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February 27, 2020

The Honorable Alex M. Azar
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington DC, 20201

Re: CMS-9916-P, Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2021

Submitted electronically via Regulations.gov

Dear Secretary Azar:

Thank you for the opportunity to comment on the February 6, 2020 proposed rule, HHS Notice of Benefit and Payment Parameters for 2021 (CMS-9916-P).

We write to express our view that certain potential policy changes on which the agency seeks comment in this proposed rule are unlawful and exceed the authority committed to the agency. In particular, the agency has invited comment on two potential proposals to change long-standing rules regarding the provision of APTC in cases of auto-reenrollment. Under the potential changes, consumers would not receive the APTC to which they are entitled under sections 1411 and 1412 of the Affordable Care Act. This is not permissible. Section 1411 is the sole source of authority for an Exchange to make an eligibility determination for APTC, and section 1412 is the sole source of authority to pay (or not pay) APTC. The statute provides no pathway by which an Exchange can lawfully provide a different (or zero) amount of APTC.

Policies related to auto-reenrollment and eligibility determinations for APTC are governed under ACA sections 1311, 1411, and 1412 and section 36B of the Internal Revenue Code.

Auto-reenrollment is the process by which a consumer from the prior year who has not actively submitted an application and enrolled in coverage for the upcoming benefit year is enrolled in a plan for the upcoming year. Under longstanding regulations and guidance, individuals are reenrolled under similar terms to the prior year – in the same or similar plan and with APTC updated only for changes in the benchmark plan, the federal poverty level, and certain newly available income information. Section 608 of the Further Consolidated Appropriations Act of 2020, enacted in December 2019, amended section 1311(c) of the Affordable Care Act to require the agency to continue auto-reenrollment for plan year 2021. Specifically, it requires CMS to "establish a process under which an individual [enrolled in the Federally-Facilitated Exchanpge] is reenrolled for plan year 2021 in a qualified health plan." In determining eligibility for APTC during that mandated reenrollment process, agency action is governed by other sections of the ACA.

Section 36B of the Internal Revenue Code (as added by the ACA) specifies a series of criteria and calculations used in determining premium tax credit amounts. ACA section 1411 directs the Secretary of HHS to "establish a program… for determining… in the case of an individual claiming a premium tax credit or reduced cost-sharing under Section 36B of such Code or section 1402 whether the individual meets the income and coverage

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requirements of such sections." Section 1412(a) directs the Secretary to "establish a program under which… advanced determinations are made under section 1411." And section 1412(c) directs that the federal government "shall make the advanced payment under this section of any premium tax credit allowed under section 36B."

In other words, section 36B is the sole statutory instruction in how to calculate a premium tax credit amount. The program established under section 1411 must determine eligibility under section 36B. And once an individual has been determined eligible under section 1411, the federal government "shall make" payments in the amount "allowed under section 36B," as required under section 1412.

The agency may not alter an eligibility determination made under these statutes.

The proposed rule seeks comment on two potential policies that would violate these statutory requirements. The agency has expressed a policy concern about consumers for whom the APTC "covers the entire plan premium." The agency thus invites comment on whether individuals for whom this would be true should be enrolled "without APTC" or with APTC "reduced to a level that would result in an enrollee premium that is greater than zero dollars." Neither is permissible.

The policies on which the agency seeks comment would require the agency to conduct an eligibility determination under section 1411, calculate the amount of assistance that would be paid under section 36B, but then decide *not* to apply that amount of APTC to the enrollment. Section 1412 forecloses such options. A decision to apply no APTC at all for consumers determined eligible under section 1411 violates the requirement that the federal government "shall make the advanced payment." If an individual has been determined eligible, APTC must be paid. Nor may the agency invent a new and reduced amount of APTC that is different from the amount allowed under section 36B. Section 1412(c) requires payment of the amount "allowed under section 36B," not some other figure invented by the agency. Whatever policy concerns the agency may have, the text of the statute is clear and provides no discretion to the agency to make the changes suggested.

The policies proposed here are not analogous to other circumstances where the FFE does not apply APTC at reenrollment.

Certainly, there are other circumstances where in the course of automatically reenrolling a consumer, the FFE has historically not applied APTC to their enrollment. However, in those cases the denial is precisely because the agency is making a determination *pursuant to section 1411* that the individual does not "meet[] the income and coverage requirements" of section 36B.

Specifically, the FFE does not apply APTC at reenrollment when tax information shows a household has had income above 500% of the federal poverty level in a recent year. In doing so, the agency is using the authority committed to the Secretary under section 1411 to evaluate available information and determine that an individual is not eligible for APTC. Similarly, the FFE does not apply APTC when it has not been provided information from the applicant or from tax data sources for multiple years; the agency has concluded that it lacks sufficient information to determine that the individual is eligible under section 1411 and therefore it may not pay APTC under section 1412.

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The procedures suggested here are entirely different. The agency is seeking comment on proposals where it would make a determination under section 1411 that a person is eligible and calculate an amount under section 36B, and then reject or alter that determination and apply a different amount of APTC or no APTC at all. It may not do so. Section 1412 requires the payment of APTC in the amount for which the consumer has been determined eligible.

There is no authority to modify or remove APTC for those eligible for assistance that covers their entire premium.

Internal Revenue Code section 36B specifies how APTC is to be calculated. Section 1411 of the ACA requires eligibility be determined in accordance with Code section 36B. ACA section 1412 requires that the federal government "shall" pay APTC for those determined eligible under section 1411 in the amount for which the consumer is eligible under section 36B. The agency may not violate those directives and apply some other amount of APTC or decline to apply APTC for which the consumer has been determined eligible.

Thank you again for the opportunity to comment. If we can provide any additional information, please do not hesitate to contact us.

Sincerely,

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