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June 6, 2022

Submitted via regulations.gov

The Honorable Charles Rettig  
Commissioner  
Internal Revenue Service  
U.S. Department of the Treasury  
P.O. Box 7604, Ben Franklin Station  
Washington, D.C., 20044

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

Dear Commissioner Rettig:

The National Health Law Program (NHeLP) has worked to improve health access and quality through education, advocacy and litigation on behalf of low income and underserved individuals for over fifty years. We appreciate the opportunity to provide comments on the Internal Revenue Service's Proposed Rule - Affordability of Employer Coverage for Family Members of Employees (hereinafter Family Glitch Rule).<sup>1</sup> We strongly support the proposed rule to correct a previously flawed interpretation of the Affordable Care Act (ACA). The proposed rule reflects an interpretation that is a more accurate representation of the purposes and intent of the statute.

**The current interpretation of the affordability rule  
reflects a flawed reading of the statute.**

Under the Affordable Care Act, individuals are not eligible to receive premium tax credits (PTCs) toward purchasing coverage in the ACA marketplaces if they have access to another form of minimum essential coverage, including most forms of employer-sponsored coverage. There are two exceptions to this rule, however, if employer-sponsored coverage is deemed unaffordable or fails to meet minimum value standards (*i.e.*, covers at least 60% of health expenses on average), then an employee would be permitted to receive premium tax credits toward the purchase of a marketplace plan. More specifically, Section 36B(c)(2)(C)(i)(II) of the Internal Revenue Code (IRC) states that employer-based insurance will not be considered affordable if the plan exceeds 9.5 percent of the employee's household income.<sup>2</sup> This same section also includes a cross reference to Section 5000A of the IRC noting that an employee's required contribution must be considered "within the meaning of section 5000A(e)(1)(B)."

Section 5000A(e)(1)(B) states that in calculating whether coverage is affordable, the required contribution for those eligible for an employer plan is based on the employee's contribution for self-only coverage. It is important to note that this section is followed by the "special rule" in 5000A(e)(1)(C) that states

*for purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.*<sup>3</sup>

It is also preceded by 5000A(e)(1)(A). This section refers to the test for determining whether coverage is unaffordable for the purpose of the exemption from the individual

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<sup>1</sup> Dep't of the Treasury, Internal Revenue Serv., Affordability of Employer Coverage for Family Members of Employees, 87 Fed. Reg. 20354-20364 (proposed April 7, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-04-07/pdf/2022-07158.pdf> (hereinafter Family Glitch Rule).

<sup>2</sup> 26 U.S.C. 36B(c)(2)(C)(i)(II). This percentage is adjusted each year for inflation and would be 9.61% for 2022. See Family Glitch Rule fn.1.

<sup>3</sup> 26 U.S.C. 5000A(e)(1)(C)



mandate penalty.<sup>4</sup> The exemption tests whether the individual must pay more than 8 percent of household income.

In 2011, the Internal Revenue Service (IRS) issued a proposed regulation that interpreted these sections to mean that the cost of *self-only* coverage is used to determine affordability for *family* coverage. This proposed rule was not finalized until 2013, when IRS promulgated a regulation that adopted this mistaken interpretation.<sup>5</sup> The interpretation in the 2013 rule, often referred to as the “family glitch,” is inconsistent with the structure and goals of the ACA.

From the outset, the National Health Law Program argued that this interpretation was a misreading of the statute that was contrary to the purposes and intent of the ACA. NHeLP noted in our 2011 comments on the proposed rule:

*[T]he rule for employees specifies that the employee’s contribution used to determine affordability is the cost of self-only coverage. Had Congress intended the special rule for dependents to use the same measure, it could have used similar language — or it could have omitted the special rule altogether. The special rule states that the determination of affordability should be made with reference to “the required contribution of the employee.” The better reading is that the measure of affordability should be “the required contribution of the employee” **for coverage of his or her dependents.***<sup>6</sup>

NHeLP’s 2011 comments further noted that this interpretation should be the “plain language reading when considered in light of how employer-sponsored health benefits operate.”<sup>7</sup> Finally, these comments concluded that

*[a] plain language reading, when done in concert with an understanding of how employer-sponsored benefits are paid for, would suggest the statute requires*

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<sup>4</sup> 26 U.S.C. 5000A(e)(1)(A)

<sup>5</sup> 26 C.F.R. 1.36B-2(c)(3)(v)(A)(2).

<sup>6</sup> National Health Law Program, Comment on the Proposed Rule on Health Insurance Premium Tax Credit 2 (Oct. 30, 2011), <https://www.regulations.gov/comment/IRS-2011-0024-0084> [hereinafter NHeLP 2011 Comments].

<sup>7</sup> *Id.* at 2.



*affordability to be based on ‘the required contribution of the employee’ for coverage of his or her dependents, rather than on the amount the covered individual pays for individual coverage.<sup>8</sup>*

Notably, in a separate, but related rule, IRS used a different reading of the special rule on family coverage as it applied to affordability in relation to the individual mandate penalty. There, the IRS determined that the special rule requires using of the cost of family coverage to assess whether coverage is affordable.<sup>9</sup> Correcting the 2013 misreading of the statute will also help correct inconsistencies between this interpretation and other portions of the statute.<sup>10</sup>

We commend the IRS for reviewing its initial interpretation of the statute that resulted with the 2013 rule. We support the proposed rule that would now correct this misreading and help remove barriers to quality, affordable health coverage for family members who have long been locked-out of premium tax credits by the current regulation.

