Irresponsibly Taxing Irresponsibility: The Individual Tax Penalty Under the Affordable Care Act

Francine J. Lipman
University of Nevada, Las Vegas – William S. Boyd School of Law

James Owens

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Health Law and Policy Commons, Social Welfare Law Commons, Taxation-Federal Commons, and the Tax Law Commons

Recommended Citation

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.
Irresponsibly Taxing Irresponsibility:
The Individual Tax Penalty Under
The Affordable Care Act

Francine J. Lipman* & James Owens**

TABLE OF CONTENTS

I. INTRODUCTION .............................................................................................................. 464
   A. Evolution of Welfare Into Workfare Delivered Through the Federal Income Tax System ................................................................. 467
   B. Civilized Societies Have Comprehensive and Affordable Health Care … 469
   C. The IRS as an Administrator .............................................................................. 470

II. A BRIEF HISTORY ........................................................................................................... 471
   A. The Affordable Care Act .................................................................................... 471
   B. IRS Outreach, Education, and Enforcement Obligations .................................. 474

III. OPERATION OF THE SRP ............................................................................................ 476
   A. Minimum Essential Coverage ........................................................................... 476
      1. Dependency Coverage and Liability ............................................................... 478
      2. One Day Rule ................................................................................................ 478
      3. What is Not Included? ................................................................................. 479
      4. Proof of Minimum Essential Coverage ....................................................... 480
   B. Exemptions From Minimum Essential Coverage ............................................ 481
      1. Individuals Who Cannot Afford Coverage .................................................... 482
      2. Taxpayers With Incomes Below Filing Threshold.............................................. 488
      3. Months During Short Term Gaps ................................................................ 491
      4. Hardships ...................................................................................................... 492
      5. Noncitizens .................................................................................................... 493
      6. Native American Tribe Members ................................................................ 494
      7. Religious and Health Care Sharing Exemptions ............................................ 495
      8. Incarcerated Individuals .............................................................................. 495
      9. Other Exemptions .......................................................................................... 495

* Francine J. Lipman is a William S. Boyd Professor of Law at the University of Nevada, Las Vegas, William S. Boyd School of Law. Professor Lipman would like to thank the faculty workshop participants at the University of Utah, S.J. Quinney College of Law, the University of Nevada, Las Vegas, William S. Boyd School of Law, and the Western Decision Sciences 2016 annual meeting for their thoughtful comments and excellent suggestions. Professor Lipman gratefully acknowledges the assiduous research assistance of Joseph Meissner and the financial support of the William S. Boyd School of Law. © 2016, Francine J. Lipman.

** J.D., University of Nevada, Las Vegas, William S. Boyd School of Law. © 2016, James Owens.
C. Determining the Amount of the SRP ................................................................. 496
1. The SRP Calculation ............................................................................. 496
2. Flat Dollar Amount................................................................................. 498
3. Percentage of Excess Income Amount ................................................. 499
4. SRP Calculation Examples ................................................................. 500

D. Irresponsibly Taxing Irresponsibility? ......................................................... 508

IV. RECONSTRUCTING THE SHARED RESPONSIBILITY PAYMENT .................. 512
A. The SRP Reconstructed: Eliminating Floors and Ceilings ....................... 512
1. Proposal for the Revised SRP: 26 U.S.C. § 5000A(c) ............................. 512
2. Restated Examples with the Revised SRP ........................................... 513
3. The Reconstructed SRP Deconstructed .............................................. 516
B. Limited Collection of, and Penalties for, SRP Liabilities ....................... 518

V. CONCLUSION .................................................................................................. 519

I. INTRODUCTION

“Taxes are what we pay for a civilized society.” – J. Holmes

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (“the Act”). The Act includes an individual health insurance coverage mandate enforced with a new tax that Congress has named the Shared Responsibility Payment (“SRP”). Even though the Act was signed into law in 2010, the SRP was not effective until January 1, 2014, and many taxpayers did not become aware of the SRP’s existence until the beginning of 2015 when they prepared their 2014 federal income tax returns. This lack of SRP awareness was evidenced by the government’s last minute establishment of a late enrollment period to sign up for 2015 health coverage from March 15 to April 30, 2015. This period was only for individuals who were not aware of the

5. See Bianca DiJulio, Jamie Firth, & Mollyan Brodie, Kaiser Health Policy Tracking Poll: December 2014, KAISER FAMILY FOUND. (Dec. 18, 2014), http://kff.org/health-reform/poll-finding/kaiser-health-policy-tracking-poll-december-2014/. According to the survey done by the Kaiser Family Foundation leading into the 2015 year, over 7 in 10 (72%) of individuals surveyed said that they did not know what the fine would be for people who did not get insurance in 2015. Of those who did know, 19% said some amount other than the 2014 or 2015 amounts. Only 6% of those surveyed could report the 2014 fine amounts, and 3% could report the 2015 fine amounts.
SRP in the earlier open enrollment period, paid the SRP for 2014, and wanted to obtain health care coverage to avoid the penalty for 2015.\(^7\)

For those taxpayers who are aware of the SRP, many remain confused as to how the penalty is calculated and whether it even applies to them.\(^8\) For more than 80\% of taxpayers who filed their 2014 income tax returns, they simply had to check a box on their federal income tax return affirming that they had essential minimum health coverage for all twelve months in 2014.\(^9\) Because these taxpayers had the required coverage, they were not penalized by the SRP; they did not have to calculate it and would not owe any SRP. It is expected that 2 to 4\% of individuals will decide to pay the SRP because they affirmatively elected not to participate in the government health insurance marketplace (“the Exchange”) and will suffer the penalty.\(^10\) This elective payment of the SRP, in lieu of obtaining health insurance, is inconsistent with congressional goals and the Act’s mission to achieve comprehensive and affordable health care coverage for all Americans.\(^11\)

Stephanie Daugherty of Fort Worth, Texas is a taxpayer who affirmatively decided to pay the SRP.\(^12\) Stephanie earns too much at her part-time doctor’s office job to qualify for Medicaid, but she believes that she does not earn enough to comfortably afford qualifying health insurance coverage through the Exchange.\(^13\) She therefore chose not to participate in the Exchange and chose to forgo receiving a federal subsidy, the Premium Tax Credit,\(^14\) which was intended

\(^7\) Id.
\(^8\) See DiJulio, Firth, & Brodie, supra note 5.
\(^11\) See, e.g., 26 U.S.C. § 5000A (2012) (mandating health care coverage). “[T]he Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. 26 U.S.C. § 5000A. Congress recognized that, without an incentive, ‘many individuals would wait to purchase health insurance until they needed care.’ 42 U.S.C. § 18091(2)(I). So Congress adopted a coverage requirement to ‘minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.’ Ibid. In Congress’s view, that coverage requirement was ‘essential to creating effective health insurance markets.’” King v. Burwell, 135 S.Ct. 2480, 2486 (2015) (discussing Congress’s reasoning behind the design of the Act).
\(^13\) Schmall, supra note 12.
\(^14\) 26 U.S.C. § 36B (2012) (setting forth the premium tax credit, a refundable tax credit intended to subsidize essential health care coverage for lower and middle-income families).
to make her purchase of comprehensive health care coverage affordable. Alternatively, Ms. Daugherty will go without insurance coverage and, if she does not obtain an exemption, will owe the SRP. Thus, the SRP is a tax on individuals who are not sharing in the responsibility to participate in Congress’s reforms to achieve comprehensive affordable health care, or a tax on “irresponsibility.”

Like Ms. Daugherty many Americans are still struggling to understand (1) whether they have essential minimum coverage, (2) whether they are “exempt” from the SRP, (3) how much the SRP costs as compared to qualifying health insurance, and (4) what this all means for their family beginning in 2014 and beyond. For these reasons, it is important to understand what exactly the SRP is, how it applies to various households, and how it will continue to apply once it is fully phased in for 2016 and beyond. This Article will fill an existing gap in scholarly literature about the SRP by providing comprehensive examples of how the SRP operates for taxpayers at various household income levels. Through these examples the authors expose an inherent problem in the design of the SRP that they remedy with a statutory amendment.

Part II begins with a brief history of the Act before moving to a discussion of the IRS’s significant obligations under the Act. Part III uses a series of practical examples to detail and describe how the SRP operates. Part III also details (1) what type of health insurance coverage qualifies as “minimum essential coverage” and what coverage does not; (2) the myriad of exemptions from the SRP; and (3) the actual calculation of the SRP. This analysis demonstrates the significant penalty the tax imposes—especially on the lowest income households who are not exempt. These examples evidence that the SRP is regressive.

Congress intended that the SRP be harsh so that most households would obtain health care coverage in lieu of paying the SRP. For those households that do not qualify for an exemption and do not obtain qualifying coverage, the penalty is as significant as intended. However, the design and structure of the

---

15. Id. (setting forth the premium tax credit, a refundable credit subsidizing purchases of qualifying health insurance); see also Francine J. Lipman & James E. Williamson, Reconciling the Premium Tax Credit: Painful Complications for Lower and Middle-Income Taxpayers, 69 SMU L. REV. (forthcoming 2016) (describing the details of the premium tax credit using detailed examples).

16. See U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 9 (noting it is expected that 3 to 5% of taxpayers will benefit from the advanced payments of tax credits to lower their marketplace premiums in 2014; 10 to 20% of taxpayers were uninsured for all or part of 2014 and will claim an exemption not requiring minimum essential coverage).

17. See infra Part IV.A chart 2 (evincing the regressive attributes of the SRP’s effective tax rates).

18. “While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law. Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596–97 (2012) (internal citations omitted).
SRP provides a much harsher penalty for lower-income individuals than higher-income individuals. Specifically, because of the inherent floor and ceiling in the complex design of the SRP, it disproportionately taxes lower-income families at a higher rate as compared to higher-income families. Part IV presents a reconstructed SRP that resolves this issue by eliminating the floor and ceiling. This remedy not only replaces the regressive structure with a modestly progressive structure, but also meaningfully simplifies the SRP. Part V concludes by reflecting on how the authors’ redesign of the SRP better achieves Congress’s goal of affordable comprehensive health care for all. Before the authors proceed with the specifics of the SRP, this Article discusses the challenges of using the federal income tax system to implement comprehensive affordable health care.

A. Evolution of Welfare Into Workfare
Delivered Through the Federal Income Tax System

In recent decades, Congress has increasingly used the federal income tax system to administer and deliver social benefits. This transition is consistent with the evolution of the American welfare system into workfare over the last several decades. As more and more social welfare benefits are conditioned upon work, not employment recruiters or trainers; see also Kathryn J. Edin & H. Luke Shaefer, $2 A Day: Living on Almost Nothing in America 156–58, 172–73 (2015) (revisiting recent American history when welfare was replaced with workfare by bolstering the well-being of working poor parents through tax credits that provide a wage subsidy through the Earned Income Tax Credit).

standingTaxes/student/whys_thm03_les02.jsp (last visited Mar. 21, 2016) (defining regressive tax).
20. See id.
21. “Historically, the IRS’s mission has been to collect taxes, but in recent years, Congress has directed the IRS to administer an increasing number of social benefits programs, including Economic Stimulus Payments, the First Time Homebuyer Credit, and the Making Work Pay Credit. The recent directive to administer major aspects of the new health care law will add significantly to the IRS’s workload. ‘I am confident the IRS can succeed in its implementation of health care reform,’ Olson said. ‘But a comprehensive assessment of the issues and challenges that lie ahead is a prerequisite for success.’” National Taxpayer Advocate Delivers Annual Report to Congress; Focuses on Tax Reform, Collection Issues, and Implementation of Health Care Reform, INTERNAL REVENUE SERV., http://www.irs.gov/uac/National-Taxpayer-Advocate-Delivers-Annual-Report-to-Congress%3B-Focuses-on-
Tax-Reform-,Collection-Issues,-and-Implementation-of-Health-Care-Reform (Jan. 5, 2011) [hereinafter National Taxpayer Advocate]; see also Francine J. Lipman, Heal the Suffering Children, 34 B.C. J. L. & SOC. JUST. 311 (2014) (noting that the most successful antipoverty programs for working families and children are the Earned Income Tax Credit and the refundable Child Tax Credit).
22. “In 1996, politicians ‘ended welfare as we know it’ by fundamentally changing this program with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The principal focus of the 1996 reform is mandatory work requirements enforced by sanctions and strict time limits on welfare receipt. While PRWORA’s emphasis on work is not new, the difference is its significant ideological and policy commitment to employment, enforced by time limits.” Joel F. Handler, The Rise and Spread of Workfare, Activation, Devolution, and Privatization, and the Changing Status of Citizenship, SOC. SCI. RES. NETWORK ELEC. PAPER COLLECTION, http://ssrn.com/abstract=1097720 (2008) (arguing for a basic income allowance that is neither means-tested nor dependent upon work); see also Joel F. Handler, Workfare Work: The Impact of Workfare on the Worker Client Relationship, 3 SOC. WORK & SOC’Y INT’L ONLINE J. 2, http://www.socwork.net/sws/article/view/192/479 (2005) (presenting the conflict for welfare office workers who are trained as social workers, not employment recruiters or trainers); see also Kathryn J. Edin & H. Luke Shaefer, $2 A Day: Living on Almost Nothing in America 156–58, 172–73 (2015) (revisiting recent American history when welfare was replaced with workfare by bolstering the well-being of working poor parents through tax credits that provide a wage subsidy through the Earned Income Tax Credit).
upon work\textsuperscript{23} and family composition,\textsuperscript{24} and are means-tested by income levels, the income tax system where this data is already systematically aggregated, authenticated, and processed has become the go-to administrative agency.\textsuperscript{25}

Nevertheless, as the National Taxpayer Advocate Nina Olson has noted, there are

\[\text{[S]}\text{ubstantial differences between benefits agencies and enforcement agencies in terms of culture, mindset, and the skills and training of their employees. As the Internal Revenue Service (the \textquote{IRS}) prepares to administer large portions of the health care legislation, it will have to shift from being an enforcement agency that effectively says, \textquote{you owe us} to an agency that places much greater emphasis on hiring and training caseworkers to help eligible taxpayers receive benefits and to work one-on-one with taxpayers to resolve legitimate disagreements.}\textsuperscript{26}\]

The health care legislation referenced by Nina Olson includes the SRP, the tax designed to enforce the individual health care mandate.\textsuperscript{27}

While deemed a constitutional tax by the U.S. Supreme Court in \textit{National Federation of Independent Business v. Sebelius},\textsuperscript{28} at its core the SRP is a

\begin{itemize}
\item \textsuperscript{23} See Lipman, \textit{supra} note 21 (describing the most successful antipoverty programs as workfare that is the Earned Income Tax Credit). For example, the Earned Income Tax Credit and the Child Tax Credit, both dependent upon earned income to generate a refundable tax benefit, lift millions of children out of poverty annually. Chuck Marr, Chye-Ching Huang, Arloc Sherman, & Brandon Debot, \textit{EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children’s Development, Research Finds}, \textit{CTR. ON BUDGET AND POL’Y PRIORITIES} (Oct. 1, 2015), http://www.cbpp.org/research/federal-tax/eitc-and-child-tax-credit-promise-work-reduce-poverty-and-support-childrens. \textquote{As the University of California’s Hilary Hoynes writes, the EITC ‘may ultimately be judged one of the most successful labor market innovations in U.S. history.’ The CTC is newer and has not been studied to the same extent, but it shares key design features with the EITC: it is available only to working families and phases in as earnings increase.” Id.}

\item \textsuperscript{24} A specific purpose of Temporary Assistance for Needy Families (TANF) is to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.” 42 U.S.C. § 601(a)(2) (2012). The law also discourages out-of-wedlock pregnancies and “encourage[s] the formation and maintenance of two-parent families.” 42 U.S.C. § 601(a)(2)-(3) (2012). A total of about two billion dollars is spent each year on marriage promotion programs under TANF. See 42 U.S.C. § 603(a)(2) (2012) (discussing funding promoting marriage and fatherhood programs); \textit{see also} 42 U.S.C. § 603(a)(2)(D) (marriage and fatherhood funding continues with 2015 fiscal appropriations of $150,000,000 under TANF); \textit{Policy Basics: An Introduction to TANF, CTR. ON BUDGET AND POL’Y PRIORITIES} (June 15, 2015), http://www.cbpp.org/research/policy-basics-an-introduction-to-tanf (describing that TANF was part of effort to “end welfare as we know it” in 1996 the Deficit Reduction Act provides a $150 million per year to support marriage and fatherhood programs).

\item \textsuperscript{25} For example, the dollar amount of Medicare premiums that depend upon adjusted gross income on the typical income tax return. \textit{See Francine J. Lipman & James. E. Williamson, Shrinking Boomer Social Security Retirement Benefits, A.B.A. SEC. TAX., 27 NEWS QUARTERLY 20} (Fall 2007) (describing how Medicare premiums are means-tested based upon federal income tax adjusted gross income from the most recently filed income tax returns).

\item \textsuperscript{26} \textit{National Taxpayer Advocate, supra} note 21.

\item \textsuperscript{27} 26 U.S.C. § 5000A (2012) (setting forth the details of the SRP).

