

May 7, 2022

The Honorable Janet Yellen
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Via <https://www.regulations.gov>

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Docket ID: IRS REG-114339-21
RIN 1545-BQ16

Dear Secretary Yellen and Commissioner Rettig:

This letter presents comments on the Notice of Proposed Rulemaking on the "Affordability of Employer Coverage for Family Members of Employees" published by your department in the *Federal Register* (86 FR 20354, April 7, 2022).

Summary of comment

The current regulations governing eligibility for the premium tax credit (PTC) are consistent with the law. Specifically, workers with an offer of employer-sponsored insurance (ESI) who must pay more than 9.5% of household income for self-only coverage may claim PTCs, assuming they meet other statutory criteria (e.g., income, lawful presence in the U.S.). Their dependents also are eligible.

The IRS and Treasury ("the agencies") propose a rule that is contrary to the statute. The NPRM would concoct a new affordability test that would make millions of dependents eligible for PTCs, in direct contravention of clear and unambiguous statutory provisions.

There is only one statutory affordability test, and it applies to workers and their dependents. If a worker pays more than 9.5% of household income for self-only coverage, then – and only then – do the worker and his or her dependents become eligible for PTCs.

Moreover, the rule is inconsistent with several ACA policy objectives, such as preserving ESI and making PTCs a last resort for health care coverage. The NPRM also is unsound fiscally and would induce companies to reduce their contributions to dependent coverage, a harm that the agencies themselves acknowledge.

It would harm many families who migrate from ESI, leaving them to navigate among different provider networks and different drug formularies and meet multiple deductibles and out-of-pocket spending thresholds, another harm the agencies acknowledge.

In addition, the NPRM would harm states by requiring them to incur higher Medicaid costs.

For these and other reasons, the agencies should withdraw the NPRM and retain the current policy on PTC eligibility for dependents of covered workers. Congress can fix the so-called "family glitch" by amending the statute. The agencies cannot.

I. The NPRM proposes a regulatory change that is contrary to the statute.

The ACA generally prohibits workers with an offer of ESI from claiming PTCs. The law does, however, make an exception in cases where the employment-based plan has low actuarial value or is unaffordable. Existing regulations accurately interpret the statute. The regulations provide that workers who must pay more than 9.5 percent of household AGI for "self-only" employer-sponsored coverage are entitled to PTCs, so long as they meet other relevant criteria (e.g., lawful presence in the U.S., income requirements).¹ Their dependents also are eligible. The regulations, which have been in effect since January 2014, also are faithful to the statutory text in stipulating that if a worker pays less than 9.5% of household AGI for employer-sponsored self-only coverage, the worker's dependents are ineligible for PTCs.

In the preamble to the NPRM, the agencies announced that they have "tentatively determined" that the exclusion of dependents from PTCs "is not required by the relevant statutes."² This tentative determination is incorrect.

The agencies further err when they characterize the NPRM as "consistent with the overall purpose of the ACA to expand access to affordable health coverage."³ The ACA established the tax credits not only to expand coverage but also to avoid supplanting existing sources of health insurance. For this reason, the statute specifically bars hundreds of millions of Americans – including those enrolled in Medicare, Medicaid and ESI that meets minimum essential coverage (MEC) standards – from claiming subsidies.

Unlike the "inartful drafting" of other provisions of the ACA,⁴ the statutory provisions addressed in the NPRM are unambiguous and clear.

In their effort to rewrite the statute by regulation, the agencies confuse provisions of the law that exempt specific categories of uninsured people from tax penalties with those that entitle certain individuals to premium subsidies. It is helpful, then, to begin with a high-level summary of the various provisions the agencies cite in support of their tentative determination before showing how the agencies have misconstrued them. These provisions include:

- 26 USC 36B, which establishes PTCs and prohibits most Americans and legal residents, as well as all unlawful residents, from claiming the credit.⁵

¹ 26 CFR 1.36B(c)(3)(v) and examples. The 9.5% threshold is indexed and varies by year. For 2022, it is set at 9.61%. This comment letter will use 9.5% throughout for the sake of simplicity.

<https://www.law.cornell.edu/cfr/text/26/1.36B-2>

² 87 FR 20355.

³ Ibid.

⁴ "The Affordable Care Act contains more than a few examples of inartful drafting," Chief Justice John Roberts wrote for the majority in a Supreme Court opinion upholding certain provisions of the law. *King v. Burwell*, Slip opinion no. 14-114, June 15, 2015, p. 3. https://www.supremecourt.gov/opinions/14pdf/14-114_gol1.pdf

⁵ 26 USC 36B(c)(2)(B), cross-referencing 26 USC 5000A(f).

- 26 USC 5000A, which imposes a tax penalty on the uninsured⁶ and exempts several categories of uninsured individuals from that penalty.⁷
- 26 USC 4980H, which imposes a tax penalty on companies that employ at least 50 full-time workers and fail to offer minimum essential coverage to those full-time workers and their dependents.⁸
- 42 USC 18081, which requires the HHS Secretary to establish a program for determining eligibility for PTCs.

