



June 6, 2022

The Honorable Janet Yellen
Secretary of the Treasury
1500 Treasury Department
Washington, DC 20220

Re: Affordability of Employer Coverage for Family Members of Employees (IRS REG-114339-21)

Dear Secretary Yellen:

Thank you for the opportunity to submit comments on the Affordability of Employer Coverage for Family Members of Employees Proposed Rule. This proposal would remedy a flawed policy that has prevented millions of Americans who cannot afford job-based coverage from qualifying for a subsidized health plan through the Affordable Care Act's (ACA) marketplaces. This policy is inconsistent with the text of the ACA and the purposes for which it was enacted and should never have been adopted. We applaud the Internal Revenue Service (IRS) for reexamining this problem and strongly support its proposal to fix it.

The undersigned organizations represent millions of patients and consumers facing serious, acute and chronic health conditions across the country, including individuals who rely on the patient protections provided under the ACA. Our organizations have a unique perspective on what patients need to prevent disease, cure illness, and manage chronic health conditions. Our breadth enables us to draw upon a wealth of knowledge and expertise that can be an invaluable resource in this discussion. We urge the federal government to make the best use of the knowledge and experience our patients and organizations offer in response to the proposed rule. Together and separately, our non-profit, non-partisan organizations are dedicated to working with the administration, members of Congress and state governments on a bipartisan basis to protect the health and wellbeing of the patients and consumers we represent.

In March of 2017, our organizations agreed upon three overarching principles¹ to guide any work to reform and improve the nation’s healthcare system. These principles state that: (1) healthcare should be accessible, meaning that coverage should be easy to understand and not pose a barrier to care; (2) healthcare should be affordable, enabling patients to access the treatments they need to live healthy and productive lives; and (3) healthcare must be adequate, meaning healthcare coverage should cover treatments patients need, including all the services in the essential health benefit (EHB) package.

We are confident that by enabling consumers to obtain the financial assistance to which they are entitled under federal law, the proposed rule will improve access to affordable, quality care in furtherance of these principles we share. We urge that the rule be finalized as proposed.

Employer-sponsored coverage can be very expensive. In 2021, the average annual premium for employee-only coverage was \$7,739, of which the employee was expected to contribute an average of \$1,299.² For coverage for a family of four, the average annual premium had reached \$22,221, with an employee contribution of \$5,969.³ The cost burdens of employer-sponsored family coverage were particularly pronounced for employees of small firms and of businesses with a relatively large share of lower-wage workers. Among small firms (3-199 workers), the average annual worker contribution to family coverage premiums was \$7,710; nearly a third (29 percent) of such workers contended with a contribution of \$10,000 or more.⁴ Among firms with a relatively large share of lower-wage workers (businesses where at least 35 percent of workers earn \$28,000 or less), employees had to pay an average of 35 percent of the premium for a family plan (a contribution rate significantly higher than found at firms with a smaller share of lower-wage workers): nearly \$7,000 annually.⁵

Affordability of Employer Coverage for Family Members

In 2013, IRS promulgated a regulation that prohibits children and other family members from obtaining subsidized family coverage through the ACA marketplaces if the cost of an employee-only plan is deemed affordable—even if the cost of a family policy would not meet the same standard. This decision, creating what is often known as the “family glitch,” was contrary to both the text and the purpose of the ACA.

Whether an offer of employer-sponsored coverage is “affordable,” within the meaning of the ACA, depends on the premium cost of the coverage and the employee’s “required contribution” to that premium. The ACA specifies how much an employee must contribute where coverage is for the employee alone and duly provides a “special rule” for determining this “required contribution” in cases

¹ Consensus Health Reform Principles. Available at: <https://www.lung.org/getmedia/24309f63-74e9-4670-8014-d59f21104cfd/092021-ppc-healthcare-principles-42-logos-final.pdf>.

² Kaiser Family Foundation. 2021 Employer Health Benefits Survey. <https://www.kff.org/health-costs/report/2021-employer-health-benefits-survey/>. Published Nov. 10, 2021.

³ Ibid.