\end{itemize}
financial penalty for not having qualifying health insurance. Historically, Congress has enacted a broad and deep menu of tax provisions to motivate and inspire U.S. taxpayers to timely report and pay their fair share of tax obligations, including penalties and interest intended to make it costly—even criminal—to ignore tax obligations. A primary purpose of these provisions is to ensure that the government has the resources it needs to timely and consistently provide Americans with “a civilized society.” While the SRP is a penalty that must be computed and delivered annually through the federal income tax system, it is not a penalty to ensure timely tax filing and payments. The SRP is designed to ensure that all Americans have access to affordable and comprehensive health care. Most recently, the Supreme Court recounted the meaningful role of the SRP in achieving Congress’s health care goals.

B. Civilized Societies Have Comprehensive and Affordable Health Care

Justice Roberts’ majority opinion in King v. Burwell describes the SRP as one of three key interconnecting health care coverage reforms. The opinion recounts that after decades of experience trying to increase health care coverage in America, experts have determined that the necessary components for sustained and affordable comprehensive coverage include: (1) health insurance community pricing that does not include pre-existing health conditions; (2) mandatory coverage so that individuals do not self-select coverage only when they are ill and need health care services; (2a) a meaningful penalty for those that do not obtain coverage to motivate even the healthiest individuals to obtain and maintain insurance; and (3) an income-based subsidy to ensure that everyone can comply with the mandate of health care coverage and that coverage is affordable for everyone. These three integrated components are designed to ensure that

30. For a comprehensive discussion of tax penalties and compliance, see Michael Doran, Tax Penalties and Tax Compliance, 46 HARV. J. ON LEGIS. 111, 114-115 (2009).
32. See Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2596-97 (describing the SRP as “plainly designed to expand access to health insurance coverage”).
33. King v. Burwell, 135 S.Ct. 2480, 2484–88 (2015) (describing that to provide health care insurance without qualifying or charging for pre-existing conditions the coverage must be mandatory to decrease the costs for insurers and for a mandate to be effective there must be a penalty, here the SRP is the penalty).
34. Id. at 2485–87 (2015) (holding that premium tax credits are available to qualifying individuals in States who participate in the Federal health care exchange).
35. Id.
36. Id.
health care insurance companies and individuals can work together to mitigate spiraling costs and maximize accessibility.\(^{37}\)

\textit{C. The IRS as an Administrator}

Under the Act, and consistent with the trend of delivering more and more antipoverty benefits through the income tax system, the IRS is responsible for administering the SRP. The SRP, together with other tax and non-tax provisions of the Act, is intended to ensure all individuals buy health insurance so that the pool of insured people includes both healthy and unhealthy individuals. Consistent with this purpose, the SRP is a tax penalty that Congress does not want Americans to pay. Congress has designed the SRP to serve as a “stick” causing individuals to avoid it by buying and maintaining qualifying health insurance. Therefore, as the National Taxpayer Advocate describes, the success of the Act depends in part on the IRS focusing not on “you owe us the SRP,” but rather on ensuring that individuals “do not owe the SRP,” because eligible individuals obtain health insurance.\(^{38}\) Congress’s goal of comprehensive affordable health care coverage can only be achieved if a broad and deep pool of individuals purchase and maintain qualifying health insurance, rather than owing the SRP.\(^{39}\) This emphasis on fostering benefits rather than enforcing the collection of taxes is a systemic challenge for the IRS. “From an organizational standpoint, there are substantial differences between benefits agencies and enforcement agencies in terms of culture, mindset, and the skill sets and training of their employees.”\(^{40}\)

In addition to meeting the systemic challenge of an enforcement agency implementing a health care benefit, the new tax provisions the IRS has had to implement under the Act are detailed and complex.\(^{41}\) When laws are complicated, confusing, and lack transparency, unregulated tax preparers are more likely to be successful at taking advantage of vulnerable community members.\(^{42}\) Early in its

\footnotesize{\begin{itemize}
\item \(^{37}\) Id. at 2485–86.
\item \(^{38}\) National Taxpayer Advocate, supra note 21.
\item \(^{39}\) For 2014 tax return filing season through the end of 2015, 7.9 million taxpayers reported a total of $1.6 billion in SRP. About 39% of these payments were $100 or less and 94% were $500 or less. The vast majority of these taxpayers received a refund after payment of the SRP. Approximately, 115 million taxpayers and their dependents claimed that they had qualifying health care coverage and 12.4 million claimed they qualified for an exemption from coverage. Another 313,000 taxpayers erroneously paid the SRP. See Koskinen, supra note 9.
\item \(^{40}\) National Taxpayer Advocate, supra note 21.
\end{itemize}}
implementation in 2015, the SRP seemed to be entering the scene as such a provision, and the IRS hoped to stall taxpayer abuse by unscrupulous tax preparers. The IRS had received a number of reports from different parts of the country describing tax preparers who were instructing their clients to make their SRP directly to the preparer and not to the U.S. Treasury. In many cases, the individuals actually were exempt from this tax penalty. And in all cases, federal tax payments should never have been made directly to tax return preparers. To combat this abuse, the IRS issued a tax tip on March 13, 2015 warning taxpayers to choose their tax professionals carefully. As a “civilized society” we have a shared responsibility to ensure that only those who should be penalized under the SRP—i.e., those who are being truly “irresponsible” by not participating in Congress’s plan for comprehensive affordable health care coverage—pay that penalty.

II. A BRIEF HISTORY

A. The Affordable Care Act

As stated earlier, the SRP is part of the Act that President Obama signed into law on March 23, 2010. Prior to its passage, there was strong opposition from the Republican Party to any health care reform. The Democratic Party lacked the required votes to stop a potential Republican filibuster. However, in December of 2009, the Democratic Party was able to overcome any potential

45. Id.
46. Id.
48. See Robert B. Leflar, Reform of the United States Health Care System: An Overview, 2013 ARK. L. NOTES 1171 (recounting the historic and contentious battle for passage of the Act and the continually contentious aftermath); see also Janet Dolgin & Janet Dieterich, Social & Legal Debate About the Affordable Care Act, 80 UMKC L. REV. 49–52 (2011) (recounting the history of the passage of the Act).
49. Dolgin & Dieterich, supra note 48, at 50.
filibusters due to the support of Ben Nelson (D-NE). By a vote of 60-39, the Senate passed its version of the Act on December 24, 2009. Later, with the election of Senator Scott Brown (R-MA) on January 19, 2010, the Democrats could no longer break a filibuster in the Senate. As a result, and because the Senate had already passed the Senate bill, the House abandoned its separate bill to facilitate passing the Senate’s bill, known as the Patient Protection and Affordable Care Act. Although the House was at first hesitant, most of the House Democrats agreed that they would pass the Senate bill on the condition that the Senate amend the bill by the Health Care and Education and Reconciliation Act. After much debate and persuasion, as well as changes to the bill, the House passed the Senate bill with a 219-212 vote on March 21, 2010. Approximately 34 Democrats and all 178 Republicans voted against it.

The primary goal of the Act is to increase the number of Americans who have health insurance. The Act itself states that one-half of all personal bankruptcies are caused in part by medical expenses. Members of Congress concluded that affordable health insurance coverage nationwide would increase the number of Americans who have access to health care and improve financial security for all American families. Since the Act became effective on January 1, 2014, the Department of Health and Human Services reports that more than sixteen million uninsured individuals have gained health insurance, reducing the uninsured rate from 17.3% to 9.2%. After less than two years the Act had

50. Rule XXII of the Standing Rules of the Senate requires a three-fifths majority vote to stop a debate, enacting what is known as “cloture.” This would therefore require 60 votes in the senate. Ben Nelson (D-NE) became the 60th individual in support of the Act, giving the Democratic Party the last vote needed to end any debate or attempt at a filibuster by the Republican Party. See Jonathan Cohn, Breaking: Nelson Says Yes; That Makes 60, NEW REPUBLIC (Dec. 19, 2009), https://newrepublic.com/article/72050/breaking-nelson-says-yes-makes-60.
53. Id.
55. Id.
57. Id.
58. Id.
resulted in the lowest uninsured rate on record or for at least more than fifty years.\(^60\)

In the twenty-two states that expanded Medicaid and set up or collaborated with the federal government to establish an Exchange by December 31, 2014, the uninsured rates decreased by 44% down to 8.9%.\(^61\) For the first time, six states—Rhode Island, Minnesota, Vermont, Connecticut, Iowa, and Hawaii—joined Massachusetts in having uninsured rates below 5%.\(^62\) Uninsured rates in Arkansas, Kentucky, Oregon, Rhode Island, and Washington have decreased by at least ten percentage points since the beginning of 2014.\(^63\) These results are consistent with every public survey released to date, including recent findings by the Centers for Disease Control and Prevention.\(^64\) Given the state-by-state success, ten more states (or thirty-two states including Washington D.C.) have expanded Medicaid to date, and three more states are in discussions to do the same, with only sixteen states not presently in either category.\(^65\) Additionally, more than 13.5 million individuals have received health insurance through expanded Medicaid as of October 31, 2015, with more individuals expected to qualify for Medicaid coverage as more and more states accept this opportunity.\(^66\)

The provisions of the Act that work in concert to provide affordable comprehensive health insurance coverage do so with a variety of incentives and penalties.\(^67\) Most notably, a legal mandate was established requiring individuals in the United States either to obtain and maintain health insurance for themselves and their dependents or pay a monetary penalty.\(^68\) This penalty is most often referred to as the “individual tax penalty” or “shared responsibility payment” and has been incorporated in the Internal Revenue Code of 1986, as amended (“the Code”), as § 5000A.\(^69\)

\(^{60}\) Jeffrey Young, Uninsured Rate Down Way More in States that Embraced Obamacare, HUFFINGTON POST (Aug. 10, 2015, 3:02 AM), http://www.huffingtonpost.com/entry/uninsured-rate-states-obamacare_us_55c7e3f9e4b0f1cbf1e561f7 (noting that states that expanded Medicaid and collaborated with or created their own Exchange by Dec. 31 saw uninsured rates drop 44% down to 8.9%, while in states that did neither the drop was only 28% with uninsured rates of 13.4%); DEP’T OF HEALTH AND HUMAN SERVS., supra note 59; Diamond, supra note 59.

\(^{61}\) Young, supra note 60 (noting that states that expanded Medicaid and collaborated with or created their own Exchange by Dec. 31, 2014 saw uninsured rates drop 44% down to 8.9% and in states that did neither the drop was only 28% with uninsured rates of 13.4%).

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.


\(^{66}\) Young, supra note 60.


\(^{68}\) Cannan, supra note 67, at 159–63.

The Act describes the SRP as a “penalty,” rather than a tax.\textsuperscript{70} Shortly after the Act was signed into law, several states brought actions in federal court declaring the Act unconstitutional.\textsuperscript{71} The states specifically challenged the individual mandate and the SRP set forth in § 5000A. Whether the SRP was an unconstitutional “penalty” or a tax permissible under Congress’s taxing power was a question eventually brought before the Supreme Court.\textsuperscript{72} In a 5-4 decision, the Supreme Court held that the Act was constitutional under the broad taxing power granted to Congress in article 1 of the U.S. Constitution.\textsuperscript{73}

The Supreme Court reviewed the SRP and determined in substance it was a constitutional exercise of Congress’s broad power to tax.\textsuperscript{74} Whether the Act describes the payment as a “penalty” or “tax” does “not determine whether the payment may be viewed as an exercise of Congress’ taxing power.”\textsuperscript{75} The Supreme Court’s holding that the SRP is a tax in substance relied on the following factors: (1) the SRP is paid into the U.S. Treasury by taxpayers when they file their annual income tax returns;\textsuperscript{76} (2) it does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold under the Code;\textsuperscript{77} and (3) for taxpayers who do owe the SRP, the amount is determined in relation to taxable income, number of dependents, and filing status.\textsuperscript{78} The Court concluded that as a result of these tax attributes, the SRP is a constitutionally permissible tax and is enforceable by the IRS, which must assess and collect it “in the same manner as taxes.”\textsuperscript{79}

\textit{B. IRS Outreach, Education, and Enforcement Obligations}

On September 10, 2014, IRS Commissioner John A. Koskinen testified before Congress describing what the IRS had done to fulfill its responsibilities under the Act, most particularly regarding the SRP.\textsuperscript{80} Commissioner Koskinen

\textsuperscript{70.} See 26 U.S.C. § 5000A (b)(2), (b)(3), (c) (describing the SRP as a “penalty” rather than a “tax” throughout the provision).
\textsuperscript{72.} Id.
\textsuperscript{73.} Id.; U.S. CONST. art. 1, § 8, cl. 1.
\textsuperscript{75.} Id. at 2594.
\textsuperscript{76.} Id.
\textsuperscript{77.} Threshold means the amount of gross income that would trigger an individual’s requirement to file a Federal income tax return under section 26 U.S.C. § 6012(a)(1). Treas. Reg. § 1.5000A-3(f)(2)(i) (2014) (applicable filing threshold). This amount varies depending on an individual’s filing status, as well as the current year’s tax tables. If your income is below the appropriate tax table for a specific filing status, that individual is not required to file a tax return, although there might be benefits in filing anyways. INTERNAL REVENUE SERV., TAX GUIDE 2015 FOR INDIVIDUALS (2015), http://www.irs.gov/pub/irs-pdf/p17.pdf.
\textsuperscript{79.} Id. at 2583 (“The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it ‘in the same manner as taxes.’”).
\textsuperscript{80.} State of the Internal Revenue Service: Hearing Before the Subcomm. on Oversight of the H. Ways and Means Comm., 113th Cong. 4–5 (2014) (written testimony of John A. Koskinen, Comm’r of the Internal Revenue Serv.).
explained that the IRS had taken steps to make sure all relevant information was available to taxpayers through its website, YouTube videos, health care tips, outreach to key groups and software communities, and social media.\textsuperscript{81} The IRS had also created new forms and worksheets for determining exemptions from the SRP and SRP calculation amounts.\textsuperscript{82}

Despite the IRS’s efforts, many Americans were (and remain) confused about the SRP, how it applied to them in 2014, and how it will apply thereafter.\textsuperscript{83} Due to the lack of detailed information about the SRP, some may not be aware that they paid the SRP for 2014 on their federal income tax returns.\textsuperscript{84} As of April 30, 2015, the National Taxpayer Advocate estimated that of the 6.6 million 2014 tax returns filed that owed SRPs averaging $190, more than 300,000 taxpayers overstated their SRP in an aggregate amount of about $35 million.\textsuperscript{85} The IRS has the authority to return these overpayments and is exploring options to determine how to best reconcile this matter. The National Taxpayer Advocate suggested that rather than placing the burden on taxpayers given the high relative cost of filing a refund claim to the average overpayment of $110, the IRS should consider distributing the overpayments without imposing a taxpayer compliance burden.\textsuperscript{86} Nearly 250,000 of the 300,000 taxpayers (totaling $27 million in SRPs) qualified for an exemption but did not claim one.\textsuperscript{87} The remaining 50,000 taxpayers miscalculated and overpaid their SRP.\textsuperscript{88} The IRS has responded to the National Taxpayer Advocate’s request by sending out letters to these individuals notifying them that they may qualify for an exemption from the SRP and that they can amend their tax return accordingly.\textsuperscript{89}

In early 2016, the IRS Commissioner reported to Congress that by the end of 2015, 115 million 2014 income tax returns filed, or 81% of individual income tax returns, claimed exemption from the SRP by checking a box that the taxpayers had minimum essential coverage.\textsuperscript{90} An additional 12.4 million income tax returns, or 9%, claimed an affirmative exemption from the SRP.\textsuperscript{91} However, in 2015, almost 8 million taxpayers, or about 5%, paid $1.6 billion in SRP for the 2014 calendar year.\textsuperscript{92} Consistent with the phase-in design of the SRP, these

\textsuperscript{81} Id.
\textsuperscript{83} NAT’L TAXPAYER ADVOCATE, OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2016, VOLUME 1 at 22–23 (noting that more than 300,000 taxpayers paid $35 million in SRP overpayments averaging about $110 per taxpayer including about 250,000 such taxpayers who qualified for an exemption from the SRP). As of Apr. 30, 2015, approximately 6.6 million tax returns included the SRP. Id. at 24.
\textsuperscript{84} See id. at 41.
\textsuperscript{85} Id. at 40–41 (describing the 2015 tax filing season with respect to the IRS’s administration of the Act specifically focusing on the SRP).
\textsuperscript{86} Id. at 41.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} See Koskinen, supra note 9 at 5.
\textsuperscript{90} Id.
\textsuperscript{91} See id. at 5.
\textsuperscript{92} Id. at 4.
payments were generally low amounts in 2015, with the average SRP around $210. About 39% of the payments were $100 or less, and about 94% of these payments were $500 or less. Most of the SRP taxpayers, or 82% of those including an SRP, reported a net tax overpayment, or refund. Through the end of 2015, more than 135 million 2014 individual income tax returns have been affected by the SRP. Part III describes how the SRP affects all taxpayers beginning on January 1, 2014 and beyond.

III. OPERATION OF THE SRP

A. Minimum Essential Coverage

Generally, every United States taxpayer is subject to the SRP provisions under the Code. However, only “applicable individuals” are required to either maintain “minimum essential coverage” or pay the SRP. An “applicable individual” for this purpose is determined on a monthly basis and is any taxpayer other than an individual who is excluded because of a “religious exemption” or because they are “not lawfully present” or “incarcerated.”

