



VIA ELECTRONIC SUBMISSION

June 2, 2022

CC:PA:LPD:PR
(REG-114339-21)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments to REG-114339-21
Affordability of Employer Coverage for Family Members of Employees

Dear Sir or Madam:

The Center for Children and Families (CCF), part of the Health Policy Institute at the McCourt School of Public Policy at Georgetown University, is an independent, nonpartisan policy and research center that conducts research, develops strategies and offers policy solutions to improve the health of America's children and families, particularly those with low- and moderate-incomes. Thank you for this opportunity to make the following comments to the IRS proposed rule: "Affordability of Employer Coverage for Family Members of Employees." As we previously pointed out in our public comments in 2011 to the original proposed rule instituting 26 C.F.R. § 1.36B-2, we believe that this proposed rule adopts the most sound and reasonable legal interpretation of the Affordable Care Act's statutory language related to the eligibility of children and other dependents in families offered employer-based coverage for premium tax credits (PTCs) for the purchase of marketplace plans.

We enthusiastically support the proposed rule. By fixing the so-called "family glitch," the proposed rule would: (1) extend the availability of subsidized marketplace coverage to between two to three million children who are currently ineligible, (2) reduce the number of children who would otherwise be uninsured, and (3) ensure that more low-income children now enrolled in Medicaid who may lose such coverage when the COVID-19 public health emergency expires have access to affordable coverage through the marketplaces, rather than becoming newly uninsured. Consistent with the preamble to the proposed

rule, we also recommend that the rule be finalized as soon as possible, so that it can take effect well in advance of plan year 2023 and before the start of the open enrollment period.

* * *

We strongly support the proposed rule's revisions to 26 C.F.R. § 1.36B-2 (Eligibility for premium tax credits), as discussed further below. We also strongly support the related amendments to 26 C.F.R. § 1.36B-3 (Computing the premium assistance credit amount). Finally, we strongly support the revisions to 26 C.F.R. § 1.36B-6 (Minimum value), which would ensure consistency and apply the same approach to employer-sponsored family coverage for the revised affordability test under the proposed rule's revisions to 26 C.F.R. § 1.36B-2 to minimum value.

1. Proposed Rule Would Adopt the Most Reasonable, Sound Legal Interpretation for Determining Premium Tax Credit Eligibility for Dependents in Families Offered Employer-Based Coverage

Under section 36B(2)(B) of the Internal Revenue Code, individuals eligible for "minimum essential coverage" are generally not eligible for PTCs. And as defined in section 5000A(f), minimum essential coverage includes "coverage under an eligible employer-sponsored plan." However, under section 36B(c)(2)(C), employees will not be considered eligible for minimum essential coverage if the coverage they are offered is not affordable or does not provide minimum value.

To determine whether employer-sponsored coverage is not affordable, section 36B(c)(2)(C)(i)(II) sets a test of whether the employee's required contribution, within the meaning of section 5000A(e)(1)(B), exceeds a certain share of household income (which is 9.61 percent of income in tax year 2022). Section 5000A(e)(1)(B)(i), in turn, states, in the case of an individual offered employer-sponsored coverage, the required contribution means the portion of the annual premium which would be paid by the individual for self-only coverage. But importantly, section 5000A(e)(1)(C) provides for a special rule, stating that "for purposes of subparagraph (B)(i) [of section 5000A], if an applicable individual is eligible for minimum essential coverage through an employment by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee." Flush language in section 36B(c)(2)(C)(i) also states that these rules "also apply to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee."

The current regulation at § 1.36B-2(c)(3)(V)(A)(2) implementing the affordability exception looks only at the cost of an employee's only coverage, irrespective of the employee's share of the premium cost of family coverage, to determine if the required contribution exceeds the affordability threshold and thus to determine whether the employee's children, spouse and other dependent family members in a family offered employer-sponsored family coverage are eligible for PTCs. In doing so, however, the current regulation entirely ignores the critical "special rule" in section 5000A(e)(1)(C).

As we stated in our 2011 comments to the original proposed rule for § 1.36B-2, had Congress intended the special rule for dependents to be interpreted this way — that the cost of self-only coverage would determine affordability for both self-only coverage and for family coverage — it could have omitted 5000A(e)(1)(C) entirely or made clear in section 36B(c)(2)(C)(i)(II) that only in this case (but not in the case of the individual responsibility requirement in section 5000A) would the special rule in 5000A(e)(1)(C) not apply to 5000A(e)(1)(B).¹

The strongest, most reasonable reading, which the proposed rule would adopt, has always been that the measure of affordability for the purpose of PTC eligibility for children and other dependents would be “the required contribution of the employee” *for coverage of his or her dependents*. This interpretation would be consistent with how employer-based health coverage works. Employer-based coverage is often paid jointly by the employer and a premium contribution by the employee. Individuals eligible for employer-based coverage due a relationship to an employee do not pay for the coverage directly. These individuals are added to the coverage by the employer and any cost of coverage above the amount paid by the employer is paid for through a contribution by the employee. *A plain reading, when done in concert with this understanding of how employer-based coverage is designed, makes clear that the statute requires 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 self-only coverage.* The mere absence of a specific reference in section 36B(c)(2)(C)(i)(II) to section 5000A(e)(1)(C) does not mean that 5000A(e)(1)(C) no longer modifies section 5000A(e)(1)(B) for the purpose of the affordability test. (The preamble similarly states such a reference is not necessary to require the consideration of 5000A(e)(1)(C) in determining affordability for related individuals for section 36B purposes.)

