

June 5, 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:

This letter presents our comments 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).

Summary of Comment

Treasury and IRS (the agencies) in 2013 promulgated final regulations regarding the affordability of employment-based health coverage for family members of employees that are fully consistent with the law.¹ They now propose to amend this regulation, having "tentatively determined" that it "is not required by the relevant statutes."²

The agencies' tentative determination is mistaken, and their proposed rulemaking contravenes the statute's clear and unambiguous language.

Section 36B of the Internal Revenue Code (IRC), which creates premium tax credits (PTCs), contains one and only one affordability test, and it applies to employer-sponsored health insurance (ESI) for workers and their dependents alike. If a worker must pay more than 9.5 percent of household income for self-only coverage, then the worker and his or her dependents are eligible to claim PTCs, assuming they meet other legal qualifications (e.g., lawful residence in the U.S., income, no other offer of minimum essential coverage).

The agencies improperly seek to legislate a separate affordability test for dependents that is not found in statute. In constructing this test, they mistake an exemption from tax penalties for an entitlement to tax credits. In addition to an affordability test for dependents, the agencies seek to create a new minimum value test that also lacks a statutory basis. They also fail to account for the relationship

¹ 78 FR 7264.

² 87 FR 20354 at 20355.

between employer "shared responsibility" requirements and the affordability test for self-only coverage found in section 36B.

The statute's clarity forecloses the agency's new claim of ambiguity. The new and impermissible reading of the statute is inconsistent with the agency's past rule and raises the specter that a new administration in the White House can pressure the IRS to alter its enforcement of the tax code in a manner that advances its political interests. Moreover, the agencies ignore that Congress has for more than 12 years refused to amend section 36B in the way the agencies now seek to unlawfully amend it through regulation. Congressional inaction does not empower the agencies to act. On the contrary, it further confirms that the proposed rule is unlawful. The agencies should withdraw it. Finalizing this proposed rule would mean that the IRS can be bullied by the White House to ignore the law and perpetuate policies for political considerations.

The proposed rule mistakes an exemption from tax penalty in section 5000A of the IRC for an entitlement to tax credits under section 36B.

The NPRM conflates two provisions of the IRC that accomplish very different things. Section 36B establishes a tax credit for purchasing exchange-based insurance policies, known as qualified health plans (QHPs). Section 5000A imposes a tax penalty on the uninsured and exempts specific categories of uninsured people from those penalties.³

Section 36B creates an entitlement to tax credits.

Section 36B creates a refundable tax credit for the purchase of QHPs. Subsections (a) and (b) establish the credit and provide rules for its computation. Subsection (c) sets forth rules relating to who may and may not claim the credit. Subsection (d) contains various definitions. Subsection (e) disqualifies people not lawfully present from claiming PTCs. Subsection (f) establishes a reconciliation process for instances where the government makes excess advance tax credit payments.

Section 36B denies tax credits to most workers and dependents with an offer of employer-sponsored coverage.

Subparagraph 36B(c)(2)(B) provides that people with another public or private source of minimum essential coverage (MEC) are ineligible for PTCs. MEC includes Medicare, Medicaid, CHIP and other government programs, as well as ESI. Thus, the general rule is that workers and their dependents with an offer of ESI are ineligible for PTCs.

Section 36B sets out a "special rule" for employees whose ESI does not constitute MEC.

Subparagraph 36B(c)(2)(C) states that "coverage must provide minimum value," meaning that an employee does not have MEC if the company's plan has an actuarial value of less than 60 percent.⁴

There is only one affordability test in Section 36B, and it applies strictly to the affordability of self-only coverage.

³ Congress has subsequently reduced the tax penalty to \$0 but has left section 5000A in place.

⁴ 36B(c)(2)(C)(ii).

That subparagraph further provides that ESI "coverage must be affordable" to qualify as MEC. A company health plan fails this test if:

"the employee's required contribution (within the meaning of section 5000A(e)(1)(B)) with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income."⁵

The cross-reference to 5000A(e) defines the employer's "required contribution" as the cost to the employee of "self-only" coverage.⁶

Thus, if a company offers a full-time worker coverage with an actuarial value of at least 60 percent at a premium for self-only coverage less than 9.5 percent of the worker's household income, then the worker cannot claim PTCs.