Each applicable individual, beginning on January 1, 2014, must ensure that they have minimum essential coverage for each month of the year, for themselves, and for each of their dependents. Failure to do so without an exemption for one or more months during the year will result in the imposition of a tax—the SRP—on the taxpayer. The tax is imposed for each month that any taxpayer or her dependents do not have the appropriate minimum essential coverage.

The term “minimum essential coverage” means that a taxpayer needs to be covered under any of the following types of coverage: (1) government-sponsored programs, including: the Medicare or Medicaid programs under the Social

93. Id.
94. Id.
95. Id.
96. Id. (adding (1) 115 million income tax returns claiming the exemption because they had qualifying health care coverage, plus (2) 12.4 million claiming an affirmative exemption, plus (3) 8 million paying the SRP, for a total of 135 million tax returns).
99. 26 U.S.C. § 5000A (setting forth that applicable individuals are required to maintain minimum essential coverage or pay the SRP).
100. 26 U.S.C. 5000A(a) (describing that the analysis as to whether someone is an “applicable individual” is determined on a monthly basis).
101. 26 U.S.C. § 5000A(d) (describing that an “applicable individual” is any taxpayer for any month that she is not excluded because she is unlawfully present, incarcerated, or qualifies for a religious exemption).
102. 26 U.S.C. § 5000A(d) (defining who is an “applicable individual”).
104. Id.
Security Act,\textsuperscript{105} the TRICARE program,\textsuperscript{106} health care programs as determined by the Secretary of Veterans Affairs,\textsuperscript{107} health care programs relating to the Peace Corps volunteers,\textsuperscript{108} and the Nonappropriated Fund Health Benefits Program of the Department of Defense;\textsuperscript{109} (2) eligible employer-sponsored plans;\textsuperscript{110} (3) health plans offered in individual State markets;\textsuperscript{111} (4) grandfathered health plans,\textsuperscript{112} and (5) other health benefits coverage, such as a State health benefits risk pool, that the Secretary of Health and Humans Services and the Secretary recognize.\textsuperscript{113}

U.S. citizens who are residents in a foreign country for an entire year\textsuperscript{114} and residents of U.S. territories are automatically considered to have minimum essential coverage.\textsuperscript{115}

---

\textsuperscript{105} 26 U.S.C. § 5000A(f)(1)(A)(i)-(ii). The regulations exclude Medicaid coverage for “pregnancy-related Medicaid” offered since states have the option to provide pregnant women with full Medicaid coverage as pregnancy-related Medicaid. Some states do not provide full Medicaid coverage as pregnancy-related Medicaid and the final regulations continue to provide that these are not minimum essential coverage. Medicaid coverage for individuals with high medical expenses who would otherwise be eligible for Medicaid, but for their income level, may be covered in some states, but will not likely be covered in the future. 26 C.F.R. §§ 1-602 (2013).


\textsuperscript{110} 26 U.S.C. § 5000A(f)(1)(B). “Eligible employer-sponsored plan” means a group health plan or group health insurance coverage offered by an employer to the employee that is a governmental plan, or any other plan offered in the small or large group market within a State; generally, these include self-insured group health plans (regardless if offered in large or small group markets in a state), coverage provided by an employer to former employers (such as retiree coverage), and plans provided by third parties on behalf of the employer. See 26 U.S.C. § 5000A(f)(2). The Congressional Budget Office (“CBO”) and the Joint Committee on Taxation (“JCT”) estimate that, because of the Affordable Care Act, about 3 to 5 million fewer people will obtain coverage through their employer in years 2019 through 2022. See CONG. BUDGET OFF., PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT (2012), www.cbo.gov/sites/default/files/cbopdfs/attachments/09-19-12-Indiv_Mandate_Penalty.pdf.

\textsuperscript{111} 26 U.S.C. § 5000A(f)(1)(C). Includes health insurance coverage offered to individuals not related to a group health plan, including a qualified health plan offered by the Exchange. A plan offered to one specific individual is also coverage for 26 U.S.C. § 5000A purposes if it is insurance coverage under 2791(b)(1) of the Public Health Service Act, is not for a short-term limited duration, and is offered in the individual market within a state. Treas. Reg. § 1.5000A-2(d) (2014).

\textsuperscript{112} 26 U.S.C. § 5000A(f)(1)(D).


\textsuperscript{114} 26 U.S.C. § 911(d)(1)(A)–(B) (2012) (defining a qualified individual for these purposes as a citizen of the U.S., who is a resident of a foreign county for an uninterrupted period which includes an entire taxable year, or a citizen or resident of the U.S., who, during any period of 12 consecutive months, is present in a foreign county during at least 330 full days in such period).

\textsuperscript{115} 26 U.S.C. § 5000A(f)(4)(A)–(B) (individuals residing outside United States or resident territories).
• Example 1. Exemption for U.S. Citizens Who Are Residents of Foreign Countries or U.S. Territories

For example, if Cheryl, a resident of Puerto Rico, was uninsured for the first half of the year but started a job with health coverage on July 1, Cheryl would still have minimum essential coverage for the entire year because she lives in a U.S. territory.116

1. Dependency Coverage and Liability

A taxpayer is liable for the SRP of a dependent117 for each month in a taxable year for which the individual is the taxpayer’s dependent.118 Whether or not a taxpayer actually claims a deduction for an individual as a dependent on her tax return for the tax year,119 she is liable for the SRP for as long as an individual qualifies as a dependent under the Code.120 This liability may not be assigned to another taxpayer, even if another taxpayer has a legal obligation to provide the child’s health coverage.121

• Example 2. Responsibility for SRP of Dependents

For example, Ann is required to provide health care for a child under a divorce decree or court order. Ann cannot and does not claim her child as a dependent on her tax return. As a result, even if Ann fails to follow the order and does not provide the child with health coverage, Ann will not be liable for the SRP for failing to provide minimum essential coverage for this child.122 The taxpayer who claims Ann’s child as a dependent is liable for any SRP.

2. One-Day Rule

A taxpayer will be treated as having minimum essential coverage for a month if the individual is enrolled in and entitled to receive benefits under a program or

---

120. 26 U.S.C. § 5000A(b)(3)(A) (describing that taxpayers are liable for the SRP for any dependents (as defined in section 152); Treas. Reg. § 1.5000A-1(c)(2)(i) (2013).
122. An individual can only be claimed as a dependent, and thus the responsibility of the taxpayer for minimum essential coverage purposes, if all of the requirements of 26 U.S.C. § 152 are met, and the child is considered either a qualifying child or qualifying relative. Commentators suggested that a non-custodial parent who must provide health care of a child under a separate agreement, such as a divorce decree or court order, be liable for the SRP if they fail to provide such coverage. This recommendation was rejected. 26 U.S.C. § 5000A clearly places the liability on the taxpayer who may claim the individual as a dependent under 26 U.S.C. §§ 151 & 152.
plan that provides minimum essential coverage for at least one day during the month.  

**Example 3. Application of One-Day Rule**

For example, if Bob left a job on May 2 and was covered under his employer’s health coverage through his departure, Bob is treated as having coverage for the entire month of May. Furthermore, if Bob did not get another job until June 30 of the same year but was covered under his new employer’s health plan immediately, Bob is also treated as having coverage for the entire month of June despite having no actual insurance coverage for almost two months.

At one point, the government contemplated implementing a rule where an individual had to be enrolled for a majority of the days in a month to be considered to have minimum essential coverage for any calendar month. Under this proposed rule the IRS would have had to use an even more fact-based review to determine the number of days each family member was covered in each month of the year. The Treasury Department and the IRS rejected this idea in favor of the administrative ease and convenience of a one-day rule.

This approach is advantageous for taxpayers as well as the IRS. The one-day rule allows the taxpayer to be treated as having minimum essential coverage for a period longer than she actually had coverage; thus, the taxpayer can minimize the amount of their SRP during transitory periods or avoid it altogether.

### 3. What is Not Included?

Congress’s goal in requiring and defining mandatory minimum essential coverage is that individuals and their dependents have access to comprehensive health care. Therefore, some health plans with limited benefits do not meet the requirements for minimum essential coverage. Most of these plans include coverage consisting solely of “excepted benefits,” such as insurance that only covers vision and dental; accident or disability insurance; workers compensation insurance; AmeriCorps coverage; Medicaid providing only family planning services; Medicaid providing limited coverage to treat tuberculosis, emergency medical conditions, pregnancies, the medically needy; and others. Whether or not Medicaid qualifies as minimal essential coverage has generated much confusion. In general, traditional Medicaid providing comprehensive coverage qualifies as minimum essential coverage. However, because Medicaid coverage

---

123. Treas. Reg. § 1.5000A-1(b)(1);  
125. Id.  
varies from state to state and contains various plans that offer a range of different coverage, not all types of Medicaid are considered minimum essential coverage.\textsuperscript{127}

Congress wants all Americans irrespective of their wealth or income to have access to comprehensive health care.\textsuperscript{128} Therefore, comprehensive health care coverage through Medicaid is a critical part of the Act.\textsuperscript{129} The most common forms of nontraditional Medicaid include coverage for pregnancy-related benefits only; wrap-around coverage for certain privately-insured children with significant health needs; and coverage that applies only after individuals themselves pay for threshold medical expenses.\textsuperscript{130} Medicaid that covers only pregnancy-related services is not minimum essential coverage.\textsuperscript{131} Medicaid coverage that is premium assistance or coverage for disabled children generally will qualify as minimum essential coverage.\textsuperscript{132} Medicaid plans that cover regular office visits, prescription medications, and hospitalizations\textsuperscript{133} are also likely to qualify as minimum essential coverage.\textsuperscript{134} As Medicaid coverage evolves, its program will have to be independently reviewed to determine whether it qualifies as minimum essential coverage.

4. Proof of Minimum Essential Coverage

Generally, consistent with other representations on annual tax returns, taxpayers will not have to provide proof of minimum essential coverage. Most taxpayers will simply make an affirmative statement on their annual tax return that they had coverage for each of the twelve calendar months under penalties of perjury.\textsuperscript{135} Starting in 2015, employers, insurers, and government programs will report information regarding taxpayers’ insurance coverage directly to the IRS.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{127} Joe Touschner, \textit{More Clarity on When Medicaid is Minimum Essential Coverage}, GEORGETOWN U. HEALTH POL’Y INST. (Sept. 4, 2013), http://ccf.georgetown.edu/all/more-clarity-on-when-medicaid-is-minimum-essential-coverage/.
  \item \textsuperscript{128} “Congress clearly intended for the Affordable Care Act to make health insurance available for almost all Americans.” Erwin Chemerinsky, \textit{With Obamacare Ruling, Court Followed Intent of Congress}, SACRAMENTO BEE (June 28, 2015), http://www.sacbee.com/opinion/op-ed/soapbox/article 25696093.html (noting that Chief Justice John Roberts stated that Congress’s clear purpose was to make health insurance affordable); King, 135 S.Ct. at 2480, 2486, 2493 (2015) (describing Congress’s goal of the Act was to provide broad access to affordable and comprehensive health care, not to undermine access to health care).
  \item \textsuperscript{129} Touschner, supra note 127.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Angeles & Straw, supra note 116, at 10.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} INTERNAL REVENUE SERV., FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN (2015), http://www.irs.gov/pub/irs-pdf/f1040.pdf (see line 61 providing a check the box to indicate coverage for everyone on the tax return for the entire year).
Individuals who purchase their insurance coverage through one of the Exchanges will receive a Form 1095A indicating their months of qualifying coverage as well as other premium cost and subsidy information. Individuals and their qualifying dependents, whether or not they are listed on the tax return, who do not have qualifying full-year coverage during the tax year in which they do not have coverage. Any SRP must be paid with their year-end tax return. However, those taxpayers and their dependents without minimum coverage may avoid the SRP for one or more months by qualifying for one of the several exemptions.

B. Exemptions From Minimum Essential Coverage

If taxpayers without minimum essential coverage meet the requirements for at least one of several exemptions, they do not owe the SRP for any exempt month. As of April 30, 2015, about 10.7 million individuals have claimed an exemption from the SRP on their 2014 individual income tax return. However, this number is necessarily understated because if a taxpayer’s income is below the income tax return filing requirement, she is exempt from the SRP and does not have to file a return to claim such exemption. Exemptions should cover about 19 million individuals by the year 2016. A taxpayer will be exempt from minimum coverage for each month that an exemption applies. Similar to the minimum essential coverage requirement, if an individual is exempt for one day of the month, then they are considered exempt for the entire month.

137. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1095-A (2014), https://www.irs.gov/pub/irs-prior/i1095a--2014.pdf (providing information regarding insurance coverage as well as information regarding the cost of insurance coverage during months in which the taxpayer was covered and any advanced premium tax credit received).

138. Query how this will be enforced when a taxpayer does not include a dependent on her income tax return. Upon audit of the taxpayer, or the dependent, or another individual claiming the dependent, whomever is determined to qualify for the dependent deduction under Section 152 is liable for the penalty. 26 U.S.C. § 5000A(b)(3)(A) (2012).


140. 26 U.S.C. § 5000A(b)(2) (describing that any SRP “shall be included with a taxpayer’s return” “for the taxable year which includes such month”).

141. See 26 U.S.C. § 5000A(c) for the qualifications for the exemptions.

142. NAT’L TAXPAYER ADVOCATE, supra note 83, at 24.

143. See 26 U.S.C. § 5000A(c)(2); Individual Shared Responsibility Provision—Reporting and Calculating the Payment, INTERNAL REVENUE SERV. (Jan. 13, 2016), https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/ACA-Individual-Shared-Responsibility-Provision-Calculating-the-Payment (noting that even a taxpayer who is not otherwise required to file a tax return and is therefore exempt from the SRP does not have to file a tax return to claim the exemption).


146. Treas. Reg. § 1.5000A-1(b)(1) (2013) (describing that an individual is deemed to have coverage for any month in which she has overage for at least one day in the month).

Exemptions are reported when a taxpayer files her individual income tax return annually on Form 8965 (Health Coverage Exemptions).\textsuperscript{148} The nature of qualifying for and even obtaining an exemption varies depending on the type of exemption. The Exchange will grant some exemptions, while others can only be claimed on the individual’s tax return.\textsuperscript{149}

The following Subparts will describe the five statutory exemptions listed in § 5000A(e) including “individuals who cannot afford coverage”; “taxpayers with income below the filing threshold”; “short coverage gaps”; “hardships”; and “members of Indian tribes.”\textsuperscript{150} In addition, the following Subparts will describe the three groups of individuals who are excluded from the definition of who is an “applicable individual” subject to the mandate and the SRP.\textsuperscript{151} These groups include individuals who qualify for religious exemptions; those who are not lawfully present; and those who are incarcerated.\textsuperscript{152} The first exempt group category focuses on affordability.\textsuperscript{153}

1. Individuals Who Cannot Afford Coverage

Individuals are exempt from the SRP if the cost of coverage is not affordable under their particular facts and circumstances.\textsuperscript{154} For this purpose, coverage is “not affordable” for any month of the year if the taxpayer’s “required contribution” for coverage is more than 8% of the taxpayer’s household income for the year;\textsuperscript{155} indexed annually for inflation beginning after 2014 (8.05% for 2015 and 8.13% for 2016).\textsuperscript{156} The definition of “required contribution” depends upon whether the individual is eligible for coverage under an employer-sponsored plan.\textsuperscript{157}


\textsuperscript{150} 26 U.S.C. § 5000A(e) (describing five exemptions from the mandate for minimum essential coverage).

\textsuperscript{151} 26 U.S.C. § 5000A(d) (describing three categories of individuals who are excluded from the definition of who is an “applicable individual”).

\textsuperscript{152} Id.

\textsuperscript{153} 26 U.S.C. § 5000A(e)(1) (describing the exemption for individuals who cannot afford coverage).

\textsuperscript{154} Id. (describing the exemption for individuals who cannot afford coverage).

\textsuperscript{155} 26 U.S.C. § 5000A(e)(1)(A) (describing individuals who cannot afford coverage).

\textsuperscript{156} 26 U.S.C. § 5000A(e)(1)(D) (setting forth indexing of the 8% for “the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period”). The required exemption amount is 8%, indexed annually for inflation. “For plan years beginning in any calendar year after 2014, the required contribution percentage is the percentage determined by the Department of Health and Human Services that reflects the excess of the rate of premium between the preceding calendar year…over the rate of income growth for the period.” Treas. Reg. § 1.5000A-3(e)(2)(i)–(ii) (2014). The indexed amount for 2015 and 2016 are 8.05% and 8.13%, respectively. See Rev. Proc. 2014-62, 2014–50 I.R.B. 948, https://www.irs.gov/pub/irs-drop/rp-14-62.pdf.

\textsuperscript{157} 26 U.S.C. § 5000A(e)(1)(B) (defining “required contribution”).
“An employee, or [an individual in the employee’s household,] is treated as eligible for coverage under an eligible employer-sponsored plan for a month . . . if [they] could have enrolled in the plan on at least one day in the month . . . .”\(^{158}\)

With multiple employee families, this could lead to situations in which an individual is eligible for coverage under more than one employer-sponsored plan. For the purposes of testing cost affordability, an individual’s own employer-sponsored plan coverage cost is used rather than the cost of any available coverage through a household member’s coverage.\(^{159}\)

In cases when an individual is eligible to purchase coverage sponsored by their employer, the “required contribution” amount is the portion of the annual premium that the employee would pay for the lowest-cost self-only coverage.\(^{160}\)

In cases of individuals who are eligible for coverage under an employer-sponsored plan because of their relationship to an employee, the “required contribution” amount is the portion of the annual premium that the employee would pay for the lowest-cost family coverage.\(^{161}\) The following examples clarify how the affordability test is applied under several different fact patterns.

