PARAGON HEALTH INSTITUTE

June 6, 2022

The Honorable Janet Yellen
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224
Via https://www.regulations.gov

Docket ID: IRS REG-114339-21
RIN 1545-BQ16

Dear Secretary Yellen and Commissioner Rettig:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) on the "Affordability of Employer Coverage for Family Members of Employees," published in the *Federal Register* (87 FR 20354, April 7, 2022). The first part of my comment was contained in a letter, which I cosigned with 35 other individuals, who have a broad array of legal and policy expertise.[1] We explained why your agencies lack the legal authority to implement this proposed rule and why the proposed rule is misguided policy. We recommended that you withdraw the proposed rule.

In this letter, I rely on my experience at the White House's National Economic Council to highlight the institutional damage to the IRS that will occur if this rule is finalized. The damage will include severe harm to its reputation and make its enforcement of the tax code susceptible to the political interests of this and future White Houses without regard for the law. I also explain why the lack of a true cost-benefit analysis in the proposed rule is unacceptable and likely violates the Administrative Procedures Act. The agency should resist the White House's and special interest groups' political pressure to violate the law and should instead withdraw this proposed rule.

The Law is Clear and Unambiguous — and the IRS was Right Last Decade.

The Affordable Care Act (ACA) is clear and unambiguous — affordability of employer coverage is based on the cost of self-only plans.[2] The IRS reviewed the statute a decade ago and issued regulations consistent with the law. At the time, the IRS resisted pressure from some politicians, interest groups, and policy experts to issue a regulation that would have been inconsistent with the statute by instead basing affordability on family coverage. In fact, this pressure was applied for more than a year as the IRS and Treasury delayed issuing a final rule on this matter.

When the IRS was drafting the premium tax credit (PTC) regulations, I was a senior professional staff member for the House Committee on Oversight and Government Reform. In 2013 and 2014, the

[1] Comment Tracking Number: l41-z6q8-rr1q
[2] For greater detail, see Doug Badger's comment letter on this rule (https://www.regulations.gov/comment/IRS-2022-0006-0070) as well as the one I submitted with 35 other individuals (Comment Tracking Number: l41-z6q8-rr1q).

Committee investigated the IRS's implementation of the ACA.[3] During that investigation, the Committee learned that the IRS and the Department of the Treasury had closely reviewed the issues pertaining to the affordability of coverage for the purposes of PTC eligibility. And the IRS and the Treasury issued a rule with the only interpretation of this provision that was consistent with the statute.

Moreover, in response to a request to provide additional review of the issue from the Government Accountability Office, the Treasury was clear and unambiguous: "determin[ing] that the language of section 36B, through a cross-reference to section 5000A(e)(1)(B), specifies that the affordability test for related individuals is based on the cost of self-only coverage."[4] This interpretation was not merely an agency policy position nor the result of insufficiently thorough or creative legal review. To the contrary, the Treasury's response was a crystal-clear conclusion about the limited authority available to the agency reflecting — without the need for any interpretation or gloss — clear statutory text, even after exhaustive legal analysis to find even a sliver of ambiguity.

The Joint Committee on Taxation was also unquestionably clear and unambiguous about this issue in its May 4, 2010 "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act.'" JCT called its original description that linked affordability to individual or family coverage a mistake (erratum) and corrected it in this document, which also corrected ten other mistakes they had made in their original description of ACA tax provisions. Despite the spurious contention in the proposed rule that JCT showed ambiguity, JCT's explanation of this exact scenario clearly shows no ambiguity. JCT's explanation also draws a clear line between the PTC affordability threshold and the individual mandate penalty exemption, which the agencies are now shamelessly attempting to blur.

> [I]f an employee with a family is offered self-only coverage costing five percent of income and family coverage costing 10 percent of income, the employee is not eligible for the tax credit in the Exchange because self-only coverage costs less than 9.5 percent of household income. The employee is not exempt from the individual responsibility penalty on the grounds of an affordability exemption because the self-only plan costs less than eight percent of income. **Although family coverage costs more than 9.5 percent of income, the family does not qualify for a tax credit** regardless of whether the employee purchases self-only coverage or does not purchase self-only coverage through the employer. However, if the family of the employee does not maintain minimum essential benefits coverage, the employee's family is exempt from the individual mandate penalty because while self-only coverage is affordable to the employee, family coverage is not considered affordable." (Emphasis added.)