⁴ Claxton G, Levitt L, Rae M. Many Workers, Particularly at Small Firms, Face High Premiums to Enroll in Family Coverage, Leaving Many in the “Family Glitch.” Kaiser Family Foundation. <https://www.kff.org/health-reform/issue-brief/many-workers-particularly-at-small-firms-face-high-premiums-to-enroll-in-family-coverage-leaving-many-in-the-family-glitch/>. Published April 12, 2022.

⁵ Kaiser Family Foundation. 2021 Employer Health Benefits Survey. <https://www.kff.org/health-costs/report/2021-employer-health-benefits-survey/>. Published Nov. 10, 2021.

where employer coverage is offered to an employee's family.⁶ These determinations are critical; if employer-sponsored coverage does not meet the affordability test — if the coverage is unaffordable — the employee and family members who are offered such coverage are eligible to receive federal premium tax credits (PTCs) to help them afford to buy a health plan through the ACA marketplaces.

IRS understood and appropriately accounted for the family coverage special rule when it issued a closely related regulation defining the affordability of employer-sponsored coverage for purposes of the individual mandate penalty. That is, it recognized that the affordability of family coverage and the affordability of employee-only coverage may differ and under the statute they must be determined separately. Nevertheless, IRS also took the position that the family coverage special rule must be disregarded for purposes of determining a family's eligibility for PTCs. Under this interpretation, finalized in 2013, the cost of employer-sponsored family coverage is irrelevant to the question of whether such coverage is "affordable." So long as a plan covering the worker, alone, is affordable, coverage for the whole family must be considered affordable too, and family members are barred from receiving PTCs.

In the proposed rule, IRS states it has preliminarily determined that the statutory text does not compel the 2013 interpretation. The 2013 interpretation ignored the family coverage special rule, even though by its terms the rule plainly applies to and specifies the procedure for determining the affordability of employer-sponsored family coverage. Whereas the proposed rule reflects a straightforward and commonsensical application of the statutory text, the 2013 interpretation cuts in the opposite direction and created inconsistencies — acknowledged in the proposed rule — with other provisions of the statute.⁷

The 2013 interpretation is also at odds with the purpose of the ACA: to expand access to affordable health coverage. As IRS recognizes, the current regulation has undermined the law by preventing children and other family members who lack access to affordable coverage from obtaining financial assistance to purchase a marketplace plan. An analysis by the Kaiser Family Foundation estimated that the family glitch prevents more than 5.1 million people from obtaining the subsidized coverage to which they are entitled under the law.⁸ More than half of those harmed are children, and nearly half a million individuals are estimated to be uninsured because of this flawed regulation.⁹

⁶ The special rule for family coverage, at section 5000A(e)(1)(C), modifies the definition of "required contribution" found in the subsection immediately preceding it, at 5000A(e)(1)(B).

⁷ As noted earlier, as a result of the 2013 interpretation, the rule for determining the affordability of employer coverage for purposes of the individual mandate penalty is inconsistent with the rule for determining the affordability of employer coverage for purposes of assessing a family's eligibility for PTCs, even though they rely on the same sections of the statute. By disregarding the special rule and the actual premium cost of family coverage, the 2013 interpretation is also at odds with 42 U.S.C. 18081(b)(4)(C), which requires marketplace applicants to separately provide the required contributions to premiums of employees and their family members for the purpose of determining PTC eligibility. As the proposed rule aptly notes, this reporting requirement makes little sense if PTC eligibility depended only on the cost of self-only coverage.

⁸ Cox C, Amin K, Claxton G, McDermott D. The ACA Family Glitch and Affordability of Employer Coverage. Kaiser Family Foundation. <https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/>. Published April 7, 2021. Of the 5.1 million people who fall into the family glitch, about 4 million have household incomes at or below 400 percent of the federal poverty level. About 1.1 million have incomes above that threshold and would not be eligible for PTCs if the enhanced subsidy framework of the American Rescue Plan Act (ARPA) is allowed to expire at the end of 2022.

⁹ Ibid.