**Example 4(a). Lack of Affordability Test for Single Taxpayer Without Dependents**

Assume Darby is unmarried without any dependents. In November 2013, Darby was eligible to enroll in self-only coverage for the year 2014 under a plan offered by her employer. If Darby enrolls, her annual premium will be $6,000 ($500 monthly). In 2014, Darby’s household income was $60,000. Darby’s required contribution amount is $6,000, the portion of the annual premium Darby pays for self-only coverage. Darby therefore lacks affordable coverage for 2014 because her required contribution of $6,000 is greater than 8% of her household income ($60,000 x .08% = $4,800).\(^{162}\) Therefore, if Darby elects to forgo purchasing this coverage, Darby will qualify for the exemption from minimum essential coverage due to lack of affordability. As such, she is exempt from the SRP for 2014 and will not have any additional tax liability in 2014 due to the SRP. While this exemption allows Darby to escape liability for the SRP, it does not accomplish Congress’s goal of providing her with access to affordable comprehensive health coverage.

To better achieve its goal of providing individuals with access to affordable comprehensive health coverage, Congress provides qualifying taxpayers with an insurance premium subsidy, the Premium Tax Credit (PTC), also delivered


\(^{159}\) Treas. Reg. § 1.5000A-3(e)(3)(i)(B) (differentiating between the multiple forms of eligibility).

\(^{160}\) Treas. Reg. § 1.5000A-3(e)(3)(ii)(A) (formulating the required contribution “of an employee who is eligible to purchase coverage under an eligible employer-sponsored plan”).

\(^{161}\) Treas. Reg. § 1.5000A-3(e)(3)(ii)(B) (differentiating contribution of individuals related to employee from employee’s contribution). “Family coverage . . . would cover the employee and all related individuals who are included in the employee’s family.” *Id.*

\(^{162}\) Treas. Reg. § 1.5000A-3(e)(3)(iii) ex.1 (giving an example of an unmarried individual who lacks affordable coverage).
through the Code.165 Through the PTC, the federal government may subsidize a taxpayer’s insurance premiums with a refundable tax credit to make it affordable164 provided they qualify under the many detailed requirements set forth in the Code.165 For example, the PTC only applies to health insurance purchased through the Exchange because an individual is not otherwise eligible for “minimum essential coverage.”166 However, if an employee’s “required contribution” for employer-provided coverage exceeds 9.5%, as indexed for inflation beginning in 2015 (9.56% for 2015 and 9.66% for 2016),167 then the employee qualifies to purchase insurance through the Exchange.

Darby’s premiums are 10% of her household income; therefore, she could qualify for Exchange insurance. However, individuals will only qualify for the PTC if their household income is equal to or greater than 100% (but not more than 400%) of the relevant poverty line.168 Because Darby’s household income is $60,000, she exceeds 400% of the relevant poverty line: $11,490 for a family of one using 2013 tables.169 Accordingly, she will not qualify for the PTC. Nevertheless, Darby should qualify for more affordable coverage under the Exchange even without the PTC subsidy,170 which meets Congress’s goal that she purchases coverage. It is important to note that if she elects to forgo health

164. See King v. Burwell, 135 S. Ct. 2480, 2480 (2015) (holding that premium tax credits are available to qualifying individuals in States who participate in the Federal health care exchange because they are a critical piece of Congress’s goal of providing Americans with affordable health care).
165. 26 U.S.C. § 36B(c) (setting forth for example the requirements for “applicable taxpayer”).
166. Under 26 U.S.C. §36B, applicable taxpayers shall be allowed a credit against the tax imposed for any year, and amount equal to the premium assistance credit. “Applicable taxpayer” is “a taxpayer whose household income for the taxable year equals or exceeds 100%, but does not exceed 400% of an amount equal to the poverty line for a family.” Id. The poverty line increases from year to year. For 2014, the poverty ranges from $11,670 to $40,090 depending on how many individuals are in the taxpayer’s household. See Lipman & Williamson, supra note 15 (demonstrating the complex and detailed mechanics of the premium tax credit under the ACA).
168. 26 U.S.C. § 36B(c)(2)(B) (setting forth the exception for allowing individuals who qualify for employer-provided health insurance to participate in the Exchange if the insurance is deemed not affordable under the Code); 26 U.S.C. § 36B(c)(1) (describing an “applicable taxpayer” with respect to any taxable year as a taxpayer whose household income is equal to or greater than 100% but does not exceed 400% of the amount of the poverty line for her family size).
170. For a detailed presentation of obtaining coverage through the Exchange even if you otherwise have insurance available through an employer, see If you’d like to change to a Marketplace plan, HEALTHCARE.GOV, https://www.healthcare.gov/have-job-based-coverage/change-to-marketplace-plan/ (last visited Feb. 12, 2016).
insurance coverage, she will qualify for the exemption from the SRP because her employer-provided insurance is deemed not affordable under the statute. 171

The PTC subsidizes health care coverage acquired through the Exchange to ensure that it is affordable. 172 For example, let us assume that Darby’s household income was only $12,000 in 2014 and that her annual employer-provided health insurance premium was $6,000. As a result, Darby lacks affordable coverage for 2014 because her required contribution of $6,000 is greater than 8% of her household income ($12,000 x .08% = $960). 173 Therefore, if Darby elects to forgo purchasing this coverage, Darby will qualify for the exemption from minimum essential coverage due to lack of affordability. However, under this fact pattern, assuming Darby purchased coverage for the same premium under the Exchange, she would qualify for a PTC of $5,760, making her annual health care coverage costs only $240, or 2% of her household income. 174

Under these circumstances, the consequence of Darby’s employer not providing affordable health care coverage may be an employer-imposed shared responsibility payment (ESRP). 175 Beginning in 2015, certain businesses with fifty or more full-time employees who do not provide insurance with minimum standards including affordability must pay a penalty. 176 This penalty is intended to work in concert with the SRP and the PTC to achieve Congress’s goal of making comprehensive and affordable health care coverage more broadly available. 177

- Example 4(b). Lack of Affordability Test for Married Taxpayers With Dependents

Now assume that Darby is married to Einstein with two children, Fran, and Geoff. They file a joint return for the year 2016. In November 2015, Darby is eligible to enroll in self-only coverage for $5,000 under a plan offered by her employer for 2016. Einstein, Fran, and Geoff are eligible to enroll in family coverage under the same plan at a cost of $20,000 to Darby for 2016. The household income 178 in 2016 is $90,000. Darby’s required contribution is her

---

171. 26 U.S.C. § 5000A(e)(1) (2012) (setting forth the exemption from the SRP for individuals who cannot afford coverage including under employer-provided health insurance).
172. 26 U.S.C. § 36B(c)(2) (describing a coverage month for the PTC as one in which the taxpayer, taxpayer’s spouse, or any dependent is covered through a qualifying health plan enrolled through an Exchange).
174. This example assumes that the insurance coverage is the second lowest-cost silver plan as required to determine the amount of the PTC subsidy under § 36B(b)(2)(B) (noting that the benchmark for determining the PTC is the monthly premium for the second lowest-cost silver plan). See Lipman & Williamson, supra note 15 (demonstrating the complex and detailed mechanics of the premium tax credit under the ACA).
176. Id.
177. For an overview of the interlocking reforms inherent in the Act, see Justice Roberts’ opinion in King v. Burwell, 135 S. Ct. 2480, 2485 (2015).
178. Household income is defined as “a taxpayer’s modified adjusted gross income and the aggregate modified adjusted gross income of all other individuals who are included in the taxpayers
share of the cost for self-only coverage, or $5,000. Darby therefore has affordable coverage for 2016 because her required contribution of $5,000 does not exceed 8.13%\(^{179}\) of Darby’s household income ($90,000 x .0813% = $7,317). The required contribution for Einstein, Fran, and Geoff is Darby’s share of the cost for family coverage, or $20,000. Einstein, Fran, and Geoff would therefore qualify for the exemption from minimum essential coverage and not be subject to the SRP in 2016 because their required coverage amount of $20,000 is not affordable based upon their household income in 2016 ($90,000 x .0813% = $7,317).\(^{180}\)

Notably, even with this level of household income, this family of four will likely qualify for the PTC if they decide to acquire health insurance and they purchase qualifying family coverage through the Exchange rather than through their “unaffordable” employer-provided insurance.\(^{181}\) Moreover, if Darby’s employer is a large employer subject to the ESRP, it may owe a penalty of as much as $3,240 per employee for not providing affordable qualifying health care coverage.\(^{182}\)

In cases where an individual is ineligible for coverage under an employer-sponsored plan, the “required contribution” is the premium of the “applicable plan” reduced by the maximum amount of any credit allowable under the PTC.\(^{183}\) This is “determined as if the individual was covered for the entire taxable year by a qualified health plan through an Exchange.”\(^{184}\)

For this purpose the “applicable plan” means “the lowest-cost bronze plan available in the individual market through the Exchange” serving the area in which the individual resides.\(^{185}\) When the Exchange does not offer a single bronze plan for all individuals included in the nonexempt family, “the premium for the ‘applicable plan’ is the sum of the premiums for the lowest-cost bronze


\(^{181}\) See Lipman & Williamson, supra note 15 (describing the 400% of poverty line for 2016 for a family of four at $97,200); see also Federal Poverty Level (FPL), HEALTHCARE.GOV, www.healthcare.gov/glossary/federal-poverty-level-FPL/ (last visited Feb. 29, 2016) (defining the poverty level for a family of four for 2016 as $24,300 times 400%, or $97,200).


\(^{184}\) Treas. Reg. § 1.5000A-3(e)(4)(ii)(A).

\(^{185}\) Bronze plan refers to the lowest medical cost coverage level insurance plans in a relevant health market Exchange. The plans are generally rated into four different categories: platinum, gold, silver, or bronze. Glossary: Health Plan Categories, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/health-plan-categories (last visited Feb. 29, 2016).

\(^{186}\) Treas. Reg. § 1.5000A-3(e)(4)(ii)(B)(1) (qualifying the bronze plan as the lowest plan in the area where a purchaser resides, regardless if they have purchased a qualified health plan).
plans offered.” The relevant plans must be from the Exchange in the area where one or more individuals in the household reside and where all of the individuals are covered.

Consistent with congressional goals of providing greater access to affordable health care, the Exchange offers many alternatives. Qualified health plans purchased through the Exchange are classified into four “metal” categories: bronze, silver, gold, and platinum. The metal categories identify the extent of the insurance coverage. Each metal category provides a different allocation of costs between the insurer and the insured. For example, a bronze policy will provide an insured with coverage for 60% of her medical costs; the coverage rate is 70% for silver, 80% for gold, and 90% for platinum. The different rates of medical cost coverage result in different premium rates. Bronze plans, which provide the lowest level of coverage, have the lowest premiums, while the platinum policies, which provide the greatest coverage, have the highest premiums. Because health plans are provided by private companies through the Exchange there are often many options for consumers in each metal category. As a result, there might be several bronze or silver plan options that a consumer could purchase through her Exchange, each with unique options and premium rates. Therefore, when Congress references a particular metal category for some purpose such as determining affordability, it must provide a more specific definition; here, for example, it describes “the applicable plan” as the “lowest-cost bronze plan.”

• Example 4(c). Lack of Affordability Test for Unmarried Taxpayers Without Dependents Purchasing Coverage Through the Exchange

Now assume again that Darby is unmarried with no dependents. Darby is not eligible to enroll in any minimum essential coverage other than the Exchange for 2016. The annual premium for the lowest-cost self-only bronze plan in Darby’s area is $5,000. The adjusted annual premium for the second lowest-cost silver self-only plan in Darby’s area is $5,500. Darby’s household income for 2016 is $40,000. Assume that Darby also qualifies for a PTC of $1,700 because her household income is at or above 100% and below 400% of the relevant federal poverty line. Darby’s required contribution would be $3,300, the amount of her

188. Id.
190. Id.
191. Id.
192. Id.
194. Under 26 U.S.C. § 36B, applicable taxpayers shall be allowed a credit against the tax imposed for any year, and amount equal to the premium assistance credit. “Applicable taxpayer” is a taxpayer whose household income for the taxable year equals or exceeds 100% but does not exceed 400% of an
health insurance premium minus the applicable PTC. Darby would lack affordable coverage for 2016 because her required contribution of $3,300 exceeds 8.13% of her household income ($40,000 x .0813% = $3,252). Therefore, Darby qualifies for the lack of affordability exemption and will not be subject to the SRP for 2016 if she elects not to purchase coverage.

- **Example 4(d). Lack of Affordability Test for Married Taxpayers With Dependents Purchasing Coverage Through the Exchange**

Now assume again that Darby is married to Einstein with children, Fran and Geoff. The family is ineligible to enroll in minimum essential coverage other than coverage in the Exchange for any month in 2016. The annual premium for their applicable lowest-cost bronze plan is $20,000. The family’s household income is $80,000, and they qualify for a 2016 PTC of $14,000 using the second highest-cost silver plan premium cost of $25,000. The required contribution for the family is $6,000, the annual premium for the least expensive family coverage minus the relevant PTC. In this scenario, the entire household has affordable coverage for 2016 because their required contribution of $6,000 does not exceed 8.13% of the household income ($80,000 x .0813% = $6,504). As a result, Darby and her family do not qualify for the exemption and therefore will be subject to the SRP if they do not purchase minimum essential coverage for every member of the household for every month during 2016.

While the “affordability threshold” depends on the cost of qualifying health care coverage being at or below 8% (as indexed for inflation) of the household’s annual income, the filing threshold exemption targeted to lower income individuals who do not have a federal income tax return filing obligation applies irrelevant of the cost of coverage. Given that the exemption depends upon low levels of gross income, some of these individuals may qualify for free health care coverage under Medicaid. Even though those who claim filing threshold exemptions are not subject to the SRP, they should obtain health coverage irrespective of the application of the exemption for their own well-being and to meet Congress’s policy goals.

2. Taxpayers With Incomes Below Filing Threshold

If an individual taxpayer’s household income is below her filing threshold, then everyone on the tax return, including her spouse and any dependents, amount equal to the poverty line for a family. *Id.* The poverty line increases from year to year. For 2014, the poverty line ranges from $11,670 to $40,090 depending on how many individuals are in the taxpayer’s household. 2014 Poverty Guidelines, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Dec. 1, 2014), https://aspe.hhs.gov/2014-poverty-guidelines.

197. Treas. Reg. § 1.5000A-3(e)(4)(iii) ex.2.
qualifies for an exemption from the SRP.\textsuperscript{199} The “filing threshold is the amount of gross income that would trigger an individual’s requirement to file a . . . tax return” in any given year.\textsuperscript{200} Thus, individuals with lower incomes who are not required to file a tax return are exempt from the requirement to have minimum essential coverage and pay the SRP. If the individual is a dependent claimed by another taxpayer, the dependent’s filing threshold is the same as the taxpayer claiming her as a dependent.\textsuperscript{201} This allows the dependent to qualify for an exemption based on the filing threshold of the person claiming the dependent. However, a dependent’s income is included in the determination of the household’s income.\textsuperscript{202} Household income for this purpose is defined as modified adjusted gross income (MAGI), which is a taxpayer’s adjusted gross income,\textsuperscript{203} plus any tax-exempt interest and any excluded foreign income.\textsuperscript{204} Household income includes the aggregate modified gross income of all individuals in the taxpayer’s family, including any individuals the taxpayer properly claims as a dependent on her annual income tax return.\textsuperscript{205}

A filing threshold is the only exemption that applies to every individual properly included on the tax return.\textsuperscript{206} Every individual has the potential to avoid liability for the SRP without having to consider alternative exemptions. Individuals whose income is below the appropriate threshold are not required to file a tax return.\textsuperscript{207} Congress understood it would be a burden, considering the tax preparation and filing costs, for a family to file a return solely to claim this exemption.\textsuperscript{208} Therefore, taxpayers do not have to file a tax return to claim this exemption. If an individual files a tax return for whatever reason, including to request a refund or to receive a refundable tax credit like the Earned Income Tax Credit, the taxpayer should fill out Form 8965 Part II to properly claim the filing threshold exemption.\textsuperscript{209} The taxpayer will simply check a box in Part II on Form

\textsuperscript{200.} Treas. Reg. § 1.5000A-3(f)(2)(i) (defining an applicable filing threshold).
\textsuperscript{201.} Treas. Reg. § 1.5000A-3(f)(2)(ii) (defining the applicable filing threshold for certain dependents).
\textsuperscript{203.} 26 U.S.C.A. § 62 (West 2016) defines “adjusted gross income” as gross income reduced by any above the line deductions provided for in the Code.
\textsuperscript{205.} Treas. Reg. § 1.5000A-1(d)(10) (defining modified adjusted gross income).
\textsuperscript{206.} Treas. Reg. § 1.5000A-3(f)(3) (indicating when a taxpayer does not have to file a tax return to claim the SRP).
\textsuperscript{207.} For a detailed question and answer determination of whether an individual is required to file a tax return, see Do I Need to File a Tax Return, INTERNAL REVENUE SERV., http://www.irs.gov/uac/Do-I-Need-to-File-a-Tax-Return%28last visited Feb. 29, 2016\right).
8965 stating that they are claiming an exemption because their household income is below the filing threshold.\(^\text{210}\)

- **Example 5. Filing Threshold Exemption for Taxpayer and Dependent**

Harriet is a qualifying surviving spouse,\(^\text{211}\) or a recent widow with a qualifying dependent, who is under age 65 and not blind.\(^\text{212}\) She has one child, Ivan, who lives with her and whom she claims as a dependent. In 2015, Harriet had a total income of $14,500. Ivan had inherited funds when his father died in 2012 and has an annual interest income of $1,500. Ivan has a federal income tax filing requirement because he has more than $1,050 of unearned income.\(^\text{213}\) His income is therefore added to his mother’s income, bringing the aggregate household income to $16,000 and placing Harriet and Ivan below the relevant tax-filing threshold for the year 2015.\(^\text{214}\) Since their household income is less than the applicable filing threshold for 2015 of $16,600,\(^\text{215}\) both Harriet and Ivan qualify for this exemption. Accordingly, even if neither purchases qualifying health care coverage, they can both avoid having an SRP obligation.

