislative and Regulatory Changes

### 1. Legislative Change: Amend Section 36B of the Internal Revenue Code (IRC):

- This legislative change requires an amendment to Section 36B of the IRC to remove the calculation of Advance Premium Tax Credits (APTC) from the tax code and transfer the responsibility for calculating health insurance subsidies to HHS under 42 U.S.C., aligning it with the payment structure under [42 CFR 422.304](#) for Medicare Advantage. This change would move the subsidy calculation to a system based on prior-year income, as specified in 42 U.S.C. § 1395r(i) for Medicare's Income-Related Monthly Adjustment Amount (IRMAA).

### 2. Regulatory Change: Leverage Existing CMS Authority for Accessing Prior-Year Income Data:

- No new legislative action is required to expand IRS or CMS authority for accessing income data, as CMS already has the regulatory authority to access prior-year IRS income data for Marketplace eligibility determination, with consumer consent. This change would refine the regulatory framework to transition the use of prior-year data from income verification purposes to subsidy calculation, reducing reliance on income projections and minimizing the need for real-time income updates and reconciliation.

### 3. Legislative and Regulatory Changes: Rework [26 CFR 1.36B](#) (Calculation of Tax Credit):

- Legislative adjustments to 26 CFR 1.36B would be necessary to shift from a tax credit calculation based on estimated income to one based on prior-year income. The IRS's role in subsidy administration would be reduced, and the calculation would now follow HHS guidelines, under the updated provisions of the Internal Revenue Code and corresponding sections of 42 U.S.C..
- As a regulatory change, the rules for APTC calculation would need to be revised to reflect this new system, reducing the need for reconciliation and aligning subsidies more closely with actual income.

### 4. Regulatory Changes to Exchange Operations (45 CFR 155):

- [45 CFR 155.315\(f\)](#) (Verification Process): Tailor the existing Data Matching Issue (DMI) process to accommodate income discrepancies using retrospective data, thereby facilitating a smoother appeals process.
- **Using the Exchange Verification Process in lieu of the IRMAA Appeal Process:** Unlike

the IRMAA Appeal process, the exchange should follow the Data Matching Issue process with the following steps:

1. During the Eligibility Application, the system should fetch the relevant tax return income immediately from IRS data feeds.
  2. The system should then indicate that rates will be based on the {YYYY} tax return income of {MAGI} for household members X, Y, and Z.
  3. The application should prompt the applicant to confirm if there has been any substantial change to household income or composition.
  4. If there are changes, the applicant should be able to provide an outline of the modifications.
- [45 CFR 155.315\(f\)\(2\)\(ii\)](#): Retain this provision, ensuring applicants are given a 90-day period to present evidence of any income or household composition changes.
  - [45 CFR 155.315\(f\)\(4\)\(ii\)](#): Similar to the current process, allow consumers to receive the subsidy allotment immediately upon attestation that they understand any necessary premium adjustments will be made if documentation is not submitted within the required timeframe.
  - If documentation is not provided within the 90-day window, adjust the plan premium to remove the previously granted subsidy and recapture the received subsidy over the remaining duration of the plan.

#### **Example:**

- **December 1st application, January 1st coverage start:**
  1. January 1st – Premium: \$300 Subsidy = Reduced Premium
  2. February 1st – Premium: \$300 Subsidy = Reduced Premium
  3. March 1st – Premium: \$300 Subsidy = Reduced Premium
  4. April 1st – Adjusted Premium: \$300 + \$100 Subsidy Recapture (Total subsidy received: \$900 over three months. Recaptured over nine remaining months = \$100 additional per month)
  5. May 1st – Adjusted Premium: \$300 + \$100 Subsidy Recapture
- [45 CFR 155.320](#) (Year Round System Automated Income Verification): Update this regulation to reflect that the Marketplace will rely primarily on two-year-old IRS data for determining subsidies, reducing the need for frequent income verification throughout the year.
- [45 CFR 155.330](#) (Redetermination and Mid-Year Changes): Adjust this regulation to

reflect the annual verification of income based on prior-year tax returns, with mid-year changes only for significant life events.

- [45 CFR 155.500–155.555](#) (Appeals Process): Update these rules to allow consumers to appeal income determinations, if life events make prior-year income less reflective of their current financial situation.

#### **5. Regulatory Change: Employer Mandate ([IRC Section 4980H](#)):**

- This section would need to be reviewed to ensure any changes in income reporting or subsidy distribution do not conflict with the employer mandate to offer affordable coverage. This regulatory review would ensure employers are not penalized due to changes in how subsidies are calculated based on prior-year income.

#### **6. Regulatory Changes for HHS Budget Transparency:**

- Update HHS regulations to include the full cost of subsidies in their budget reporting, ensuring that the transition from a tax credit overseen by the Treasury Department to a direct subsidy overseen by HHS is fully transparent and accounted for.