### **The current interpretation of the affordability rule undermines the purpose and intent of the ACA.**

We agree with the IRS that the current interpretation of the affordability rule runs contrary to the policy goals of the ACA, which is to provide individuals and families with quality, affordable health care.<sup>11</sup> According to a study by the Kaiser Family Foundation, nearly 5.1 million people fall into the family glitch, including 2.8 million children.<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> 26 C.F.R. § 1.5000A-3(e)(3)(ii)(B).

<sup>10</sup> In addition to the inconsistency noted in this paragraph, adopting the interpretation in the proposed rule would, as the IRS notes “promote consistency between the affordability rules in these provisions and 42 U.S.C. § 18081(b)(4)(C), which requires Exchange applicants to separately provide the required contributions of employees and of related individuals in order to determine PTC eligibility.”

<sup>11</sup> 87 Fed Reg. 20355-20357.

<sup>12</sup> Cynthia Cox, Krutika Amin, Gary Claxton & Daniel McDermott, Kaiser Family Foundation, *The ACA Family Glitch and Affordability of Employer Coverage* (Apr. 7, 2021), <https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/>. 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

Additionally, nearly half a million individuals are estimated to be uninsured because of this flawed regulation.<sup>13</sup>

Workers in small businesses are also impacted as they are more likely to face higher premiums for family coverage. Five percent of covered workers in large businesses face a premium of at least \$10,000 to enroll family members in their employer plan. That number grows to 29 percent of covered workers in small businesses who must pay \$10,000 to obtain family coverage.<sup>14</sup>

The family glitch has a greater impact on low-income families, but it is also a problem for middle-income families. Almost half (46%) of the people in the family glitch have incomes under 250% of the federal policy level (FPL) and another third (33%) have income between 250%-400% of FPL.<sup>15</sup> Fixing the family glitch would provide greater premium savings for those families with incomes under 200% of FPL (\$580 average savings per person).<sup>16</sup> Low-income families would also see significant savings in out-of-pocket costs, thanks to lower cost-sharing for families with income under 250% of FPL. This could mean thousands of dollars in cost-sharing savings for these families.<sup>17</sup> The proposed rule will help millions of families by allowing for a separate affordability test for family members that would be based on the cost to enroll family members in the employer coverage (not the cost of enrolling only the employee). Given the significant benefits people will garner by having access to affordable insurance, we agree with the

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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.

<sup>13</sup> *Id.*

<sup>14</sup> Gary Claxton, Larry Levitt & Matthew Rae, Kaiser Family Foundation, *Many Workers, Particularly at Small Firms, Face High Premiums to Enroll in Family Coverage, Leaving Many in the 'Family Glitch'* (Apr. 12, 2022), <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/>.

<sup>15</sup> *Id.*

<sup>16</sup> Mathew Buettgens & Jessica Banthin, The Urban Institute, *Changing the 'Family Glitch' Would Make Health Coverage More Affordable for Many Families* (May 2021), [https://www.urban.org/sites/default/files/publication/104223/changing-the-family-glitch-would-make-health-coverage-more-affordable-for-many-families\\_1.pdf](https://www.urban.org/sites/default/files/publication/104223/changing-the-family-glitch-would-make-health-coverage-more-affordable-for-many-families_1.pdf)

<sup>17</sup> Dania Palanker & Christina Goe, Commonwealth Fund, *ACA "Family Glitch" Increases Health Care Costs for Millions of Low-and Middle-Income Families* (Apr. 22, 2021), <https://www.commonwealthfund.org/blog/2021/aca-family-glitch-increases-health-care-costs-millions-low-and-middle-income-families>



IRS that the proposed regulation is more consistent with the ACA's goals of providing quality, affordable coverage to all people.

**The proposed clarifications to the minimum value test will help ensure family members of employees receive adequate coverage.**

We also appreciate the opportunity to comment on the two clarifications that the proposed rule would make to the minimum value test.

First, the IRS would clarify that the minimum value definition requires employers to provide substantial coverage of inpatient hospital and physician services in order to satisfy the 60 percent actuarial value threshold. It would ensure that this definition also extends to family members of the employee. We support this definition.

Second, the IRS clarifies that the minimum value test, like the affordability test, will be applied separately for employees and family members. We support this clarification and agree that it will ensure that family members are not barred from premium tax credits by coverage that is affordable but fails to meet the minimum value standard.

**Conclusion**

We thank you for the opportunity to comment on the proposed rule. We agree with the IRS that the proposed rule's new interpretation is a better reading of the statute. It is also consistent with the goals of the ACA to expand access to affordable coverage. As a result, millions of families – particularly those of low-wage workers -- will no longer be forced to choose between unaffordable employer coverage and unsubsidized marketplace coverage for family members. Families will be able to choose the coverage option that works best for them, whether that be to remain as a family in the employer plan or to obtain marketplace coverage, with financial assistance, for those family members for whom the employer plan would be unaffordable.

Our comments include citations to supporting research and documents for the benefit of IRS in reviewing our comments. We direct IRS to each of the items cited and made available to the agency through citations and active hyperlinks, and we request that IRS



consider these, along with the full text of our comments, part of the formal administrative record on this proposed rule.

Sincerely,

A handwritten signature in cursive script that reads "Dania Douglas".

Dania Douglas

[douglas@healthlaw.org](mailto:douglas@healthlaw.org)