However, in 2016 Harriet will no longer qualify as a surviving spouse; therefore, the household tax-filing threshold is not measured by the “married filing jointly” filing status, but rather is measured by the “head of household” filing status, which is several thousand dollars lower.\(^\text{216}\) Assuming the same household income level of $16,000 for 2016, even with the higher 2016 indexed for inflation amounts, the filing threshold for a head of household filing status with one personal exemption amount would be $14,350.\(^\text{217}\) Accordingly, neither Harriet nor Ivan will qualify for this exemption, and both will either have to purchase qualifying insurance or pay the SRP with their 2016 income tax return. Even though they have a filing requirement, given the low amount of household income Harriet and Ivan will likely qualify for meaningful federal subsidies.

\(^{210}\) Id.


\(^{213}\) 26 U.S.C.A. § 1(g) (2016) requires that children under the age of 18, who have unearned income of more than $1,050 (for year 2015, as adjusted for inflation), to report that income, and are taxed at the parent’s top marginal rate. This prevents parents from using dependents as a tool to shift income in lower tax brackets.


\(^{215}\) See INTERNAL REVENUE SERV., supra note 214, for filing thresholds for taxpayers with various filing statuses and ages.


through the PTC and, thus, affordable qualifying insurance coverage through the Exchange.\(^{218}\)

3. Months During Short Term Gaps

Individuals without minimum essential coverage for a continuous period of less than three consecutive months during the year are exempt from the SRP for this period.\(^{219}\) If the taxpayer went without minimum coverage for three months or more, no exemption will apply and they will be subject to the SRP for this period as well as any other uncovered months unless another exemption applies.\(^{220}\) This exemption provides for short coverage gaps but also ensures that individuals do obtain coverage in a timely manner after job loss, divorce, or other reason for a gap in coverage.

- **Example 6(a). Short Term Gap Exemption in One Tax Year**

For example, Jack has minimum essential coverage in 2016 from January 1 through March 2. After March 2, Jack no longer has minimum essential coverage until June 15, when he enrolls in an eligible employer-sponsored plan. Jack therefore only has required coverage for the months of January, February, March, and June through December. Because Jack did not have minimum essential coverage for a two-month gap (April and May) in 2016, these months constitute a short gap, and he is exempt from the SRP for this period.\(^{221}\) If Jack’s new employer sponsored plan did not start until July 1, then Jack’s gap period without coverage would be three months, now including June. The short coverage gap exemption would not apply and Jack would be subject to the SRP for this period unless another exemption applied.

If there are multiple continuous periods where the taxpayer went without coverage for less than three months, an exception will only apply to the qualifying months in the first period.\(^{222}\) The three months do not need to be in the same tax year.\(^ {223}\) If an individual does not have minimum essential coverage for a continuous period that begins in one tax year and ends in another tax year, they can still qualify for a short coverage exemption for each of the two tax years under certain circumstances. When applying the short coverage exemption to the first year, the months in the second year are disregarded.\(^ {224}\) When applying the short coverage exemption to the second year, the months in the first taxable year included in the continuous period are taken into account.\(^ {225}\)

\(^{218}\) See Lipman and Williamson, *supra* note 15.


\(^{220}\) *Id.*

\(^{221}\) Treas. Reg. § 1.5000A-3(j)(4) ex.1 (2014).


\(^{224}\) Treas. Reg. § 1.5000A-3(j)(3)(ii) (continuous period of short coverage gaps).

\(^{225}\) *Id.*
• Example 6(b). Short Term Gap Exemption Over Two Tax Years

Assume Karen is unmarried and has no dependents. Karen has maintained minimum essential coverage from January 1 through October 15, 2016. Karen does not obtain coverage once again until February 15, 2017. When Karen files her income tax return for 2016, November and December of 2016 will be treated as a qualifying short-term coverage gap under this exemption. For the year 2017, January is not part of a short coverage gap because November and December of 2016 are included in the continuous period for 2017, which is not less than three months.226

Now assume that months later, on June 15, 2017, Karen once again loses minimum essential coverage but enrolls in a new qualified plan on September 15, 2017. The continuous period without minimum essential coverage is two months, July and August. January of 2017 was not part of a short coverage gap; therefore, the earliest coverage gap occurring in the year 2017 are the months of July and August.227 As a result, although the short-term coverage gap exception will apply for January 2017, the SRP will not apply for the months of July and August 2017.

4. Hardships

Consistent with congressional goals of penalizing only those who are “irresponsibly” not participating in comprehensive affordable health care reform, individuals who have suffered a hardship may be eligible for an exemption.228 Only hardships that undermine an individual’s ability to obtain qualifying health care coverage will qualify for the exemption from the SRP.229 There are several different ways to qualify for and claim a hardship. For instance, one way to obtain a hardship is through the Exchange.

The Exchange must grant hardship exemptions for a number of different reasons. One reason is if the Exchange determines that an individual’s financial or domestic circumstances are such that the individual had an unexpected increase in essential expenses that prevent them from obtaining coverage under a qualified health plan.230 Next, the Exchange must also grant a hardship exemption when purchasing a qualified health plan causes an individual to experience serious deprivation of food, shelter, clothing or other necessities.231 Lastly, the Exchange must grant a hardship exemption when the individual has experienced other circumstances that prevented him or her from obtaining coverage under a qualified health plan.232 Other qualifying hardships include individuals who: (1) are ineligible for Medicaid based on a state’s decision not to expand; (2) are homeless; (3) were evicted in the past six months or are facing...
eviction or foreclosure; (4) received a shut-off notice from a utility company; (5) recently experienced the death of a close family member; (6) experienced a fire, flood, or other natural or human caused disaster; (7) filed for bankruptcy in the last six months; (8) have medical expenses that they could not pay in the last 24 months that resulted in substantial debt; (9) experienced unexpected increases in necessary expenses due to caring for an ill, disabled or aging family member; (10) had their individual insurance plan cancelled; or (11) have any other hardship obtaining health insurance. 233 Hardship exemptions generally cover the months of the hardship, as well as the month before and after the hardship. 234

- Example 7. Hardship Exemption Period

Now assume Karen did not have minimum essential coverage for a period of four months because her mother was terminally ill. If Karen had to use all of her available income for these months to care for her mother, Karen can apply for an exemption. However, the exemption only applies for the months during which Karen was experiencing a hardship, as well as the month before and the month after the hardship. If Karen’s mother passed away during the first two months of the four-month period, the last month would not be exempt, and Karen would be subject to the SRP for one non-exempt month.

5. Noncitizens

In general, an individual is exempt for every month that they are an exempt noncitizen. 235 An exempt noncitizen is an individual who is not a U.S. citizen or U.S. national for any day during the month and is either (1) a nonresident alien 236 or (2) an individual who is not lawfully present. 237 Individuals who have been granted deferred action under the Department of Homeland Security childhood arrivals process are considered to be “not lawfully present” under the Act. 238 Because these individuals cannot purchase health care coverage through the Exchange or qualify for the PTC, they are not subject to the SRP for not having


236. H2A and H2B visa holders may (or may not be characterized) as nonresident aliens under the physical presence test set forth in the statute. 26 U.S.C. § 7701(b)(1)(B) (West 2016). A nonresident alien is defined as an individual who is neither a citizen of the United States nor a resident of the United States, within the meaning of a “resident alien” as defined in 26 U.S.C. § 7701(b)(1)(A). See also Alison Siskin and Erika K. Lund, CONG. RES. SERV., TREATMENT OF NONCITIZENS UNDER THE ACA (2014), https://www.fas.org/sgp/scr/misc/R43561.pdf (describing the tests to determine if an individual is characterized as a resident or nonresident alien for federal income tax purposes).

237. Treas. Reg. § 1.5000A-3(c)(2)(ii)(A)-(B) (exempt noncitizens); see also Siskin, supra note 236.

238. See Exclusion of Youth Granted “Deferred Action for Childhood Arrivals” from Affordable Health Care, NAT’L IMMIGRATION LAW CTR. (Sept. 25, 2013), https://www.nilc.org/issues/health-care/acadacafaq; see also 45 C.F.R. § 152.2 (the federal regulations setting forth the exception to the definition of legally present for this purpose).
minimum essential coverage. Qualifying noncitizens claim this exemption by filing their federal income tax return—even if their gross income falls below the filing threshold—with the appropriate tax form attached. These taxpayers will claim this exemption by checking the relevant box on Form 8965 and including it with their annual income tax returns.

6. Native American Tribe Members

Individuals are exempt from minimum essential coverage for every month in which they are members of an “Indian tribe.” “Indian tribe” includes any Indian tribe, band, nation, pueblo, or other organized group or community. During the review and comment period, Indian advocate groups recommended that the final regulations also include a hardship exemption for an individual who is not a member of a federally recognized Indian tribe but who is eligible for services through an Indian Health Care Provider. The final regulations adopted this exemption and provide that Indian tribe members and other eligible participants for Indian Health Care Provider services may claim this exemption from the IRS on their annual income tax return rather than from the Exchange.

---

239. For example, noncitizens are ineligible for any tax credits and subsidies. This is because they are only available for months during which a person purchases health insurance through the Exchanges and noncitizens residing unlawfully in the U.S. are prohibited from buying insurance through an Exchange. Siskin, supra note 236; see also Immigrants and the Affordable Care Act (ACA), NAT’L IMMIGRATION LAW CTR. (Jan. 2014), https://www.nilc.org/issues/health-care/immigrantscher.


245. See 45 C.F.R. § 155.605(g)(6) (2016), which states that a hardship exemption is available to an individual who is an American Indian or Alaska Native eligible for services through an Indian health care provider, as defined in 42 C.F.R. 447.51, or an individual eligible for such services in accordance with 25 U.S.C. § 1680c(a), (b), or (d)(3).

246. 45 C.F.R. § 155.605(g)(6)(iii).
7. Religious and Health Care Sharing Exemptions

Individuals may be exempt for a period if they have a religious conscience exemption certification\(^{247}\) or are members of health care sharing ministries.\(^{248}\) The certification is issued by an Exchange that verifies that an individual is “a member of a recognized religious sect or division of the sect . . . [and] an adherent of established tenants or teachings of the sect or division.”\(^{249}\) A health care sharing ministry is defined as a tax-exempt organization in which members share a common set of religious beliefs, including shared medical expenses.\(^{250}\) The member must retain membership in the religious organization even after developing a medical condition.\(^{251}\)

8. Incarcerated Individuals

Individuals who are incarcerated are exempt for each month in which they spend one day being incarcerated.\(^{252}\) For this purpose, “incarcerated means confined, after the disposition of charges, in jail, prison, or another correctional facility.”\(^{253}\)

9. Other Exemptions

The exemptions listed above are statutorily enumerated, but they are not exhaustive examples. As evidenced by the extensive statutory list of exemptions, Congress does not want to penalize individuals who do not obtain qualifying health coverage for what they perceive are legitimate reasons.\(^{254}\) As such, Congress provides flexibility for expanding exemptions through by delegating to the Secretary of Health and Human Services the determination of what qualifies as hardship exceptions.\(^{255}\) This has presently resulted in additional exemptions for individuals who: (1) were uninsured any number of months before May 1, 2014; (2) lived in a state that did not expand its Medicaid program but would have qualified otherwise for Medicaid coverage; (3) enrolled a child in the Children’s Health Insurance Program (CHIP); (4) enrolled in limited Medicare or TRICARE coverage; or (5) recently experienced domestic violence.\(^{256}\)

\(^{248}\) Treas. Reg. § 1.5000A-3(b).
\(^{249}\) Treas. Reg. § 1.5000A-3(a)(2).
\(^{250}\) Treas. Reg. § 1.5000A-3(b)(2).
\(^{251}\) Treas. Reg. § 1.5000A-3(b)(2)(iii).
\(^{252}\) 26 U.S.C. § 5000A(d)(4); Treas. Reg. § 1.5000A-3(d).
\(^{253}\) Treas. Reg. § 1.5000A-3(d)(2).
\(^{254}\) See 26 U.S.C. § 5000A(d)–(e) (setting forth statutory exclusions from who is characterized as an “applicable individual” subject to the SRP and additional exemptions from the SRP).
\(^{255}\) 26 U.S.C. § 5000A(e)(5) (providing that the Secretary of Health and Human Services can identify exemptions for hardships related to an individual’s capacity to obtain coverage).
Individuals who believe they may qualify for any exemptions should refer to their Exchange for additional information on how to obtain any potential exemptions.

If a taxpayer qualified for an exemption for any month she did not have minimum essential coverage during the taxable year, she does not owe any SRP because she is exempt under § 5000A. Those who do not have an exemption or minimum essential coverage for at least one month during the taxable year have not followed Congress’ mandate; thus, they owe an SRP for any calendar month after January 1, 2014 for which they did not have coverage. Individuals are responsible for paying the SRP not only for themselves, but also for any spouse and dependents reported on the return who did not have minimum essential coverage or an exemption for at least one month during the tax year. The SRP is determined and paid annually when taxpayers file their annual federal income tax return.

C. Determining the Amount of the SRP

This Subpart describes the formula used to determine the amount of the SRP owed by nonparticipating, nonexempt individuals and their qualifying dependents. The SRP is an annual amount that is calculated on a monthly basis using either a “flat dollar amount” or a “percentage of income amount.” The taxpayer must determine the greater of these two monthly amounts and aggregate them to determine the annual SRP. The following Subparts first describe each of these components of the SRP calculation and then, using detailed examples, compute the SRP for various taxpayer scenarios.

1. The SRP Calculation

Consistent with SRP exemption determinations and health care coverage pricing and purchase, the SRP is first calculated by determining the monthly penalty amount. The monthly penalty amount is equal to 1/12 of either (1) a flat amount or (2) a stated percentage of the excess of the taxpayer’s annual household income over her filing threshold amount, whichever amount is greater. The next step applies a cap on the annual SRP. Thus, the annual

258. Id.
261. 26 U.S.C. § 5000A(c)(1)–(2) (describing the SRP as the sum of the monthly penalty amounts and the monthly penalty amounts as the greater of a flat dollar amount or a percentage of income amount).
262. 26 U.S.C. § 5000A(c)(2)(A)–(B) (describing the SRP monthly penalty amounts as the greater of a flat dollar amount or a percentage of income amount).
263. See 26 U.S.C. § 5000A(c) (providing the penalty amounts and applicable formulae for calculating the penalty).
264. 26 U.S.C. § 5000A(c)(2) (providing the calculations for determining the monthly penalty amounts).
265. 26 U.S.C. § 5000A(c)(1) (applying the overall cap to the SRP).
SRP is the lesser of (1) the monthly penalty amount multiplied by the number of months without minimum essential coverage or exemption or (2) an amount equal to the national average annual premium for qualified health plans offered through the Exchange with a bronze level of coverage during the taxable year.\footnote{266}{26 U.S.C. § 5000A(c)(1).} Under the latter calculation, the premium is adjusted for family size coverage;\footnote{267}{26 U.S.C. § 5000A(c)(1)(B) (describing the overall cap as the national average premium for qualified health plans which have a bronze level of coverage for the applicable family size involved).} therefore, the SRP can never exceed the average annual cost of the relevant bronze level for an entire year.\footnote{268}{Id.}

Using the average cost of the bronze level premium amount as the maximum may not represent what the family would have paid for the lowest level of actual qualifying health care coverage because the premiums are gross amounts and are not reduced by any PTC that the family may have otherwise qualified for under § 5000A.\footnote{269}{Id.} For 2014, the monthly national average premium for qualified health plans with a bronze level of coverage was $204 per individual and $1,020 for a family with five or more members.\footnote{270}{Rev. Proc. 2014-46, 2014-33 I.R.B. 367.} This means that in 2014 the maximum SRP for any individual would have been $2,448 ($204 x 12), and for a family of five or more the maximum SRP would have been $12,240 ($1,020 x 12). The bronze level national average premium is determined annually.\footnote{271}{26 U.S.C. § 5000A(c)(1).} The maximum annual SRP for 2015 increased by $36 to $2,484 ($207 x 12) per individual and increased by $180 to $12,420 ($1,035 x 12) for a family of five or more members.\footnote{272}{Rev. Proc. 2015-15, 2015-5 I.R.B. 564 (setting forth the 2015 amounts for determining the SRP under 26 U.S.C. § 5000A(c)(1)(B) and Treas. Reg. § 1.5000A-4 (2014)).} This estimate seems high for the single bronze policy amount, but it is consistent with the 2014 and 2015 figures with respect to the family plan bronze amount.