#### **7. Regulatory Changes to Medical Loss Ratio (MLR) Requirements:**

- [45 CFR 158.240](#) (MLR Rebates): Amend this section to allow insurers to reconcile MLR rebates directly with HHS, rather than consumers, when federal subsidies are administered by HHS. This ensures that subsidy overpayments are returned to HHS, which can then reinvest these funds into market stabilization.
- [45 CFR 158.110](#) (MLR Reporting): Update reporting requirements for how insurers allocate HHS-issued subsidies, ensuring full transparency and compliance with MLR standards.
- [45 CFR 158.260](#) (Appeals and Adjustments): Expand this section to cover situations where MLR rebates are owed to HHS, allowing insurers to appeal MLR determinations before returning subsidy overpayments.
- [45 CFR 158.221](#) (Allowable Medical Expenses): Clarify that the inclusion of direct subsidies from HHS does not reduce the consumer protections afforded by the MLR requirements.

## **8. Regulatory and Legislative Changes for Eligibility Coordination:**

- Coordination rules between Medicaid, CHIP, and the Marketplace would need to be revised, both legislatively and through regulatory adjustments. Medicaid and CHIP currently rely on current-year income, while the proposed system would rely on prior-year income. These adjustments would ensure seamless transitions between programs for consumers, particularly in non-expansion states.

## **9. State-Level Regulatory Adjustments and Section 1332 Waivers:**

- States operating their own exchanges under 1332 waivers may need to pass state-level legislation or update regulations to align with the new federal model of retrospective income reporting. Federal [guidelines](#) for 1332 waivers should be adjusted to ensure states have the flexibility to comply with this shift while maintaining innovation in their exchanges.

# Benefits of the Proposal

## **1. Improved Program Integrity:**

- By using actual income data from prior years, this proposal would reduce the opportunity for income manipulation and fraud, ensuring that subsidies are allocated based on real financial need. The estimated 5 million individuals who have misrepresented their income would no longer be able to exploit the system, leading to a more equitable distribution of benefits.

## **2. Financial Stability for Consumers and Government:**

- Consumers with fluctuating incomes, such as freelancers and small business owners, would benefit from more predictable subsidies. They would no longer need to estimate future income or fear significant tax liabilities during reconciliation.
- The federal government would achieve better cost control and reduce budgetary discrepancies by basing subsidies on verified prior-year income data.

## **3. Cost Savings and Reduced Reconciliation:**

- Shifting from real-time income estimates to prior-year data would reduce the need

for complex reconciliation processes, saving both administrative costs and consumer hardships related to repaying excess subsidies. In the long term, the program would generate cost savings by minimizing the need for income updates and appeals.

#### **4. Increased Transparency and Oversight:**

- HHS would be responsible for both managing and reporting the true cost of the subsidy program, providing greater transparency in how federal funds are allocated. This would avoid the types of large discrepancies seen under Treasury's budgeting, such as the \$54 billion shortfall in 2023 (U.S. Department of the Treasury).

## **Conclusion**

The current ACA subsidy system is plagued by misreporting, reconciliation issues, and budgetary discrepancies. This proposal offers a solution that would enhance program integrity, protect taxpayers, and provide more predictable benefits for consumers. By basing subsidies on prior-year income and transitioning program oversight to HHS, the government would reduce fraud, ensure more accurate budget projections, and streamline subsidy administration.

I recommend that Congress seek a Congressional Budget Office (CBO) score to evaluate the budgetary impacts of this proposal, and to further analyze the potential long-term benefits for both consumers and the federal government.

If you have any questions about this proposal and the comments herein, or if I can be of any assistance as you move forward, please do not hesitate to contact me at [jbrooker@pahealthadvocates.com](mailto:jbrooker@pahealthadvocates.com)

Sincerely,



**Joshua Brooker, REBC<sup>®</sup>, ABHP, ASFC**

*Advocate for a better US health system from coverage to cost of care*

## Supplement A:

### Disclosure

The comments and opinions expressed in this proposal are solely my own and are informed by the collective experiences I have gained through various roles in the healthcare and health insurance industries. These roles have included direct consumer advocacy and macro-level policy analysis, in collaboration with key federal agencies and congressional members. While these insights reflect my personal perspective, they are grounded in the broader understanding I have developed through my work in healthcare policy and reform.

## Supplement B:

### IRS Reporting of Refundable Premium Tax Credit & Links to Treasury Budget in Brief

<b>Budget Year</b>	<b>Actual Reconciled</b>		<b>Estimated PTC Cost</b>		<b>Future Projected PTC</b>		<b>Link to Budget</b>
2025	2023	99,281	2024	86,787	2025	82,147	<a href="#">2025 Budget In Brief</a>
2024	2022	85,486	2023	80,128	2024	74,191	<a href="#">2024 Budget In Brief</a>
2023	2021	68,721	2022	62,672	2023	46,235	<a href="#">2023 Budget In Brief</a>
2022	2020	60,672	2021	59,255	2022	45,740	<a href="#">2022 Budget In Brief</a>
2021	2019	59,178	2020	47,600	2021	40,400	<a href="#">2021 Budget In Brief</a>
2020	2018	54,351	2019	48,639	2020	41,854	<a href="#">2020 Budget In Brief</a>
2019	2017	45,629	2018	39,909	2019	36,553	<a href="#">2019 Budget In Brief</a>
2018	2016	30,827	2017	40,129	2018	42,930	<a href="#">2018 Budget In Brief</a>
2017			2016	39,285	2017	57,700	<a href="#">2017 Budget In Brief</a>
2016					2016	44,782	<a href="#">2016 Budget In Brief</a>