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June 3, 2022

Charles P. Rettig
Commissioner
Internal Revenue Service
111 Constitution Ave NW
Washington DC 20224

Submitted electronically via www.regulations.gov

RE: Affordability of Employer Coverage for Family Members of Employees – AHIP Comments

Dear Commissioner Rettig:

On behalf of AHIP, thank you for the opportunity to offer comments in response to the Treasury Department and the Internal Revenue Service proposed rulemaking on Affordability of Employer Coverage for Family Members of Employees (“family glitch”), published in the *Federal Register* on April 7, 2022.¹

Everyone deserves affordable, high-quality coverage choices, whether they obtain coverage through their employer or buy coverage on their own through the Affordable Care Act (ACA) health insurance marketplaces. We share the Administration’s goal outlined in Executive Order 14009, “Strengthening Medicaid and the ACA,” to make high-quality health care accessible and affordable to all Americans, including ensuring access to affordable coverage and financial assistance for dependents. It is estimated over five million Americans cannot access affordable, quality coverage due to the ACA’s family glitch. **We support the Administration’s proposed approach to fix the family glitch so millions of Americans can access premium tax credits (PTCs) to enroll in affordable coverage through the ACA marketplaces.**

The New Affordability Test Advances Important Goals of the Affordable Care Act

The proposed rule strikes an appropriate balance that will preserve the integrity of the employer market while expanding access to affordable coverage through the ACA marketplaces for those that need coverage. Specifically, by proposing a new affordability test for related individuals, family members of the employee’s household may be determined eligible for PTCs if an employer offer of *family coverage* is deemed unaffordable. We are pleased to see the rule does not propose changes to the affordability test for employees and thus preserves the employer firewall. Under the approach, an employee may have an affordable offer of employer-sponsored coverage while the employee’s

¹ AHIP is the national association whose members provide health care coverage, services, and solutions to hundreds of millions of Americans each day, including through employer-sponsored coverage and the Affordable Care Act (ACA) health insurance marketplaces. We are committed to making health care better and coverage more accessible to everyone. We believe when people get covered and stay healthy, we all do better. The best way to do that is to expand on the market-based solutions and public-private partnerships that are proven successes.

spouse and dependents may not have an affordable offer of family coverage through the employer. This crucial approach ensures employees cannot forego an affordable offer of employer sponsored coverage to enroll with their family in subsidized marketplace coverage. Consistent with Executive Order 14009, the rule appropriately focuses on ensuring access for dependents who are locked out of affordable coverage without unnecessarily undermining stability of the employer market.

Adopting a new affordability test for related individuals will provide significant relief for low- and middle-income families. Of the more than 5 million Americans impacted by the family glitch, 4.4 million are currently enrolled in employer-sponsored coverage but are likely spending more than 9.61 percent of annual income on premiums.² One study estimated families who would become eligible for PTCs if the affordability test took into account the cost of premiums for family coverage currently spend an average of 15.8 percent of their before-tax income on premiums.³ Nearly half of this population is estimated to have incomes between 100 percent and 250 percent of the federal poverty level (FPL), meaning they would qualify for significant premium and cost-sharing subsidies through the marketplaces. A recent analysis estimates limiting the employee contribution for family coverage could save low- to middle-income families thousands of dollars annually. Specifically, a married couple with two children earning \$53,000 or a single parent with two children earning \$43,920 (both 200 percent FPL) would save over \$4,000 annually.⁴ The same study estimates those same families with incomes three times the poverty line would save up to \$1,000 annually. These are significant savings for low- and middle-income families.

The Proposed Rule Preserves Access to Employer-Provided Coverage

The approach proposed by Treasury and IRS would make affordable coverage options available to families without jeopardizing coverage through employer-sponsored group health plans. We agree with Treasury and IRS that the ACA requires an offer of employer coverage for an employee to be deemed affordable if the cost of self-only coverage does not exceed the required contribution percentage. An alternate interpretation in which the employee would be eligible for PTCs if the employee contribution to family coverage is deemed unaffordable would not be consistent with the statute and would risk eroding the employer market. In a 2015 study, RAND found such an approach would result in approximately 3 million fewer enrollees in employee-sponsored coverage, compared to only 1 million fewer enrollees if the employer firewall was preserved.⁵ This study did not account for current policies, namely the expanded PTCs authorized in the American Rescue Plan Act. It is critical that the employer firewall be preserved to align with statute and ensure continued stability and affordability of the employer-sponsored coverage market for the more than 177 million Americans who have employment-based coverage.

² The ACA Family Glitch and Affordability of Employer Coverage. Kaiser Family Foundation. April 7, 2021. <https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/>

³ Buttegens, M. Dubay, L., Kenney, Genevieve M. Marketplace Subsidies: Changing the ‘Family Glitch’ Reduces Family Health Spending But Increases Government Costs. Health Affairs. 2016. <https://www.healthaffairs.org/doi/10.1377/hlthaff.2015.1491>

⁴ *ibid*

⁵ Alternatives to the ACA’s Affordability Firewall. RAND Corporation. 2015. https://www.rand.org/pubs/research_reports/RR1296.html

The Treasury Department and IRS Are Properly Exercising Authority to Interpret the Statute

The revised affordability test is sound public policy squarely within the authority of Treasury and IRS to execute. Executive Order 14009 directed agencies to review policies and practices that may reduce affordability of coverage or financial assistance for coverage, including for dependents. Treasury and IRS conducted a review of existing regulations governing eligibility for PTC and, based on those findings, determined the statute could be interpreted in a different manner, siding with an alternate interpretation that more closely aligns with the intent of the ACA to expand access to affordable coverage. As a matter of administrative law, Treasury and IRS retain significant authority to adopt the regulations as proposed. Federal agencies are empowered to amend existing regulations, explaining their rationale for doing so, and courts are empowered to assess that rationale. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (stating that agencies must “provide a reasoned explanation for [a] change.”). Importantly, the Supreme Court has recognized that “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, *the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis,*” for example, in response to changed factual circumstances, or a change in administrations.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added) (internal citations omitted). Here, Treasury and IRS have continued to evaluate the implementation of a statute under which they have significant interpretive discretion and they have determined the prior interpretation of the statute does not fulfill the intent of the statute and its underlying policy of expanding health insurance coverage.