While the amount of the SRP cannot exceed the average cost of the lowest qualifying coverage, a family could end up with a meaningful penalty. First, the maximum penalty is not reduced by any PTC; second, if the family without coverage incurs health care costs, then it must pay both the unsubsidized cost of

---

\footnote{266}{26 U.S.C. § 5000A(c)(1). The United States Department of Health and Human Services provides that non-grandfathered health insurance coverage, including qualified health plans offered through Exchanges, may only set individual premiums on the basis of rating area, age, tobacco use, and family size. See 45 CFR § 147.102; Rev. Proc. 2014-46, 2014-33 I.R.B. 367.}


\footnote{268}{Id.}

\footnote{269}{Id.}

\footnote{270}{Id.}

\footnote{271}{26 U.S.C. § 5000A(c)(1).}

\footnote{272}{Id.}

\footnote{273}{Letter from CBO Director Doug Elmendorf to Senator Olympia Snowe (Jan. 11, 2010), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10884/01-11-premiums_for_bronze_plan.pdf (estimating that premiums for Bronze plans purchased individually in 2016 would average between $4,500 and $5,000 for single policies and between $12,000 and $12,500 for family policies).}
the premium as a penalty and the cost of the health care itself. As such, consistent with Congress’s goal, the maximum SRP is likely costly relative to the alternative of obtaining and maintaining qualifying coverage for most families for the entire year. To better understand the nuances and subtleties of the SRP computation, one must understand how the flat dollar amount and the percentage of household income amounts are determined.

2. Flat Dollar Amount

The flat dollar amount is either the sum of the “applicable dollar amount” for all individuals in the taxpayer’s family or 300% of the applicable dollar amount, whichever one is smaller.274 The “applicable dollar amount” was $95 in 2014, was $325 in 2015, and is $695 in 2016, and it is subject to a cost-of-living adjustment for tax years after 2016.275 Thus, the maximum the flat dollar amount can be is $285 in 2014, $975 in 2015, $2,085 in 2016, and $2,085 as adjusted for inflation for years after 2016.276 If an applicable individual is under age eighteen on the first day of the month in question, “the applicable dollar amount with respect to such individual for the month shall be one-half of the applicable dollar amount for the calendar year in which the month occurs.”277 Because the maximum flat dollar amount is capped at three “adults” and the flat dollar amount for an individual under eighteen is the equivalent of one-half of an adult penalty, a family with two adults and at least two children will be subject to the maximum flat dollar amount for 2014—and thereafter—unless their percentage of income amount is greater than the maximum flat dollar amount.278

As a result of Congress’s plan to phase in the penalty amount, the “applicable dollar amount” is significantly lower for 2014 than for calendar year 2015 and lower for 2015 than when fully phased in during 2016. In early 2015, millions of individuals were for the first time discovering that an SRP was due with their 2014 tax returns. The phase-in of the SRP was intended to allow individuals some time to familiarize themselves with the insurance mandate under the Act, any relevant exemptions, and the cost and process of purchasing qualifying coverage through the Exchange before they suffered a significant penalty. The following chart describes the “applicable dollar amount.”

---

276. 26 U.S.C. § 5000A(c)(2)(A), (C), (D) (flat dollar amount for adults and children and requirement to index the flat dollar amount for inflation in $50 increments for calendar years after 2016).
278. Thus, these families will be subject to a maximum flat dollar amount penalty of $285 in 2014, $975 in 2015, and $2,085 in 2016. 26 U.S.C. § 5000A(c)(2)(A), (C) (flat dollar amount for adults and children). For example, in 2016, the flat dollar amount for two adults is $695 each and for two children is $347.50 each or $2,085 (2 x $695 + 2 x $347.50), which is the maximum flat dollar amount of 300% of $695, or $2,085. Id.
Table 1. Applicable Dollar Amount (Phase In)

<table>
<thead>
<tr>
<th>Tax Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>Applicable dollar amount is $95 for adults, $47.50 for dependents under the age of 18, maximum amount is $285 per family.</td>
</tr>
<tr>
<td>2015</td>
<td>Applicable dollar amount is $325 for adults, $162.50 for dependents under the age of 18, maximum amount is $975 per family.</td>
</tr>
<tr>
<td>2016</td>
<td>Applicable dollar amount is $695 for adults, $347.50 for dependents under the age of 18, maximum amount is $2,085 per family.</td>
</tr>
<tr>
<td>2017 and thereafter</td>
<td>Applicable dollar amount is $695 increased by a cost of living adjustment. Half of the applicable dollar amount will apply for dependents under the age of 18. The maximum amount per family will be three times the applicable dollar amount with the cost adjustment.</td>
</tr>
</tbody>
</table>

3. Percentage of Excess Income Amount

As discussed above, computation of the monthly penalty amount is 1/12 of the greater between the flat dollar amount and the “percentage of excess income amount.” The “percentage of excess income amount” is the percentage set forth in § 5000A multiplied by the individual family’s household income to the extent household income exceeds the taxpayer’s applicable filing threshold amount. Unlike the flat dollar amount, this number is not tied to the number of individuals in the household, but rather the total household income as of the end of the year. Household income, with respect to the taxpayer, is the taxpayer’s MAGI plus the aggregate MAGI of all other individuals who are subject to the SRP under the taxpayer’s return.

The applicable percentage used to calculate the percentage of excess income amount is phased-in from 2014 through 2016. The following chart describes how
the percentage of excess income amount is calculated for the phase-in period, in addition to describing the maximum penalty amounts.

Table 2. Percentage (Phase In)

<table>
<thead>
<tr>
<th>Tax Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>1% of household income over the income tax filing threshold. Limited to a maximum penalty amount of $2,448 for an individual, and $12,240 per family of five or more.</td>
</tr>
<tr>
<td>2015</td>
<td>2% of household income over the income tax filing threshold. Limited to a maximum penalty amount of $2,484 for an individual, and $12,420 per family of five or more.</td>
</tr>
<tr>
<td>2016</td>
<td>2.5% of household income over the income tax filing threshold. Limited to a maximum penalty amount determined for current year.</td>
</tr>
</tbody>
</table>

4. SRP Calculation Examples

The SRP is 1/12 of the greater of the flat amount or the percentage of excess income amount for each month that the taxpayer and any dependents did not have either an exemption or minimum essential coverage. In no case can the aggregate of all the monthly amounts or the SRP exceed the overall cap of the annual average cost of bronze level of coverage, calculated at $2,484 per individual or up to $12,420 for families of five or more in 2015. Below are examples of this calculation for a number of different scenarios.

295. 2.5% of household income over the income tax filing threshold will remain the standard for all future years. 26 U.S.C. § 5000A(c)(2)(B)(iii).
296. Id.
297. See calculations for determining the 2016 SRP at If you don’t have health insurance: How much you’ll pay, HEALTHCARE.GOV, https://www.healthcare.gov/fees/fee-for-not-being-covered/ (last visited Apr. 4, 2016).
Example 8(a). Unmarried Taxpayer Without Minimum Essential Coverage for the Entire Year: Middle-Income Household

Linda is an unmarried taxpayer with no dependents. Assume Linda did not have minimum essential coverage in the year 2016. The example uses tax year 2016 to demonstrate systemic issues in the SRP formula that are most pronounced when the SRP is fully phased in. However, because the bronze plan premium amounts for 2016 have not yet been determined, we will use the 2015 amounts for these this measurement. The annual increases were about 1% for the average monthly amounts from 2014 to 2015, so using the 2015 amounts for 2016 should be reasonable. Linda’s household income is $50,000, and Linda’s filing threshold is $10,350. The annual national average bronze plan premium for Linda is $2,484.

Linda’s flat dollar amount is $695, which is the annual amount for an adult individual in 2016. Linda’s excess income amount is $991, which is 2.5% of $39,650 (Linda’s household income of $50,000 minus Linda’s filing threshold amount of $10,350).

Linda’s monthly penalty is $83 (the greater of $58 ($695/12) or $83 ($991/12)). The sum of the monthly penalty amount is $991 ($83 x 12) because Linda did not have minimum essential coverage for the whole year or twelve continuous months. The cap does not limit this amount, because $991 is less than the national average bronze plan annual premium amount of $2,484. Linda’s penalty for not having minimum essential health coverage for 2016 is $991 (or about 2% of her household income of $50,000). This amount must be added to any other tax liability and paid with her tax return no later than April 15, 2016. This amount will either increase her tax liability due or decrease her tax refund.

Example 8(b). Unmarried Taxpayer Without Minimum Essential Coverage for the Entire Year: Higher-Income Household

Now assume Linda’s household income is increased to $110,000. Linda’s flat dollar amount is $695, which is the annual amount for an adult individual in 2016. Linda’s excess income amount is $3,241, which is 2.5% of $99,650 (Linda’s household income of $110,000 minus Linda’s threshold amount of $10,350).

298. See supra text accompanying notes 292 & 294 (discussing (1) the $36 annual increase in the individual amount, from $2,448 in 2014 to $2,484 in 2015, and (2) the $180 annual increase over the same period for a family of five or more, from $12,240 in 2014 to $12,420 in 2015).


300. Treas. Reg. § 1.5000A-4(d) ex.1 (2014) (providing the example of an unmarried taxpayer without minimum essential coverage).

301. 26 U.S.C. § 5000A(b)(2) (2012) (noting that the penalty is paid with the tax return in addition to any income taxes).
$10,350). Linda’s monthly penalty is $270 (the greater of $58 ($695/12) or $208 ($2,491/12)). The sum of the monthly penalty amount is $2,491 ($208 x 12) because Linda did not have minimum essential coverage for the whole year or twelve consecutive months. However, the $2,491 is limited to the national average bronze plan premiums of $2,484.\textsuperscript{302} Thus, Linda’s SRP for not having minimum essential health coverage for 2016 will be $2,484 (or about 1.8% of her household income).\textsuperscript{303} Moreover, even if Linda’s household income is higher than $110,000, her SRP will remain the same because the average bronze plan premium is the overall cap. Thus, as household income increases above $110,000, the SRP will decrease as a percentage of household income.

- \textbf{Example 8(c). Unmarried Taxpayer Without Minimum Essential Coverage for the Entire Year: Lower-Income Household}

Now assume Linda’s household income is decreased to $20,000. Linda’s flat dollar amount is $695, which is the annual amount for an adult individual in 2016. Linda’s excess income amount is $241, which is 2.5% of $9,650 (Linda’s household income of $20,000 minus Linda’s threshold amount of $10,350).

Linda’s monthly penalty is $58 (the greater of $58 ($695/12) or $20 ($241/12)). The sum of the monthly penalty amount is $695 ($58 x 12) because Linda did not have minimum essential coverage for the whole year or, consistent with the required monthly (as opposed to annual) analysis, each of the twelve calendar months in 2016. The $695 is not limited by the national average bronze plan premiums of $2,484. Thus, Linda’s SRP for not having minimum essential health coverage for 2016 will be $695 (3.5% of her household income, or a percentage that is almost twice as great as the higher-income example).\textsuperscript{304} Moreover, even if Linda’s household income is lower than $38,000, her SRP will remain the same because the flat amount is higher than the percentage amount for lower income individuals. Thus, as household income decreases below $38,000, the SRP will increase as a percentage of household income until the household income is equal to Linda’s 2016 threshold amount of $10,350.\textsuperscript{305} When the household income reaches and goes below the threshold amount, the taxpayer is exempt from the SRP. In the most extreme example, at one dollar above the threshold amount ($10,351 in 2016), the SRP would be $695 (6.7% of her household income or four times as great as the higher-income example). Notably, by adding one or more dependents to the household who are similarly not covered by minimum essential coverage, the SRP can triple up to a maximum flat penalty amount of $2,085 in 2016 (or almost 16% for one adult with four

---

\textsuperscript{302} As described in the text accompanying note 298, this is the 2015 amount for the average annual bronze coverage.

\textsuperscript{303} Treas. Reg. § 1.5000A-4(d) ex.1 (providing the example of an unmarried taxpayer without minimum essential coverage).

\textsuperscript{304} Id.

\textsuperscript{305} At single household income levels of $38,000 and below, the excess amount is $691 (2.5% of $27,650 ($38,000–$10,350). Therefore the flat dollar amount is higher at these income levels. 26 U.S.C. § 5000A(c) (2012) (setting forth that the penalty is the greater of the flat dollar amount or the excess of income amount).
children and a household income of just over the head of household filing status of $13,351).\textsuperscript{306}

- **Example 9. Unmarried Taxpayer Without Minimum Essential Coverage for Part of the Year: Middle-Income Household**

Assume the same facts as in Example 8(a) except that Linda has minimum essential coverage for the period January through June. Therefore, Linda’s flat dollar amount is $695, which is the annual amount for an adult individual in 2016. Linda’s excess income amount is $991, which is 2.5% of $39,650 (Linda’s household income of $50,000 minus Linda’s filing threshold amount of $10,350).

However, Linda’s monthly penalty is $83 (the greater of $58 ($695/12) or $83 ($991/12)). Because Linda only lacked coverage for six months, the sum of the six monthly payments in this scenario would be $498 ($991/12 x 6). The sum of the monthly national average bronze plan premiums is $1,242 ($2,484/12 x 6). As a result, Linda’s SRP for 2016 would be $498 (the lesser of the two amounts), or one-half of the SRP in Example 8(a) above when Linda lacked coverage for the entire year.\textsuperscript{307}

- **Example 10(a). Family Without Minimum Essential Coverage: Higher-Income Household**

Taxpayers Maya and Nathan are married and have three children: Oliver, age 21; Paige, age 15; and Quincy, age 10. No member of the family had minimum essential coverage in 2016. The total household income is $250,000, and the applicable filing threshold is $20,700.\textsuperscript{308} The national average bronze plan premium for a family of five—3 adults and 2 children, because Oliver is over age 18 for the entire year—is $12,420 (using 2015 amounts).

The flat applicable dollar amount for the family would be $2,085 ($695 x 3 adults) plus $695 ($695/2 x 2 children), or $2,780, for 2016. However, the total flat dollar amount is limited to 300% of the $695 rate, or a family maximum of $2,085 ($695 x 3), for 2016. Therefore, the family’s flat dollar amount is limited to $2,085.

The excess income amount is $5,733 (($250,000 - $20,700) x 2.5%). This reflects 2.5% of the difference between the total household income and the filing threshold amount. The monthly penalty amount is $478 (the greater of

\begin{footnotes}

\item[307] Treas. Reg. § 1.5000A-4(d) ex.2 (providing an example of a taxpayer with part-year coverage).

\end{footnotes}
(5,733/12) or (2,085/12)). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is 5,733 (the monthly amount of $478 x 12 months of no coverage). This is below the $12,420 national average bronze plan premium for a family of five, so the maximum is not reached, and the ceiling does not apply to this situation.³⁰⁹ The 2016 SRP of $5,733 is 2.3% of the family household income of $250,000. Because of the high household income, this family would not receive any federal subsidy, or PTC, if they otherwise qualified to purchase minimum essential coverage through the Exchange.³¹⁰

**Example 10(b). Family Without Minimum Essential Coverage: Highest-Income Households**

Now assume the same family—married taxpayers Maya and Nathan and their three children, Oliver, Paige, and Quincy—have a household income of $1,000,000. The flat applicable dollar amount for the family remains the same limited amount at $2,085 ($695 x 3 adults) plus $695 ($695/2 x 2 children), or $2,780, for 2016.

The excess income amount is $24,483 ($1,000,000 - $20,700) x 2.5%). This reflects 2.5% of the difference between the total household income and the filing threshold amount. The monthly penalty amount is $2,040 (the greater of ($24,483/12) or (2,085/12)). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $24,483 (monthly amount of $2,040 x 12 months of no coverage). This is above the $12,420 national average bronze plan premium for a family of five, so the maximum is reached and the ceiling applies to this situation.³¹¹ The 2016 SRP of $12,420 is only 1.2% of the family household income of $1,000,000. Because of the high household income, this family would not receive any PTC, or federal subsidy, if they otherwise qualified to purchase minimum essential coverage through the Exchange.³¹²

**Example 10(c). Family Without Minimum Essential Coverage: Middle-Income Household**

Now assume the same family has a household income of only $70,000. The excess income percentage amount is $1,233 (($70,000 - $20,700) x 2.5%). This reflects 2.5% of the excess of the total household income over the filing threshold amount. The monthly penalty amount is $174 (the greater of the monthly excess income amount ($1,233/12) or the limited flat penalty amount ($2,085/12)). Because the family did not have minimum essential coverage for the whole year,

---

³⁰⁹. Treas. Reg. § 1.5000A-4(d) ex.3 (providing the example of a family without minimum essential coverage).
³¹⁰. See 26 U.S.C. § 36B (2012) (describing the PTC as applicable to taxpayers who have household income levels below 400% of the poverty level).
³¹¹. Treas. Reg. § 1.5000A-4(d) ex.3 (providing an example for a family without minimum essential coverage).
³¹². See 26 U.S.C. § 36B (describing the PTC as applicable to taxpayers who have household income levels below 400% of the poverty level).
the 2016 SRP is $2,085 (the monthly amount of $174 x 12 months of no coverage). This is below the $12,420 national average bronze plan premium, so the maximum is not reached, and the ceiling does not apply to this situation.\(^3\) The 2016 SRP of $2,085 is 3% of the family household income of $70,000. Because of the middle-income level of household income, this family would likely receive some amount of federal subsidy through the PTC if they otherwise qualified to purchase minimum essential coverage through the Exchange.\(^4\)

**Example 10(d). Family Without Minimum Essential Coverage: Low-Income Household**

Now assume the same family has a household income of only $35,000. The excess income amount is $358 (($35,000 - $20,700) x 2.5%). This reflects 2.5% of the difference between the total household income and the filing threshold amount. The monthly penalty amount is the floor of the flat dollar amount or $174 (the greater of the monthly excess income amount ($358/12) or the monthly flat dollar amount as limited ($2,085/12)). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $2,085 (the monthly amount of $174 x 12 months of no coverage). This is below the $12,420 national average bronze plan premium, so the maximum is not reached, and the ceiling does not apply to this situation.\(^5\) The 2016 SRP of $2,085 is 6% of the family household income of $35,000. While this family has household income above the federal poverty line, they would likely receive either free coverage in states that expanded Medicaid or a significant federal subsidy through the PTC for minimum essential coverage for their family.