Section 36B(c)(2)(C)(i) applies that same affordability test to dependents of workers:

"This clause shall apply to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee."

There is thus a single affordability test in section 36B, and it applies identically to workers and dependents: if employer-sponsored self-only coverage costs more than 9.5 percent of an employee's household income, then the employee and his or her dependents are eligible for PTCs.

There is no other affordability test in section 36B. Nor is there any reference to the cost of family coverage. On that point, the statute is straightforward and clear. There is no other permissible reading.

The agencies improperly use section 5000A, which relates to the tax penalty on the uninsured, to construct a new affordability test with no statutory basis.

Ignoring this clarity, the agencies set out to construct a second affordability test, this one based on the cost of family coverage.

They appeal not to section 36B, which creates the tax credits for health insurance, but to section 5000A, which imposes tax penalties on the uninsured.

The agencies assert that 5000A(e)(1)(C) (which determines whether an uninsured dependent of a worker with an offer of ESI is exempt from tax penalty) as a "modification" of a similar provision relating to workers (5000A(e)(1)(B)) and of the affordability test in section 36B. This is an impermissible and utterly implausible reading of the statute.

Section 5000A focuses entirely on establishing the individual mandate requirements. Subsection 5000A(a) requires every "applicable individual" and any dependent of that individual to maintain MEC. Subsections (b) and (c) impose tax penalties on those who don't maintain MEC and provide for their calculation. Subsection (d) excludes various categories of people from the definition of "applicable individual" and, consequently, from the tax penalty. Subsection (e) exempts various uninsured applicable individuals from the tax penalty.

⁵ 36B(c)(2)(C)(i). The 9.5 percent threshold is indexed and therefore varies year by year. In 2022, it is 9.61 percent. For the sake of simplicity, this letter uses the statutory 9.5 percent figure throughout.

⁶ 5000A(e)(1)(B)(i).

Paragraph 5000A(e)(1) exempts "individuals who cannot afford coverage." Subparagraph (e)(1)(A) lays out the general rule: If an uninsured individual's "required contribution" to purchase a QHP (exchange-based health insurance) exceeds eight percent of the individual's household income, then the government will not assess a tax penalty.

Paragraph (e)(1)(B) provides that an uninsured worker with access to ESI is exempt from the tax penalty if the cost of self-only coverage exceeds 9.5 percent of household income. Paragraph (e)(1)(C) lays out a special rule for individuals related to employees with ESI, making the exemption contingent on the cost of ESI rather than on the cost of individual, exchange-based insurance.

Subparagraph (C), therefore, is not, as the agencies mistakenly claim, a "modification" of subparagraph (B), much less of 36B(c)(2)(C)(i), but a special rule for determining whether an uninsured dependent of a worker with ESI is exempt from tax penalties. Uninsured dependents exempt from the penalty are no different from other categories of people exempted by subsections (d) and (e) of section 5000A.⁷ None are subject to tax penalties, and that exemption renders none of them eligible for tax credits.

The agencies' attempt to discover statutory ambiguity in 5000A(e)(1)(C) is unavailing. That subparagraph performs a single function – exempting certain uninsured dependents from tax penalties. It neither modifies subparagraph (B) nor creates an entitlement to PTCs under section 36B.

The proposed rule also improperly creates a minimum value test for dependents in section 36B.

Just as there is no affordability test for dependents based on the cost of family coverage in section 36B, so there is no minimum value test for such dependents. The agencies acknowledge this, observing that "36B(c)(2)(C)(ii) does not specifically mention related individuals."⁸ That provision reads:

"An employee shall not be treated as eligible for minimum essential coverage if such coverage consists of an eligible employer-sponsored plan ... and the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of the costs."

The minimum value test in section 36B applies only to the employee, just as the affordability test in that section applies only to the cost of self-only coverage. The agencies concede the former point and its implications.

"Without a separate minimum value rule for related individuals based on the costs of benefits provided to related individuals, a PTC would not be allowed for a related individual offered coverage under a plan that was affordable but that provided minimum value to employees and not to related individuals."⁹

Instead of recognizing this as further evidence that their reading of the statute is untenable, the agencies attempt through regulation to legislate a minimum value test for dependent coverage. As with

⁷ That list includes members of certain religious sects, individuals enrolled in health sharing ministries, individuals not lawfully present in the U.S., incarcerated individuals, taxpayers with incomes below the filing threshold, members of Indian tribes, and any individual determined by the HHS Secretary "to have suffered hardship with respect to the capability to obtain coverage under a qualified health plan."