In addition, as the preamble to the proposed rule notes, this reading, which would be adopted by the proposed rule, also avoids the current inconsistencies that exist between the affordability regulations implementing section 36B(c)(2)(C)(i) and those implementing section 5000A(e)(1) related to the individual responsibility requirement — which correctly base affordability on the cost of family coverage for related individuals — as well as the application requirements for Exchange applicants under 42 U.S.C. § 18081(b)(4)(C). There is no indication that Congress, in enacting the Affordable Care Act, ever intended affordability for family coverage to be determined one way in determining whether a family is exempt from the individual responsibility requirement and another way for PTCs. It is far more likely that Congress intended that section 5000(A)(e)(1)(B)(i), as modified by 5000A(e)(1)(C), to apply uniformly in both cases.

The proposed rule thus would finally adopt the stronger, more reasonable and consistent interpretation of the statutory language and as discussed further below, such an

¹ Georgetown University Center for Children and Families, Comments to REG-131491-10, October 31, 2011, <https://www.regulations.gov/comment/IRS-2011-0024-0151>

interpretation would also advance the overall goals of the Affordable Care Act in expanding health coverage and access and improving affordability.

2. Proposed Rule Would Significantly Increase Coverage and Affordability for Children and Families

Many families offered family coverage through their employers are required to make premium contributions that are unaffordable. But because of the current regulation at § 1.36B-2(c)(3)(V)(A)(2), children and other dependents in such families are ineligible for PTCs for the purchase of coverage in the marketplaces. The Kaiser Family Foundation (KFF), which conducts an annual survey of employers about job-based health insurance, finds that the average, total premium for employer-based coverage in 2021 was \$7,739 for self-only coverage and \$22,221 for a family of four. The average premium contribution for workers offered such coverage was \$1,299 for self-only coverage and \$5,969 for a family of four. And for some workers, the cost of family coverage is considerably higher.²

KFF finds that 12 percent of workers offered family coverage in 2021 would have had to pay at least \$10,000 for their share of the total premium cost. The percentage is significantly larger among smaller employers (those with fewer than 200 workers), among whom 29 percent of workers faced family premiums of at least \$10,000. In comparison, the percentage was only five percent among workers for larger employers. According to KFF, this is because nearly one in five small employers made little or no contribution towards the cost of family coverage. Workers in certain industries were also more likely to face family premium contributions of at least \$10,000. For example, 19 percent of workers in the service industry whose employers offered family coverage and 16 percent of workers in the agriculture/mining/construction industries were required to contribute at least \$10,000 in premium costs.³ But despite these significant premium costs that deter enrollment in employer-sponsored insurance and leave some families uninsured, or place undue financial burdens on low- and moderate-income households, children and other dependents in these families are ineligible for PTCs under the current regulation.

The proposed rule would address this inequitable “family glitch” situation and better serve the purpose of the Affordable Care Act by making health coverage more accessible to millions of children and families who have an offer of employer-based coverage that is unaffordable. For example, KFF estimates that 5.1 million people now fall into the family glitch and as a result are ineligible for PTCs under the current regulation at § 1.36B-2(c)(3)(V)(A)(2). Of those, 451,000 are now uninsured and nearly half (46 percent) have incomes below 250 percent of the federal poverty level (FPL). *Notably, nearly 2.8 million —*

² Gary Claxton, Larry Levitt and Matthew Rae, “Many Workers, Particularly at Small Firms, Face High Premiums to Enroll in Family Coverage, Leaving Many in the ‘Family Glitch,’” Kaiser Family Foundation, April 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/>.

³ Claxton, Levitt and Rae, *op cit*.