While there is a sometimes a gray area between creative legal interpretation and the rule of law, the proposed rule does not straddle or approach this area. Rather, it starts and ends in lawless usurpation in derogation of the oath every Executive branch employee swears.[5]

[3] https://republicans-oversight.house.gov/report/administration-conducted-inadequate-review-key-issues-prior-expanding-health-laws-taxes-subsidies/

[4] https://www.gao.gov/products/gao-12-648

[5] Standard Form 61, "Appointment Affidavits", U.S. Office of Personnel Management (2002), available at: https://www.opm.gov/forms/pdf_fill/sf61.pdf ("I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without

These provisions of the ACA have not changed since the law's passage in March 2010. Past IRS and Treasury regulations as well as the JCT's explanation of ACA tax provisions were consistent with the law. Over the past decade, some members of Congress have attempted to change the law to define affordability of employer coverage in relationship to the cost of family plans, but Congress has never enacted such legislation. In 2020, the House of Representatives passed H.R. 1425, which would have amended the Internal Revenue Code (IRC) to add an affordability test based on the cost of family coverage.[6] However, this legislation died in the Senate. Thus, the law has not changed, but there was a desire after the 2020 election of a new president to increase the number of enrollees in the ACA exchanges and enhance access to federal subsidies.

The IRS Must Enforce the Law.

No amount of political pressure can ever be justification for the IRS and the Treasury to ignore the clear statutory language and issue a regulation inconsistent with the law. One of the reasons why the IRS Commissioner has a five-year term is to better ensure such adherence to law and insulate it from any political influence of the White House to violate the law. Taxpayers must be able to rely upon a fair and unbiased IRS. With this proposed rule, the IRS demonstrates its willingness to unconstitutionally violate tax law based on the political preferences of a White House which has forsworn its duty and powerful special interests, which desire greater government health care spending.

When a new president takes office, the president and the new administration are constitutionally bound to enforce the law and ensure that Executive Branch agencies such as the IRS do too. Any new administration naturally seeks to carry out its executive authority in such a way as to move public policy in the direction of its political views and agenda. However, no president and administration can disregard clear statutory language that Congress has declined to revise and take regulatory action in violation of the law. The facts surrounding the IRS's proposed rule on the affordability of employer coverage are troubling and create an impression that the IRS is willing to become a political wing of the White House by changing its enforcement of the tax code according to politicians' interests without regard to the actual law.

The Proposed Rule Will Harm Many People and Entities.

The rule discusses two groups of people who would be harmed if this rule were to be finalized:

- Some families would bear higher total costs, lose access to employer plans with broader provider networks and lower cost-sharing, and will instead have exchange plans with narrower provider networks and much higher cost-sharing.

- Other families would be harmed by the rule's resulting complications — forced to navigate multiple insurance plans with different benefit structures, cost-sharing amounts, and provider networks.

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any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.")

[6] H.R. 1425, section 103.

If this rule were to be finalized, there would be three other clear losers:

- The nation's future taxpayers, who would have to pay off the new spending (and interest costs) that this rule would unleash. The Congressional Budget Office (CBO) has estimated the new spending to be $45 billion over the next decade.[7]

- States would face higher costs from public programs.

- The IRS itself would suffer because it would prove that it can be pressured to kowtow to a White House that is willing to violate laws enacted by Congress, resulting in increased public distrust and necessary congressional oversight to prevent the agency from further politicizing its enforcement powers.

Finalizing the Rule Will Damage the IRS.