⁸ 87 FR 20358.

⁹ *Ibid.*

its creation of an affordability test for dependent coverage in section 36B, that action is contrary to statute.

The employer mandate (section 4980H) provides further evidence of the proposed rule's unlawfulness.

The Affordable Care Act (ACA) for the first time placed a requirement on "applicable large employers" – generally those with 50 or more full-time employees – to offer health coverage through their group plans.¹⁰ Section 4980H(a) imposes a "shared responsibility" penalty on an applicable large employer who "fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan."¹¹ When "at least one full-time employee" claims a PTC, the penalty is triggered.¹²

Subsection (b) deals with applicable employers who do sponsor coverage of their full-time workers and dependents. If "one or more" of those full-time employees claims a PTC, the employer incurs a "shared responsibility penalty," but only for the employees who receive a PTC.¹³

The employer shared responsibility rules have several implications for the agencies' efforts to legislate an affordability test based on premiums for family coverage. First, the mere offer of MEC to the dependent of a full-time worker fulfills the company's legal obligation. The statute does not require the employer to contribute anything to dependent coverage, much less a contribution sufficient to make family coverage affordable.

Second, the employer's obligation to full-time workers is much greater and more consequential. The company must offer such workers coverage, but it must also contribute to self-only coverage. Moreover, that contribution must be sufficient to make self-only coverage affordable. If the employee must pay more than 9.5 percent of household income for self-only coverage, the company is subject to tax penalties.

Failing to contribute enough to a full-time employee's self-only coverage thus sets off a chain reaction.

- *It establishes that the worker does not have access to minimum essential coverage.* This determination is based exclusively on the cost to a worker of self-only coverage.
- *It exempts the worker from the tax penalty on the uninsured.*¹⁴
- *It entitles the worker and his or her dependents to PTCs.*¹⁵
- *It subjects his or her employer to a tax penalty, if the worker receives PTCs.*¹⁶

There is no comparable chain of events for a dependent because the employer has no legal obligation to contribute to dependent coverage. Hence, there is no affordability test for family coverage in section 36B and, consequently, no eligibility for tax credits.

¹⁰ 26 USC 4980H.

¹¹ 4980H(a)(1).

¹² 4980H(a)(2).

¹³ 4980H(b)(1)(B).

¹⁴ 26 USC 5000A(e)(1)(B).

¹⁵ 26 USC 36B(c)(2)(B).

¹⁶ 26 USC 4980H(b).

The affordability of self-only coverage is thus the key determinant of whether a worker is subject to the tax penalty on the uninsured, whether he and his dependents are eligible for PTCs and whether his employer is subject to “shared responsibility” penalties. The statute consequently takes great care in defining the affordability of self-only ESI, while not establishing any measure of the affordability of employer-sponsored family coverage. By inventing such a measure, the proposed rule contravenes the statute.

The employer “shared responsibility” provisions are entirely consistent with the clear language of section 36B, which bases eligibility for PTCs exclusively on the cost to the worker of self-only coverage.

Congress has not amended the statute.

The agencies finalized the current rule in 2013. Congress has not amended the statute despite ongoing controversy about the so-called “family glitch.” In June 2020, the House passed H.R. 1425, which would have amended section 36B(c)(2)(C) to add an affordability test based on the cost of family coverage.¹⁷ It would have, in sum, amended the statute to do what the agencies unlawfully propose to do by regulation. The Senate did not take up this legislation.

Since then, Congress has expanded access to PTCs in various ways, increasing their size for those already eligible to claim them and making millions more people eligible by lifting the eligibility cap set at 400 percent of the federal poverty level.¹⁸ However, it has not “fixed” the “family glitch.” Unless and until Congress amends the statute, the agencies cannot rewrite the law to establish an affordability test for family coverage, regardless of the political pressure applied by the White House.

The agencies’ action appears to stem from political pressure from the White House.

The agencies issued their final rule on the affordability of coverage for dependents of workers with ESI in 2013. That regulation faithfully implemented the statutory language. It has been in effect since January 2014, when PTCs first became available. Congress has not amended the statute to establish an affordability test based on the cost of family coverage.