**Example 11. Change in Shared Responsibility Family During Year**

Assume the same facts in Example 10(a) above, except that Maya has minimum essential coverage for January through June. The relevant annual national average bronze plan premium for a family of four (two adults, two children) is $9,936 (using the 2015 amount of $2,484 x 4), and six months for Maya is $1,242 ($2,484/12 x 6), which comes to a total of $11,178.\(^6\) For the period January through June, the applicable flat dollar amount is $2,085 ($695 x 2 adults) plus $695 ($695/2 x 2 children). The applicable flat dollar amount for the period July through December is $2,085 ($695 x 3 adults) plus $695 ($695/2 x 2 children), or $2,780. However, the flat amount is limited to $2,085 or 300% of the $695 rate. The flat dollar amount in this case is $2,085 or the lesser of these two amounts.

---

313. Treas. Reg. § 1.5000A-4(d) ex.3 (providing an example for a family without minimum essential coverage).
314. See 26 U.S.C. § 36B (describing the PTC as applicable to taxpayers who have household income levels below 400% of the poverty level).
316. $207 per individual x 4 individuals = $828. $828 x 12 months = $9,936. See chart and discussion of the national average bronze coverage cap at notes 292, 294, & 297.
The excess income amount in this example remains stable at $5,733 for the entire year. The monthly penalty amount is $478 (the greater of ($5,733/12) or ($2,085/12)), for both periods—January through June and July through December—because the excessive income for the year remains the same. Therefore, the SRP remains the same as in the previous example even though Maya had minimum essential coverage for six months of the tax year.

Even though Maya obtained coverage for six months during the year, the SRP in this scenario does not decrease and so remains at $5,733. This amount is below the $11,178 national average bronze plan premium for the family under these circumstances, so the overall ceiling does not apply.\(^{317}\) Thus, obtaining minimum essential coverage for one member of the household may not change the household’s SRP. The 2016 SRP of $5,733 is 2.3% of the family household income of $250,000.

When the excess income amount applies, as in this case, the penalty will not decrease if one or more members of the household obtain qualifying coverage because this amount does not vary based upon number of individuals not covered. Additionally, when the flat dollar amount applies to large families (e.g., a married couple with more than three children), the penalty may not decrease if one or more members of the household obtain coverage because the flat dollar amount cap (i.e., 300% of the flat dollar amount)\(^ {318}\) is not reduced until the family size goes below two adults and two children (or one adult and four children).\(^ {319}\)

**Example 12. Family Without Minimum Essential Coverage, Except for One Adult Child, Subject to the Flat Dollar Amount Ceiling**

Assume the same family of five as in Example 10(c) with a family household income of $70,000, but Oliver, age 21, has qualifying health care coverage as a college student. The excess income percentage amount is $1,233 (($70,000 - $20,700) x 2.5%). This reflects 2.5% of the excess of the total household income over the filing threshold amount. As in Example 11, this amount does not change because it does not depend upon the number of individuals without coverage.

In addition, the flat penalty amount does not change because it was previously capped at $2,085. The new flat penalty amount for two adults ($695 x 2) is $1,390.

\(^ {317}\) 26 U.S.C. § 5000A(c)(1)(B) (setting forth overall cap for the SRP); see also Rev. Proc. 2015-15, 2015-5 I.R.B. 564 (setting forth the national average bronze plan amounts for 2015); Treas. Reg. § 1.5000A-4(d) ex.4 (change in family size during the year).


\(^ {319}\) See 26 U.S.C. § 5000A(c)(2)(A)(ii) (setting forth cap on the flat dollar amount of 300% of the applicable dollar amount irrespective of the number of family members once the 300% limit is reached). A lower or middle income family with two adults (2 x $695 = $1,390) and three or more children (at least 3 x $347.50 = $1,043) would be subject to the flat amount limit of 300% of $695 or $2,085 (as compared to $2,433 = $1,390 + $1,043) in 2016 even if the number of children dropped from three or more to only two because they obtained qualifying health care coverage. Similarly, a family with one adult ($695) and more than four children (at least 5 x $347.50 = $1,738) would be subject to the flat amount limit of 300% of $695 or $2,085 (as compared to ($2,433 = $695 + $1,738) in 2016 even if the number of children dropped from five or more to only four because one or more children obtained qualifying health care coverage. See id.
2) and two children ($695/2 x 2) remains the same at $2,085. Therefore, the monthly penalty remains the same amount at $174 (the greater of the monthly excess income amount ($1,233/12) or the limited flat penalty amount ($2,085/12)). Because everyone in the family (other than Oliver) did not have minimum essential coverage for the whole year, the 2016 SRP is $2,085 (the monthly amount of $174 x 12 months of no coverage). This is below the national average bronze plan premium for four individuals ($9,936), so the maximum is not reached and the overall cap does not apply to this situation. The 2016 SRP remains the same at $2,085 despite the fact that one family member obtained minimum essential coverage. However, if one more family member obtains coverage, the flat dollar amount will decrease resulting in a reduced SRP.

This is also true for families with six or more individuals subject to the overall cap of the average annual bronze premium amount. The average annual bronze premium amount is capped at five or more individuals; thus, if a family of six is subject to the overall cap and one member obtains coverage, the same dollar amount cap will continue to apply.

321 The next example demonstrates this situation.

- Example 13(a). Family of Six Without Minimum Essential Coverage Subject to the Annual Average Bronze Premium Family of Five or More Cap

Now assume the same family as in Example 10(b), married taxpayers Maya and Nathan. However, they have one additional young child for a total of four children (only Oliver is over 18) and a family of six. The family’s household income is $1,000,000. The flat applicable dollar amount for the family remains the same at $2,085 because it is limited by $3,127 (($695 x 3 adults) plus ($695/2 x 3 children)) for 2016. However, the total flat dollar amount is limited to 300% of the $695 rate for a family maximum of $2,085 ($695 x 3) for 2016.

The excess income amount also remains the same at $24,483 (($1,000,000 - $20,700) x 2.5%). This reflects 2.5% of the difference between the total household income and the filing threshold amount. The monthly penalty amount is $2,040 (the greater of ($24,483/12) or ($2,085/12)). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $24,483 (the monthly amount of $2,040 x 12 months of no coverage). However, because the excess amount is above the $12,420 national average bronze plan premium for a family of five or more, the maximum is reached, and the ceiling applies to this situation. Therefore, even though this family has four children as

320. Treas. Reg. § 1.5000A-4(d) ex.1–5 (demonstrating the application of the overall cap of the national average bronze premium amount in a variety of different fact patterns).

321. See id.; see supra discussion in notes 292, 294, & 297 (bronze premium amount caps on the overall SRP). Example 13(a), supra Part III.C.4, demonstrates the mathematics of this phenomenon.

322. See 26 U.S.C. § 5000A(c)(1)(B) (setting forth overall cap for the SRP); Rev. Proc. 2015-15, 2015-5 I.R.B. 564 (setting forth the dollar amounts for 2015 of the national average bronze premium for a family of five or more at $1,035 per month or $12,420 annually).
compared to only three in Example 10(b), the 2016 SRP of $12,420 is capped and remains the same.

- **Example 13(b). Family of Six, All Without Minimum Essential Coverage Except One, Subject to the Annual Average Bronze Premium Family of Five or More Cap**

  Finally, assume the same facts as in Example 13(a); however, similar to Example 12 above, Oliver obtains qualifying health insurance as a college student. The family’s 2016 SRP will not decrease but will remain the same at $12,420 because the ceiling amount is capped for a family of five or more at this dollar amount. Only if two additional family members obtain coverage and the number of uninsured drops to four or fewer will the overall cap or the average annual bronze premium cost of $2,484 per individual (maximum of $12,420 for family of five or more) decrease and result in a lower 2016 SRP.

  The structure of the SRP is complex and confusing given that some penalty amounts will fluctuate with certain changes in the number of uncovered nonexempt family members and that other penalty amounts will not fluctuate at all. The next Subpart discusses financial challenges inherent in the SRP design, especially for lower income families.

  **D. Irresponsibly Taxing Irresponsibility?**

  As the examples above demonstrate, the design of the SRP is extremely complicated, lacks transparency, and is regressive. The design disproportionately penalizes lower-income individuals relative to higher-income individuals because the design includes both a floor and a ceiling. As a result of these mechanisms, the lowest-income individuals (who are not otherwise exempt and thus necessarily have incomes above the federal income tax filing threshold) will be subject to the flat amount rather than the percentage of excess income amount because the SRP requires the higher of the two calculations. As discussed, the SRP penalty is the lesser of the national average premium for a bronze health plan or the sum of the monthly penalty amounts, and the monthly

323. Regressive taxation is when lower-income taxpayers pay a greater percentage of their income in taxes than middle- and higher-income taxpayers. While federal income taxes in the United States are progressive today, the history of the U.S. tax system was replete with taxes. “‘The taxation system is unjust in the United States,’ New York City tailor Conrad Carl boldly informed national lawmakers in the summer of 1883. ‘It is only indirect taxes, which fall back upon the workingman, . . . He is the last one that they can fall back upon, and they get the taxes out of him. It is only the workingman that is the taxpayer, in my opinion, in the United States.’ Testifying before the U.S. Senate Committee investigating the relations between labor and capital, Carl described how the existing system of import duties and excise taxes exacerbated the already dismal daily living conditions of ordinary American workers. He explained how these indirect taxes imposed a greater financial burden on the poor than on the rich, taking more from those who had less.” AJAY K. MEHROTTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013).

324. See 26 U.S.C. § 5000A(c) (providing the formulae to compute the amount of penalty under the SRP).

penalty amounts are calculated as 1/12 of the greater of the flat amount or the percentage of excess income amount.\textsuperscript{326} Because the difference between a low-income household’s income and the filing threshold is a low dollar amount, 2.5% of this excess income (i.e., the percentage of excess income amount)\textsuperscript{327} is unlikely to exceed $695 (i.e., the lowest possible flat amount, based on the applicable dollar amounts beginning in 2016)\textsuperscript{328} even with an annual inflation adjustment.\textsuperscript{329} Therefore, in 2016 the lowest-income individuals who owe a penalty under the SRP for the calendar year will be subject to at least a $695 penalty.

The $695 floor corresponds with a $2,085 ceiling because the flat dollar amount is at most equal to 300% of the applicable dollar amount (i.e., $695 in 2016).\textsuperscript{330} This ceiling is relatively large in real dollars for lower-income working families who may earn minimum wage household salaries of $15,000 to $30,000 per year.\textsuperscript{331} For a household of two full-time minimum wage earners with two or more children, the 2016 SRP of $2,085 is 7% of their $30,000 gross income.

The design of the SRP also creates a perverse cliff effect and a trap for the unwary. A low-income household earning below the threshold amount is exempt from the SRP, but a low-income household that earns one dollar or more above the threshold is not exempt. Therefore, one additional dollar of gross annual income could trigger a $2,085 penalty for an average family of four with two children. For example, a married couple with two children earning $20,700 in 2016 will be exempt from the SRP, but if the same family earns $20,701 in 2016, they are not below the filing threshold and are therefore subject to the maximum 2016 SRP flat penalty amount of $2,085 in 2016, or 10% of household income.\textsuperscript{332}

This cliff effect is a huge cost and shock to a family that would likely receive free health care coverage through Medicaid. While the penalty might shock them

\textsuperscript{326} See supra Part III.C; 26 U.S.C. § 5000A(c)(1)–(2) (2012).
\textsuperscript{327} 26 U.S.C. § 5000A(c)(2)(B).
\textsuperscript{328} 26 U.S.C. § 5000A(c)(3)(A).
\textsuperscript{329} 26 U.S.C. § 5000A(c)(3)(D) (providing for indexing the flat amount for inflation).
\textsuperscript{330} 26 U.S.C. § 5000A(c)(2)(A)(ii) (setting forth the ceiling for the flat dollar amount).
\textsuperscript{331} 2,080 hours annually (40 x 52 weeks a year) x $7.25 = $15,080 or approximately $15,000 per adult worker per year. For two adult workers working fulltime at minimum wage this is about $30,000 per year. Federal minimum wage amount in 2016 is $7.25, but some states have enacted a higher floor.
\textsuperscript{332} The “cliff effect” as used here is intended to mean that one additional dollar of income causes a significantly disproportionate charge (e.g., $695 annual SRP) or decrease in net income. This, effect if understood by a taxpayer, would certainly warrant a rational response to not suffer this disproportionate hardship by not earning or including those harmful additional marginal dollars. This is a disincentive to earn more and antithetical to goals of financial independence and progress. See, for example, the “cliff effect” of getting a raise for a family on the precipice of poverty when they begin to lose social benefits as a result of the higher income. This effect has also been visually described as one step forward – two steps backward. See When a raise means losing ground for low-income families, PBS NEWSHOUR (Jan. 11, 2014), http://www.pbs.org/newshour/rundown/when-getting-a-raise-means-losing-ground-for-low-income-families/.
\textsuperscript{333} The flat dollar amount of $2,085 ($695 per each of two adults and $347.50 per each of two children) will exceed the excess of income amount of 2.5% of $1 ($20,701 household income over the $20,700 2016 filing threshold amount). As such, the 2016 SRP would be $2,085 on $20,751 of household income, or 10%. This amount is less than the 2016 average annual bronze premium amount, so it is not subject to the overall cap. See 26 U.S.C. § 5000A(c) (setting forth the calculation of the penalty).
into enrolling, it could paralyze or distract them from enrolling. Similar to monetary penalties for not having children in car seats for lower-income households, the solution is providing a car seat—not a financial penalty that will just push the family deeper into debt and make them less able to afford a car seat. Here, too, the solution is getting the family into comprehensive and affordable health care coverage, not driving them deeper into debt.

Individuals with incomes well above the filing threshold are comparatively less vulnerable to this cliff and will most likely be subject to the SRP based upon a percentage of income. This is because 2.5% of their household income will exceed the flat amount beginning at about $38,500 for a single person (that is, $28,650 over the filing threshold amount of as low as $10,350).\(^{334}\) However, for higher-income individuals, the percentage of income amount is capped at the bronze plan premiums of $2,484 for each individual in 2015 (and annually adjusted each year to the actual market pricing).\(^{335}\) Thus, at about $110,000 of income and above for a single individual\(^{336}\) or $418,500 of income and above for a family of four, the penalty is capped at the cost of the bronze plan premiums of $2,484 and $9,936 (or about 2.3% of gross income).\(^{337}\) As gross income increases above these amounts, the percent of the SRP of gross income decreases. For example, at $1,000,000 of gross income, the percentage of the $9,936 SRP is less than 1.0%. As a result of the structure of the SRP, lower-income households suffer a significantly higher effective tax rate than the highest-income families. This higher rate occurs despite the same “irresponsibility” or failure to obtain minimum essential coverage. Moreover, lower-income families have meaningfully fewer disposable resources and, thus the penalty is even more detrimental given that the marginal value of these dollars are so critical to the families’ health, safety, and basic welfare. Thus, in value-added dollars the effective tax rate is even higher.

Consistent with congressional intent to subject only those that are “irresponsibly” not participating in comprehensive affordable health care reform to the SRP, individuals who have suffered a hardship are exempt.\(^{338}\) However, only hardships that undermine an individual’s ability to obtain qualifying health care coverage will qualify for the exemption from the SRP.\(^{339}\) Therefore, it does not appear that the SRP itself can be the source of the hardship. Ironically, individuals who would most suffer from the economic hardship of the SRP would likely most qualify for significantly subsidized or even free health care

\(^{334}\) $38,500 household income less $10,350 threshold amount = $28,150. $28,150 x .025 = $704, or an amount in excess of the flat amount of $695.

\(^{335}\) 26 U.S.C. § 5000A(c)(1)(B) (providing a ceiling of the amount of the applicable bronze level premiums).

\(^{336}\) $110,000 household income less $10,350 threshold amount = $99,650. $99,650 x .025 = $2,491 an amount in excess of the average annual bronze plan premium for an individual.

\(^{337}\) $418,500 household income less $20,700 threshold amount = $397,800. $397,800 x .025 = $9,945, or an amount in excess of the average annual bronze plan premium for a family of four. See supra discussion in Part III.C.4.