On January 28, 2021, President Biden issued an Executive Order on Strengthening Medicaid and the Affordable Care Act.[8] In that order, the president directed the Secretary of the Treasury and other heads of executive departments and agencies to review "policies or practices that may reduce the affordability of coverage or financial assistance for coverage, including for dependents." Executive orders provide policy direction but do not give federal departments the power or authority to take regulatory actions that violate the law. This executive order overtly increased political pressure on the Treasury and the IRS to issue regulations that disregard the statute and instead define affordability based on family coverage

I worked with IRS and Treasury career officials on a host of tax-related issues during my time as a special assistant to the president for economic policy at the National Economic Council from 2017-2019. Those IRS and Treasury officials exercised due diligence and professionalism in their policy and legal work. In several instances, political appointees in the White House (including me) expressed desire for the IRS to take administrative actions to expand consumer choice and control over their own health care finances. Despite the administration's and the public's strong interest in such actions, IRS officials routinely pushed back with their interpretation that the law and precedent prevented such actions. On these questions, the legal issues were much less clear than the ACA language at issue now that plainly links affordability to self-only coverage. But we respected the IRS's historic and consistent approach to these issues. Thus, we were left to push legislative reforms rather than administrative ones.

If the IRS were to finalize this proposed rule, it would lack credibility to object to changes desired by future administrations. By finalizing an illegal change in the definition of affordability of coverage from self-only plans to family plans, the IRS would not be able to credibly oppose efforts by this and future administrations to change tax policy in direct contravention of the Internal Revenue Code. If this illegal proposed rule were to be finalized, based on the precedent set in this situation, future enforcement of the tax code would gyrate back and forth based on the administration in power without regard to enacted law. The only way for IRS to avoid this dangerous outcome is by withdrawing this rule.

[7] https://www.cbo.gov/system/files/2020-06/Patient_Protection_and_Affordable_Care_Enhancement_Act_0.pdf
[8] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/executive-order-on-strengthening-medicaid-and-the-affordable-care-act/

The Lack of a Credible Cost-Benefit Analysis is Unacceptable.

Finally, the lack of a quantitative cost-benefit analysis in the proposed rule is striking and a break from norms. This failure permitted the agency to deceive the public by classifying the rule as not significant even though CBO projects that the financial impact would increase federal spending by billions of dollars annually.

The rationale provided by the IRS for the lack of a cost-benefit analysis is also inconsistent with past precedent. For example, the Treasury led the drafting of the June 2019 rule which expanded health reimbursement arrangements.[9] The Treasury used its health insurance microsimulation model to provide detailed point estimates of the take-up of the new HRAs (including by firm size) as well as the budgetary impact. The HRA rule was more complicated to model than this proposed rule and included premium information. Thus, the agencies' claim that they were not capable of modeling this proposed rule strains credulity.

There are two possible explanations for the agencies' failure to conduct and provide a quantitative cost-benefit analysis:

1) The IRS and Treasury rushed through this process to meet a political timeline, perhaps to coincide with the ACA's twelfth anniversary that President Obama returned to the White House to celebrate.

2) Such a cost-benefit analysis would be harmful to the rule because it would further demonstrate the magnitude of spending needed to only slightly reduce the number of uninsured.

The brief qualitative discussion in this proposed rule refers to some of the potential costs, but a full cost-benefit analysis would reveal the proposed rule's gross inefficiency. According to CBO estimates, the ten-year cost of a legislative proposal to modify affordability based on family coverage would be $45 billion. The White House press release for the proposed rule stated that about 200,000 additional people would gain insurance coverage on net if this rule were to be finalized.[10] These two estimates together show that the cost to provide health insurance coverage would be a staggering $225,000 over ten years for just one additional person. This huge cost would result from the rule's primary economic effect: replacing employer-financed coverage with public subsidies. And of course, the economic burden from taxation, or deadweight loss, would be significant if this rule is finalized— on the magnitude of several billions of dollars of economic loss each year.

The lack of a cost-benefit analysis in the rule likely also violates the Administrative Procedures Act. This failure deprives the public of an opportunity for meaningful notice and comment, demonstrates the lack of a reasoned explanation for the IRS's about face, and underscores the arbitrariness and capriciousness of this rule—yet another reason why the IRS should not finalize it. If the agency does not withdraw the rule because it concludes after additional review that it lacks legal authority, it

[9] https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans
[10] https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/05/fact-sheet-biden-harris-administration-proposes-rule-to-fix-family-glitch-and-lower-health-care-costs/

should at a minimum open the rule back up for public comment after completing and publishing a real regulatory impact analysis.

Sincerely,

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