54 percent — are children under age 19.⁴ The Urban Institute similarly estimates that 4.8 million people would be made eligible for PTCs under the approach adopted by the proposed rule, of which nearly 2.2 million (46 percent) are children under age 19. The Urban Institute also projects that 710,000 more people would newly enroll in subsidized marketplace coverage and there would be 190,000 fewer people without health insurance. Importantly, these substantial coverage gains would likely be considerably larger if the temporary PTC subsidy increases enacted under the American Rescue Plan Act, which are scheduled to expire at the end of this year, are extended. The Urban Institute projections do not assume the continued availability of those subsidy enhancements.⁵ The UC Berkeley Labor Center and the UCLA Center for Health Policy Research recently estimated that just in California, 615,000 people, including 235,000 children, would otherwise be ineligible for PTCs in 2023, due to the family glitch, without the proposed rule.⁶

The proposed rule would also have the additional, positive effect of lowering premiums in the marketplaces because those becoming newly eligible would likely be in better-than-average health and have lower health care costs, improving the risk pool in the individual market. For example, KFF estimates that 94 percent of those now in the family glitch are in better health.⁷ The Urban Institutes estimates that because new marketplace enrollees would be healthier than current enrollees, overall premiums in the individual market would fall by about one percent nationally.⁸

3. Proposed Rule Would Mitigate Coverage Losses Among Children and Families After Expiration of the Public Health Emergency

Under the Families First Coronavirus Response Act, as a condition of a temporary 6.2 percentage point increase in states' federal Medicaid matching rates, which applies for the duration of the COVID-19 public health emergency, state Medicaid programs are prohibited from involuntarily disenrolling any individual from Medicaid who was already enrolled or newly enrolls after March 18, 2020. This Medicaid continuous coverage requirement has been an extremely important policy tool that avoided increases in the number of uninsured people during the pandemic, especially among children. For example, from the month prior to the pandemic in February 2020, through June 2021, children's enrollment in

⁴ Cynthia Cox, Krutika Amin, Gary Claxton and Daniel McDermott, "The ACA Family Glitch and Affordability of Employer Coverage," Kaiser Family Foundation (KFF), April 7, 2021, <https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/>.

⁵ 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>.

⁶ Miranda Dietz, Tynan Challenor and Srikanth Kadiyala, "Fact Sheet: Fixing the Family Glitch in California, Projections from the California Simulation of Insurance Markets," UC Berkeley Labor Center and UCLA Center for Health Policy Research, June 2, 2022, <https://laborcenter.berkeley.edu/fixing-the-family-glitch-in-california/>.

⁷ Cox et al., *op cit*.

⁸ Buettgens and Banthin, *op cit*.

Medicaid and the Children’s Health Insurance Program (CHIP) increased by 11 percent, resulting in roughly half of the nation’s children now covered by Medicaid and CHIP.⁹

Once the public health emergency ends, states will have to conduct eligibility redeterminations for about 37 million children who are now protected by the Medicaid continuous coverage requirement. Some children will no longer be eligible for Medicaid due to changes in family income while others would be at risk of losing coverage for procedural reasons even though they otherwise would remain eligible. *We project that nationally, 6.7 million children now enrolled in Medicaid will likely lose Medicaid coverage when the continuous coverage requirement is lifted.*¹⁰ Parents and other adults are also at risk of losing their Medicaid coverage.

While many of these children would likely be eligible for CHIP-funded Medicaid coverage or separate state CHIP programs, other children will have family incomes that exceed CHIP eligibility levels — especially in states where CHIP income eligibility is below the national median eligibility level, which was equal to 255 percent of the FPL as of January 2022.¹¹ Some may become eligible for PTCs. But while other children may be eligible for employer-sponsored family coverage, such coverage may be unaffordable. At the same time, the family glitch leaves these families ineligible for PTCs to purchase marketplace plans for them. However, if the proposed rule is finalized, it would help ensure that more children (as well as their parents) who lose Medicaid coverage when the public health emergency ends have access to affordable coverage through subsidized marketplace plans. While marketplace enrollment among children is relatively modest, the proposed rule would likely reduce the number of children who end up uninsured. The proposed rule is therefore a critical step, among other necessary steps, in helping avoid large coverage losses among children and families when the continuous coverage requirement expires.¹²

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Thank you again for the opportunity to make the above comments in support of the proposed rule. Please contact us at Edwin.Park@georgetown.edu and jca25@georgetown.edu if you have any questions or if we can be of further assistance.

⁹ Joan Alker and Tricia Brooks, “Millions of Children May Lose Medicaid: What Can Be Done to Help Prevent Them from Becoming Uninsured,” Georgetown University Center for Children and Families, February 2022, <https://ccf.georgetown.edu/2022/02/17/millions-of-children-may-lose-medicaid-what-can-be-done-to-help-prevent-them-from-becoming-uninsured/>.

¹⁰ Alker and Brooks, *op cit*.

¹¹ Tricia Brooks et al., “Medicaid and CHIP Eligibility and Enrollment Policies as of January 2022: Findings from a 50-State Survey,” Kaiser Family Foundation, March 16, 2022, <https://www.kff.org/report-section/medicaid-and-chip-eligibility-and-enrollment-policies-as-of-january-2022-findings-from-a-50-state-survey-report/>.

¹² Alker and Brooks, *op cit*.

Respectfully submitted,

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