\(^{338}\) See 26 U.S.C. § 5000A(c)(5).

\(^{339}\) Id.
coverage. While the magnitude of the SRP is certainly harsh enough to be attention-getting, it might be too harsh for these particularly vulnerable households.

**Chart 1. SRP Effective Tax Rates for Three Scenarios**

To better achieve the goal of comprehensive and affordable health care, perhaps Congress should consider a less significant financial penalty for these families coupled with direct outreach to enroll these families in health care. As the National Taxpayer Advocate Nina Olson has described, social benefits delivery should embody a mindset of how can we deliver benefits broadly and deeply, versus how can we collect a penalty for not having the benefit. The next Subpart describes a potential alternative SRP structure to mitigate the harsh penalty for lower income individuals.

340. This line graph represents the effective tax rates of the current SRP for three different households at household income levels from $5,000 to $1,500,000 including a single person, a married couple with two children, and a single head of household with four children. The specific calculations for each data set are on file with the authors.

341. See National Taxpayer Advocate, supra note 21 (noting that the IRS is a benefits administrator even though its design is for revenue collection).
IV. RECONSTRUCTING THE SHARED RESPONSIBILITY PAYMENT

A. The SRP Reconstructed: Eliminating Floors and Ceilings

One solution to the cliff effect and the disproportionate tax rates inherent in the SRP is to eliminate both the flat amount floor and the bronze plan premium ceiling. This will smooth out the SRP to make it consistent for all gross income levels irrespective of magnitude and household size. Thus, the penalty applies until all household members either qualify for an exemption or obtain qualifying health care coverage. Thus, the complexity of whether or not the penalty decreases when one or more members obtain coverage is eliminated. As a result, the SRP motivates the entire household to obtain coverage. Moreover, the new design is simpler and more transparent. Transparency and simplicity are fundamental goals in tax policy that seem to be wanting in the SRP.342

1. Proposal for the Revised SRP: 26 U.S.C. § 5000A(c)

Our proposal for the Revised SRP retains much of the basic structure of the SRP in that it continues to be a monthly analysis as to whether or not a taxpayer is subject to the penalty for the tax year. All of the exemptions and health insurance coverage requirements will remain the same. However, the calculation for the Revised SRP is reconstructed to be equal to a flat percentage of household income in excess of the applicable filing threshold. Similar to the SRP, the applicable percentage is phased in beginning in 2014 through 2016 and is determined as follows:

(c) Amount of penalty

(1) In general The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred.

(2) Monthly penalty amounts The monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of an amount equal to the following percentage of the excess of the taxpayer’s household income for the

342. See Anthony Infanti, Tax Equity, 55 BUFFALO L. REV. 1191 (2008) (discussing tax policy generally to include issues of simplicity and transparency); see also C. Eugene Steuerle, Multiple Goals of Tax Reformers, TAX ANALYSTS (Oct. 11, 1995) (noting that tax simplicity is a bipartisan universal goal in tax policy).
taxable year over the amount of gross income specified in section 6012 (a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.343

With these revisions, the 2016 SRP is simply equal to a penalty of 2.5% of household income above the threshold amount for all nonexempt taxpayers. This structure results in a progressive rather than a regressive effective tax rate, which is consistent with a policy that taxes households based on the taxpayer’s ability to pay.344 The following restated examples evidence how this change would function.

2. Restated Examples with the Revised SRP

• Example 14(a). Family Without Minimum Essential Coverage: Higher-Income Household

Taxpayers Maya and Nathan are married and have three children: Oliver, age 21; Paige, age 15; and Quincy, age 10. No member of the family had minimum essential coverage in 2016. The total household income is $250,000, and the applicable filing threshold is $20,700.345

The excess income amount is $5,733 (($250,000 - $20,700) x 2.5%). This reflects 2.5% of the difference between the total household income and the filing threshold amount. The monthly penalty amount is $478 ($5,733/12). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $5,733 (the monthly amount of $478 x 12 months of no coverage). The 2016 SRP of $5,733 is 2.3% of the family household income of $250,000. Because this household was neither subject to the ceiling nor the floor, their SRP does not change from the example above and is consistent with the revised SRP of 2.5% of household income in excess of the threshold amount.

343. See 26 U.S.C. § 5000A(c) (setting forth the calculation with the floor and ceiling amounts).


• Example 14(b). Family without Minimum Essential Coverage:
  Highest Income Households

Now assume the same family’s household income is $1,000,000. The excess income amount is $24,483 (($1,000,000 - $20,700) x 2.5%). This reflects 2.5% (for 2016) of the difference between the total household income and the filing threshold amount. The monthly penalty amount is $2,040. Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $24,483 (the monthly amount of $2,040 x 12 months of no coverage). The 2016 SRP of $24,483 is 2.4% of the family household income of $1,000,000. Because of the high amount of household income, this family would not receive any federal subsidy if they otherwise qualified to purchase minimum essential coverage through the Exchange. Because this household was subject to the ceiling, the SRP increases from the example above ($12,420, or 1.2% of household income). Nevertheless, the new effective SRP rate is consistent with the 2.5% rate on household income in excess of the threshold amount. Moreover, it is marginally progressive relative to the 2.3% effective tax rate in the SRP for the high-income family above. That is, the tax rate for the high-income family with $250,000 of household income is 2.3%, while the tax rate for the highest-income family with household income of $1,000,000 (or four times as much) is 2.4%.

• Example 14(c). Family without Minimum Essential Coverage:
  Middle Income Household

Now assume the same family’s household income is $70,000. The excess income percentage amount is $1,233 (($70,000 - $20,700) x 2.5%). This reflects 2.5% (for 2016) of the excess of the total household income over the filing threshold amount. The monthly penalty amount is $103 ($1,233/12). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $1,233 (the monthly amount of $103 x 12 months of no coverage). The 2016 SRP of $1,233 is 1.8% of the family household income of $70,000. Because of the middle-income level of their household income, this family would likely receive federal subsidies through the PTC if they otherwise qualified to purchase minimum essential coverage through the Exchange. This amount of $1,233 (effective penalty rate of 1.8%) is significantly lower than the existing SRP of $2,085 (effective rate of 3%) because the floor no longer applies. However, the SRP is over $1,000, and thus it is a meaningful penalty for a family of five with $70,000 of household income (or less than 250% of the 2015 federal poverty threshold). Moreover, the effective tax rate in the SRP of 1.8% is lower for this family than for families with significantly higher household incomes of $250,000 (2.3% effective tax rate) and $1,000,000 (2.4% effective tax rate).

• Example 14(d). Family without Minimum Essential Coverage: Low-Income Household

Finally, assume the same family’s household income is only $35,000. The excess income amount is $358 (($35,000 - $20,700) x 2.5%). This reflects 2.5% (for 2016) of the difference between the total household income and the filing threshold amount. The monthly penalty amount is the floor of the flat dollar amount or $30 ($358/12). Because the family did not have minimum essential coverage for the whole year, the 2016 SRP is $358 (the monthly amount of $30 x 12 months of no coverage). The 2016 SRP of $358 is 1% of the family household income of $35,000. While this family has household income above the federal poverty line, they would likely receive either free coverage in states with expanded Medicaid coverage or a significant federal subsidy through the PTC for minimum essential coverage for their family. This amount is significantly lower than the existing SRP of $2,085 (effective tax rate of 6%) because the floor no longer applies. However, the SRP of $358 is a meaningful penalty for a family marginally above poverty level. Moreover, the SRP effective tax rate is lower for this family than for the middle- and high-income families with significantly higher household incomes of 200% ($70,000) and 715% ($250,000) described above.

347. $35,000/$28,410 = 123% of the poverty threshold for a family of five in 2015. Id.
348. Medicaid coverage has been expanded in certain states to 138% of the federal poverty line. For discussions regarding the Medicaid expansion, see Medicaid expansion and what it means for you, HEALTHCARE.GOV, https://www.healthcare.gov/medicaid-chip/medicaid-expansion-and-you/ (last visited Feb. 29, 2016).
349. It’s Expensive to Be Poor, ECONOMIST (Sept. 5, 2015), http://www.economist.com/news/united-states/21663262-why-low-income-americans-often-have-pay-more-its-expensive-be-poor (Nearly half of American households said they could not cover an unexpected $400 expense without borrowing or selling something; 2% said this would cause them to resort to payday lending.).
The restructured SRP has many benefits and few weaknesses. Most meaningfully, the revised structure eliminates the regressive nature of the original SRP and replaces it with a marginally progressive effective tax rate. The reconstructed SRP is marginally progressive to account for the exemption from the SRP for the lowest income households. As such, household income up to the amount of the filing threshold is not subject to the reconstructed SRP. This new structure eliminates the notably adverse cliff effect of having one dollar over the filing threshold resulting in a flat amount penalty of up to $2,085 in 2016.

Finally, the reconstructed SRP is simpler and more transparent for taxpayers. The monthly penalty is basically 2.5% of household income above the relevant filing threshold, which is indexed for inflation each year, divided by 12. The SRP penalty owed is the sum of the monthly penalties for each month that any member of the household does not have minimum essential coverage. The penalty will no longer fluctuate based upon the somewhat arbitrary changing

---

350. This line graph represents the effective tax rates of the revised SRP for three different households at household income levels from $2,500 to $1,500,000, including a single person, a married couple with two children, and a single head of household with four children. The specific calculations for each data set are on file with the authors.

number of uninsured dependents or their ages (e.g., below or above age 18) claimed on a tax return.352

Unfortunately, certain weaknesses may still remain in the reconstructed design of the SRP. Because the reconstructed SRP is based upon a percentage of household income, it does not decrease if one or more of the members of the household obtain minimum essential coverage.353 Indeed, the household would owe the same amount of SRP even if everybody but one person in the household did not have minimum essential coverage. This flaw is inherent in using a percentage of household income rather than a flat amount per individual as the base for the penalty. This flaw could be mitigated by a graduated rate based upon the number of individuals in the household without minimum essential coverage. However, this would add complexity coupled with lack of transparency, as the rate could vary monthly. Moreover, the current structure does motivate a household to ensure that every member of the household either has essential health care coverage or is exempt. As practical matter, this seems consistent with family health care coverage generally in that everyone in the family is typically included in family health care plans.

Another potential problem in the reconstructed design might be that the penalty will not be harsh enough to compel households to obtain minimum essential coverage in lieu of paying it. The purpose of the SRP is to strongly discourage individuals from only obtaining minimum essential coverage when they need it and going without when they do not in order to take advantage of the community pricing. Consistent with its phase-in design, the SRP is more significant in 2015 than in 2014 and most significant when fully phased in during 2016 and beyond.

The Kaiser Family Foundation (KFF) has estimated that under the current statute, the average household SRP for 2015 tax filings was $661 (a 215% increase over the 2014 average amount of $210); for 2016 tax filings, KFF estimates that it will be $969 (a 47% increase over 2015).354 Taxpayers who are expected to qualify for federally-subsidized health insurance premiums through the Exchange are estimated to be subject to a lower SRP with an average household 2016 SRP of $738 (89% increase over $389 for 2015).355 Comparably, higher-income taxpayers who will not qualify for any subsidy are estimated to be subject to an average household 2016 SRP of $1,450 (23% increase over $1,177

352. See Treas. Reg. § 1.5000A-4(d) ex.4 (2014) (illustrating the change in family size during the year provision); Treas. Reg. § 1.5000A-4(d) ex.5 (illustrating the change in age of a dependent during the year provision).

353. See Treas. Reg. § 1.5000A-4(d) ex.4 (demonstrating that the SRP does not decrease if one or more of the family members obtain minimum essential coverage, even if at least one family member does not have minimum essential coverage).


355. Id.
for 2015). Notably, of the seven million uninsured individuals who qualify for subsidized health insurance through the Exchange in 2016, KFF estimates that about 3.5 million of these individuals could purchase health care coverage for less than their 2016 SRP. This number includes about two million, or 28%, who would qualify for fully-subsidized health insurance coverage. However, of the entire eleven million uninsured individuals who qualify for coverage under the Exchange in 2016, about 7.1 million will be subject to a 2016 SRP that is less than the lowest cost of qualifying health insurance. The purpose of the SRP is to make uninsured individuals acquire and maintain health insurance not only for the obvious benefits to their family, but to keep health insurance premiums affordable for everyone. If the SRP is not harsh enough, it will not accomplish this goal, which is integral to the success of the program.

Nevertheless, if the penalty is too harsh for lower-income families, it could undermine the household’s financial ability to survive—let alone to obtain health insurance coverage. Moreover, the time and energy dealing with the SRP and the IRS would be better spent actually enrolling in affordable comprehensive health care coverage. This is especially true of households that qualify for free or significantly subsidized coverage with the PTC. Rather than a paralyzing financial penalty, the IRS could partner with the Exchanges to ensure that households which are subject to the SRP are contacted directly to facilitate qualifying health care coverage. This approach is more in line with administering benefits and is analogous to the distribution of free child car seats to lower-income families in lieu of an expensive ticket. The reconstructed SRP structure should better achieve congressional goals of ensuring that all households have and maintain comprehensive and affordable health care coverage.

**B. Limited Collection of, and Penalties for, SRP Liabilities**

Consistent with the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, Congress affirmatively provided that the

---

356. Id.
357. Id.
358. Id.
359. See discussions from the National Taxpayer Advocate regarding the IRS’s role as an administrator of benefits rather than a collector of tax revenue, and how these roles and attendant missions are notably different, requiring different skills and resources (e.g., encouraging individuals to receive tax related benefits as a human right, rather than focusing on abuse of benefits). Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, TAX NOTES (June 3, 2013).
360. For example, fines for failure to use child car seats properly are allocated to providing free or low cost car seats to needy families and for education. MELISSA SAVAGE, ET AL., NAT’L CONFERENCE OF STATE LEGISLATORS, PROTECTING CHILDREN: A GUIDE TO CHILD TRAFFIC SAFETY LAWS 7 (Dec. 2002). See, for example, in San Diego California a $245,000 grant from the California Office of Car Safety to fund almost 2,000 car seats for qualifying low-income families. Claire Trageser, *San Diego County To Give Car Seats to Low-Income Families*, KBPS NEWS (Jan. 5, 2015), http://www.kpbs.org/news/2015/jan/05/san-diego-county-give-car-seats-low-income-families/.
government should assess and collect the SRP in the same manner as taxes.362 However, given that the broad purpose of the SRP is to ensure access to affordable health care coverage and to mitigate hardships rather than create them, failure to pay the SRP is treated less harshly than other tax penalties.363 Under § 5000A, failure to pay the SRP will not result in criminal prosecution or penalties or a lien or levy of the taxpayer’s property.364 These provisions mitigate the magnitude of hardship a taxpayer might suffer from her nonpayment of the SRP relative to her failure to pay other tax penalties.365

V. CONCLUSION

While debate over the Patient Protection and Affordable Care Act continues, almost thirty million more Americans have health insurance today than when President Obama first signed the Act into law in 2010.366 Approximately 16.4 million uninsured individuals have acquired health insurance coverage through the Exchange367 since the Act became effective in 2014. After less than two years, the Act resulted in the lowest uninsured rate on record in more than fifty years.368 A recent study published in the Journal of the American Medical Association indicates that Congress’s goals have been realized in that Americans have better access to health care.369

Regardless of one’s opinion of the Act generally, the SRP affects millions of American taxpayers. Understanding the underlying principles, implementation and function of the SRP is important for tax professionals, taxpayers, and

362. 26 U.S.C. §§ 5000A(g)(1), 6671 (providing that the SRP penalty shall be assessed and collected in the same manner as taxes).
364. Id.
365. See, e.g., 26 U.S.C. § 7202 (willful failure to collect or pay over tax).
367. See DEPT’T OF HEALTH & HUMAN SERVS., supra note 366.
368. See Diamond, supra note 59; see also Jeffrey Young, Uninsured Rate Down Way More in States that Embraced Obamacare, HUFFINGTON POST (Aug. 10, 2015), http://www.huffingtonpost.com/entry/uninsured-rate-states-obamacare_us_55c7e5f9e4b0f1cbf1e56a17 (noting that states that expanded Medicaid and collaborated with or created their own Exchange by Dec. 31 saw uninsured rates drop 44% down to 8.9% and in states that did neither the drop was only 28% with uninsured rates of 13.4%); DEPT’ OF HEALTH & HUMAN SERVS., supra note 337; CTRS. FOR MEDICAID & MEDICARE SERVS., supra note 366.
369. Benjamin D. Sommers, Munira Z. Gunja, Kenneth Finegold, & Thomas Musco, Changes in Self-Reported Insurance Coverage, Access to Care, and Health Under the Affordable Care Act, 314 JAMA 4, 366–74 (July 28, 2015) (finding that among the more than 500,000 adults in the survey pre-ACA health care trends were significantly worsening for all outcomes compared with these trends the first two ACA enrollment periods significantly improved trends in self-reported coverage, access to primary care and medications, affordability, and health especially for minorities).
scholars. This Article, through a series of detailed examples, has exposed many of the complex statutes and U.S. Treasury regulations inherent in the SRP and has sought to reconstruct the SRP to mitigate some of its problems. Such de/reconstruction provides a better understanding of the details in the SRP that both enhance and distract from congressional goals for the Act. This clarity and exposure should facilitate a more informed and constructive discussion regarding how we can achieve a healthier and more civil America.