The proposed rule concludes that the special rule does apply for purposes of determining a family's PTC eligibility: that the ACA is better read to require separate affordability tests for employees and for family members. We are grateful that IRS has reassessed the regulation and statute and strongly agree with its determinations in the proposed rule. In our view, the ACA does not require and does not support the 2013 interpretation, and we respectfully suggest that correcting this interpretive error is necessary to give full effect to the statute.

IRS's proposed fix for the family glitch would give the millions of people affected by this error the option to enroll in subsidized marketplace coverage and would result in substantial savings for many, particularly those at lower incomes. For example, a recent study estimated that a family of four with an income of \$53,000 (200 percent of the federal poverty level (FPL)) would save more than \$4,100 in premiums annually.¹⁰ Families with incomes at or below 250 percent FPL will experience additional savings because they will be able to enroll in a marketplace plan with reduced cost-sharing.

If finalized, the proposed rule will make coverage more affordable for many families when previously it was not. But the savings these families will realize are no more, or less, than what they were already entitled to under the statute. We greatly appreciate and strongly support the proposal to align the affordability regulation with the statute so as to make these benefits a reality.

Minimum Value of Employer Coverage for Family Members

The ACA provides that if employer-sponsored coverage does not provide "minimum value," employees and related individuals to whom coverage is offered may be eligible to enroll in a subsidized marketplace plan. IRS proposes two clarifications to its regulations governing this provision.

First, IRS proposes to clarify that employer-sponsored family coverage is itself subject to the minimum value standard and must be independently assessed for compliance with the standard. That is, the value provided by self-only coverage and by family coverage may differ, and compliance with minimum value must be determined separately. This approach is wholly consistent with the ACA's text and purpose and with IRS's proposed method for determining the affordability of employer-sponsored family coverage, discussed above. Further, it reduces the risk that the ACA framework is undermined by appropriately ensuring that a family offered low — below minimum — value coverage is not prevented from accessing PTCs simply because this low value coverage is also cheap. We strongly support this proposal.

Second, IRS proposes to incorporate into its minimum value regulation the substance of a parallel minimum value rule that was adopted by the Department of Health and Human Services (HHS) in 2015. The HHS rule specifies that employer coverage provides minimum value only if it covers at least 60

¹⁰ Kendall D, Murdock K, Ahmadi L. Capping Families' Health Care Costs: Savings by State. <https://www.thirdway.org/report/capping-families-health-care-costs-savings-by-state>. Third Way. Published April 13, 2022. This analysis reflects savings that can be expected if the ARPA's enhanced subsidy framework is extended. Researchers from the Urban Institute have estimated the effects of fixing the family glitch, assuming ARPA-level subsidies lapse. They find smaller but still substantial cost savings for affected individuals, especially families with low incomes. Buettgens M, Banthin J. Changing the "Family Glitch" Would Make Health Coverage More Affordable for Many Families. The Urban Institute. https://www.urban.org/sites/default/files/publication/104223/changing-the-family-glitch-would-make-health-coverage-more-affordable-for-many-families_1.pdf. Published May 2021.

percent of the total allowed costs of provided benefits *and* it also includes substantial coverage of inpatient hospital services and physician services. We urge that this proposal be finalized, as well.

Thank you for the opportunity to provide these comments. If you have any questions contact Rachel Patterson, Senior Director of Federal Relations & Policy, Epilepsy Foundation, at rpatterson@efa.org.

Sincerely,

ALS Association
American Cancer Society Cancer Action Network
American Heart Association
American Kidney Fund
American Lung Association
Arthritis Foundation
Cancer Support Community
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Cystic Fibrosis Foundation
Epilepsy Foundation
Hemophilia Federation of America
JDRC
Lupus Foundation of America
March of Dimes
Muscular Dystrophy Association
National Coalition for Cancer Survivorship
National Hemophilia Foundation
National Kidney Foundation
National MS Society
National Organization for Rare Disorders
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The AIDS Institute
The Leukemia & Lymphoma Society
WomenHeart: The National Coalition for Women with Heart Disease