More than nine years later, the agencies abruptly announced that they have “tentatively determined” that they may have discovered ambiguity in the statute. This epiphany is inconsistent with the IRS’s typically reasoned approach to enforcing the tax code and permits the agencies to propose a regulation that invents an affordability test for family coverage that is neither in the statute nor permitted by it.

The announcement inspired much fanfare. The White House unveiled it at an event marking the twelfth anniversary of the ACA’s enactment.¹⁹ The President, Vice President, and former President Barack Obama – making his first public appearance at the White House since he left office in January 2017 – spoke at the event.

¹⁷ H.R. 1425, section 103.

¹⁸ “American Rescue Plan Act of 2021,” P.L. 117-2, March 11, 2021. <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>

¹⁹ “Remarks by President Biden, Vice President Harris, and Former President Obama on the Affordable Care Act,” the White House, April 5, 2022. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/05/remarks-by-president-biden-vice-president-harris-and-former-president-obama-on-the-affordable-care-act/>

The political celebration of the proposed rule and the obvious White House political pressure on the agency that preceded it may explain why the agencies suddenly, albeit tentatively, detected something that is not written in the statute – an affordability test based on the cost of employer-sponsored family coverage.

The IRS plays a unique role in the executive branch. It oversees the administration of federal tax law that raises trillions of dollars annually in federal revenue. Given this weighty responsibility, it is essential that the agency operate free of political pressure. If the IRS shows itself susceptible to such pressure, it will face more of it from this and future administrations, undermining its reputation for impartiality and eroding confidence in its reputation of equitably enforcing tax law. Every rule it issues, however well-established in statute, will be prone to meddling by political appointees, who will urge career civil servants to reopen well-grounded and longstanding rules and reshape tax law to suit transitory political sensibilities.

Changing a longstanding rule that is solidly grounded in the statute to advance a White House political agenda holds ominous implications for the future of the agency. Protecting the IRS's independence from political interference is among the many compelling reasons why the agencies should withdraw the rule.

The proposed rule would harm families and states and result in inefficient use of federal resources.

The agencies acknowledge that the proposed rule would harm families.

Although the statute does not require employers to contribute to dependent coverage, most do. According to the Kaiser Family Foundation, companies that offered health benefits in 2021 paid on average 83 percent of the premium for self-only coverage and 72 percent of the premium for family coverage.²⁰ Making dependents eligible for government-subsidized coverage in the exchange would incentivize employers to reduce or eliminate their contributions. The agencies themselves acknowledge that the proposed rule "would likely lead to a decrease in the total amount employers are spending on health insurance as the federal government increases spending on PTC."²¹ That, ironically, would increase the cost of job-based dependent coverage, a demonstrable harm to millions of workers and their families.

The rule would increase the cost of dependent coverage offered in the workplace but reduce the out-of-pocket cost of exchange-based insurance for those who qualify for federal subsidies. The tradeoff would disadvantage many families. The Bureau of Labor Statistics has estimated that ESI has an average actuarial value of 85 percent.²² That is much richer than exchange coverage, where the most popular plans have an actuarial value of 60 percent or 70 percent.²³ Those who migrate from employment-based

²⁰ "Employer Health Benefits: 2021 Summary of Findings," Kaiser Family Foundation, undated.

<https://files.kff.org/attachment/Summary-of-Findings-Employer-Health-Benefits-2021.pdf>

²¹ Ibid.

²² Table 3.2, p. 8. <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/analysis/health-and-welfare/analysis-of-actuarial-values-and-plan-funding-using-plans-from-the-national-compensation-survey.pdf>

²³ Dependents with household income between 138 percent and 200 percent of FPL (100 percent to 200 percent of FPL in states that have not expanded Medicaid) qualify for richer coverage, due to a practice known as "Silver Loading." Under that arrangement the government compensates insurers for increasing the actuarial value of the policies they issue to low-income households.

insurance will have less comprehensive insurance with less choice of medical providers. These narrow network plans subject families to greater risk that their health care spending will not be covered by their plan as they provide sparse coverage for out-of-network providers.