Moreover, as the preamble to the proposed regulations makes clear, section 36B(c)(2)(C)(i) does not specify the manner in which clause 36B(c)(2)(C)(i) should apply to spouses and dependents of employee-taxpayers. As a result, the statute’s ambiguity is ripe for the type of reasoned interpretation that the Treasury and IRS propose here to address the policy and regulatory inconsistencies that the current rule creates. Where “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Here, given the overwhelming evidence in the structure and language of the ACA, it is clear that Congress intended to facilitate the purchase of health insurance for individuals who could otherwise not afford coverage in the individual market or through their employers. Accordingly, a reviewing court should afford broad deference to the agencies’ reinterpretation of the statutory provision in section 36B.

Minimum Value Calculations Should be Addressed

It is our experience that most plans offered by employers do not feature different benefit designs for employees and for related family members. Therefore, we recommend the minimum value calculator continue to be based on a standard population that includes both employees and dependents to calculate a single, composite minimum value for employee and dependents unless the plan’s benefit design for employees is different from its design for related individuals. Separate standard populations should not be required. When the same benefit design is provided to both employees and related individuals, minimum value calculated separately for both populations will be very close to

the minimum value calculated across both. A separate calculation in all instances would, however, create substantial extra work on the part of plan sponsors and issuers to track this information.

To effectuate any changes to the minimum value calculation rules, we reiterate as we have in the past that the minimum value calculator maintained by CMS should be updated from its existing version. The current minimum value calculator is based on outdated data and assumptions; As a result, permitted plan designs may not meet minimum value using the calculator or limit plan design options available to employers in the large group market. The minimum value calculator should be updated regularly, similar to the actuarial value calculator used for the individual market, to reflect updated maximum out-of-pocket maximums, medical trend, and model changes. We also recommend the minimum value calculator be updated to include the family aggregate deductible in the calculation.

If Treasury and IRS do not update the standard population, we recommend a safe harbor for when the minimum value will be the same for individual versus family coverage. For example, plans where employees and dependents have the same benefits available and deductible and out-of-pocket amounts are embedded, the minimum value for individual coverage and family coverage would be the same. In coverage with a shared deductible and/or out-of-pocket maximum, amounts for family coverage should be used to determine if the plan meets minimum value. This would be consistent with the safe harbor provided for calculating actuarial value for plans with family cost-sharing features, where CMS considers the actuarial value with a deductible and/or out-of-pocket maximum that accumulates at the family level to be considered the same actuarial value as calculated using the actuarial value calculator for the corresponding individual plan. Issuers should maintain flexibility to do out-of-calculator adjustments if they feel the need to do so to more accurately calculate minimum value.

Guidance for Plan Sponsors and Administrators and Resources for Exchange Enrollees Are Necessary to Operationalize the Rule

Additional guidance will be necessary to effectuate this rule change. We recognize finalizing the rule as proposed would create new requirements for plan sponsors and administrators to ensure compliance with the rule. After finalizing the rule, Treasury and IRS should issue a Request for Information to better understand the recordkeeping and compliance needs of stakeholders who will be affected by the final rule. It will be critical that Treasury and IRS issue guidance that clearly details how plan sponsors and administrators, as well as individual taxpayers, are to satisfy requirements that ensure proper eligibility calculations for PTC.

In addition to guidance for plan sponsors and administrators, individual consumers purchasing coverage via an Exchange would greatly benefit from resources and guidance that help them make an informed purchasing decision. We urge the Treasury Department and IRS to work with HHS on how to best communicate information to families considering whether to enroll in Exchange coverage with a PTC in lieu of enrolling in employer-provided coverage. While the shopping experience would be similar to any consumer, there are unique considerations for families with other offers of coverage as explained by the Treasury Department and IRS: some families would experience “split coverage” (i.e., the employee enrolling in employer-provided coverage and the family enrolling in

the Exchange) could lead to lower premiums for the family, or could lead to uninsured individuals becoming insured, for some other families, the cost of the two coverages could be higher, and having two deductibles and two out-of-pocket limits could also increase costs for families. Clear information presented in an accessible fashion to consumers both generally and as part of the Exchange application will help ensure that the families who choose to enroll in split coverage are those who will benefit from doing so.

The Rule Should be Finalized Largely as Proposed

For years since the enactment of the ACA, the family glitch has been widely viewed as an unnecessary obstacle to fully achieving the intent of Congress in passing a law to increase the number of Americans with health insurance coverage by making that coverage more affordable. Congress never intended this barrier and the interpretation by Treasury and IRS in this proposed rule finally corrects a prior interpretation, consistent with their regulatory authority and to the benefit of millions of Americans. We recommend the rule be finalized as proposed, with the addition of addressing minimum value calculations.

Sincerely,

A handwritten signature in cursive script that reads "Jeanette Thornton". The signature is written in black ink and includes a long horizontal flourish extending to the right.

Jeanette Thornton
Senior Vice President,
Product, Employer & Commercial Policy
AHIP