The regulation would result in a second anomaly, which the agencies also acknowledge. Creating separate affordability tests for workers and their dependents will lead to what the agencies term "split coverage." A worker whose self-only coverage costs less than 9.5 percent of household income would not be eligible for PTCs. But her family members may be eligible if their coverage were unaffordable under the new standard that the agencies propose. The worker would remain in her employer's plan. Her dependents would be covered under an exchange-based policy.

Consequently, family members would have different provider networks and drug formularies, be required to meet deductibles in two separate policies, and have separate caps on out-of-pocket spending. This will increase administrative hassle, confusion and out-of-pocket medical spending for many families.

The proposed rule would inflict two harms on millions of people: employers would contribute less to dependent coverage, and families would have multiple health insurance policies, leading to potentially higher out-of-pocket medical spending and greater complexity and confusion. Many of these people would likely sue the agency if it decides to finalize this unlawful proposal.

The proposed rule would harm states by moving people from ESI to Medicaid and CHIP.

States also would face significant adverse consequences from the rule. Dependents who migrate from ESI to the exchanges may find that they qualify for Medicaid and CHIP. The Urban Institute's analysis of "fixing" the "family glitch" estimates that "90,000 family members—mainly children—would newly enroll in Medicaid or the Children's Health Insurance Program (CHIP) owing to their parents seeking Marketplace coverage."²⁴ These public programs are associated with narrow networks of medical providers, making it harder for families to find pediatricians and other primary care physicians, dentists and medical specialists.²⁵

States also will experience harm since they contribute financially to these programs. Moving people from ESI, where states bear little or no cost, to public programs, the most significant items on state budgets, will impose new burdens on states. Many of these states will likely sue the agency if it decides to finalize this unlawful proposal.

The proposed rule would result in inefficient use of federal resources.

The proposed rule also would adversely affect the federal government. The Congressional Budget Office estimated that the "fix" to the "family glitch" included in H.R. 1425 would increase the federal deficit by

²⁴ Matthew Buettgens and Jessica Banthin, "Changing the 'Family Glitch' Would Make Health Coverage More Affordable for Many Families," Urban Institute, May 2021. <https://www.urban.org/research/publication/changing-family-glitch-would-make-health-coverage-more-affordable-many-families>

²⁵ Kayla Holash and Martha Heberlein, "Medicaid Patients: What Matters and What Doesn't," Health Affairs Forefront, April 10, 2019. <https://www.healthaffairs.org/doi/10.1377/forefront.20190401.678690/full/>

\$45 billion over ten years.²⁶ Very little of this new spending would expand coverage as the main economic effect would cause dependents to lose ESI and switch to exchange coverage. The Urban Institute study cited above estimates that, of the 4.8 million who would be made eligible for PTCs, only 190,000 would have been previously uninsured.²⁷ The rule would thus necessitate an enormously inefficient use of federal resources. The rule would also be inflationary, growing federal deficits and raising prices throughout the economy as more money chases the same number of goods and services.

Conclusion

Longstanding federal regulations faithfully implement the statutory provisions of the ACA relating to the availability of PTCs for workers and dependents with an offer of employer-sponsored insurance. Those regulations are consistent with the statute. The White House has pressured the agency to ignore the clear statutory language and implement an impermissible reading of the statute to advance its political objectives, including expanding enrollment in the ACA exchanges.

Unfortunately, the agencies have adopted an impermissible reading of the statute and proposed a rule that is contrary to law. The agencies propose to abruptly rewrite their regulations in a way that, in effect, rewrites a statutory provision that Congress has left unamended for more than 12 years. In addition to lacking a basis in statute, their proposed policy would harm many of the families it purports to help, impose new financial burdens on states, and increase the federal debt and inflation without appreciably expanding health insurance coverage. In addition to being unlawful, finalizing this rule will signal that the IRS can be pressured to change its enforcement of the tax code based on the political interests and whims of the White House. The agencies should withdraw the proposed rule.

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²⁶ “Estimated Effect on the Deficit of Rules Committee Print 116-56, the Patient Protection and Affordable Care Enhancement Act,” Congressional Budget Office, June 24, 2020. https://www.cbo.gov/system/files/2020-06/Patient_Protection_and_Affordable_Care_Enhancement_Act_0.pdf

²⁷ Buettgens and Jessica Banthin, “Changing the ‘Family Glitch.’”

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