The statute greatly restricts the availability of PTCs

Section 36B of the Internal Revenue Code (IRC), alone among the above-referenced provisions, creates an entitlement to PTCs. Subsections (a) and (b) define the refundable credit amounts and set rules for their calculation. Subsection (c) prohibits individuals with other sources of MEC from claiming PTCs.

The statute defines these other sources of MEC by cross-reference to 26 USC 5000A(f). That subsection defines MEC to include various sources of public and private health insurance coverage. People with MEC are both exempt from tax penalties and ineligible for PTCs. The cross-reference to this subsection in 36B bars people with MEC from claiming the tax credit. In addition to people offered ESI, which we discuss below at greater length, these include:

- Medicare beneficiaries;
- Medicaid recipients;
- CHIP participants;
- TRICARE recipients;
- V.A. recipients; and
- Peace Corps members.

In short, by cross-referencing subsection 5000A(f), section 36B of the IRC disqualifies hundreds of millions of Americans from claiming PTCs.

The statute generally prohibits workers with an offer of ESI and their dependents from claiming the tax credit.

26 USC 36B(c)(2)(C) establishes a "special rule for employer-sponsored minimum essential coverage." To qualify as MEC, such plans must provide workers with coverage that has at least a "minimum value"⁹ and is "affordable."¹⁰ A worker with access to ESI that meets both criteria may not claim a PTC.

The statute defines affordability based exclusively on the amount a worker must contribute for self-only coverage under the plan. An employer-sponsored plan fails the affordability test if:

⁶ 26 USC 5000A(b)&(c). Congress has subsequently reduced the tax penalty to \$0, but the statutory requirement to purchase minimum essential coverage and the penalty structure remain in both law and regulation.

⁷ 26 USC 5000A(d)&(e).

⁸ 26 USC 4980H(a).

⁹ 26 USC 36B(c)(2)(C)(ii), which establishes that a plan must have an actuarial value of at least 60%.

¹⁰ 26 USC 36B(c)(2)(C)(i)(II).

"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."¹¹

5000A(e)(1)(B), cross-referenced in the subparagraph, defines "required contribution" as "the portion of the annual premium which would be paid by the individual ... for self-only coverage."¹²

Here, it is important to note three things. First, and most obviously, the cross-reference to 5000A(e)(1)(B) establishes that the affordability test applies strictly to the cost of self-only coverage and not to the cost of family coverage. Second, section 36B does not cross-reference 5000A(e)(1)(C), which sets forth "special rules for individuals related to employees." Third, 5000A(e)(1)(B)&(C) do not create an entitlement to PTCs. Rather, they exempt uninsured people whose ESI does not meet MEC standards from tax penalties.

This is a critical point and one the agencies' tentative determination completely misconstrues. Subparagraph (C), which 36B doesn't cross-reference, cannot be contorted into a "modification" of the affordability test for determining eligibility for PTCs. That contrived reading of the statute, as we will discuss further, is impermissible.

The statute's affordability test establishes a threshold for creating an entitlement to PTCs for workers and their dependents that is based exclusively on the cost of self-only coverage.

There is only one affordability test in section 36B, and it applies to workers and their dependents. The final phrase of 36B(c)(2)(C)(i) establishes eligibility for dependents:

"This clause shall 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 only permissible reading of "this clause" is that it must refer to the language that immediately precedes it. As we have seen, that language sets forth one criterion for determining the affordability of employer-sponsored insurance: the cost to the worker of self-only coverage.

If a worker pays more than 9.5% of household income for self-only coverage, then – and only then – do the worker and his or her dependents become eligible for PTCs.

The statute's affordability test for workers sets off a chain of interrelated events. Specifically, it:

- *Establishes that the worker does not have access to minimum essential coverage.* This determination, based exclusively on the cost to a worker of self-only coverage, has implications for the worker, her employer and her dependents.
- *Exempts workers whose employers offer unaffordable coverage from the tax penalty on the uninsured.*¹³ Exempting various uninsured individuals from the tax penalty on the uninsured is the primary function of subsection 5000A(e), which is entitled "exemptions." 5000A(a) establishes a requirement to maintain minimum essential coverage. Subsections (b)&(c)

¹¹ 26 USC 36B(c)(2)(C)(i).

¹² 26 USC 5000A(e)(1)(B)(i).

¹³ 26 USC 5000A(e)(1)(B).

establish a penalty for not maintaining such coverage. Subsections (d)&(e) exempt certain uninsured people from that penalty.

- *Entitles such workers and their dependents to PTCs.*¹⁴ Section 36B(c)(2)(C)(i) establishes that a worker and her dependents are eligible for PTCs if the worker must spend more than 9.5% of household income on employer-sponsored self-only coverage.
- *Subjects certain employers to tax penalties.*¹⁵ If one or more full-time employees of an applicable large employer receive a PTC, then the employer must pay a tax penalty.¹⁶

Coverage offered by a company that employs at least 50 full-time workers and fails the affordability test for at least one full-time worker thus sets off a chain reaction -- exempting the worker from penalties if he remains uninsured, entitling him and his dependents to PTCs and subjecting the company to tax penalties.

By contrast, there is no such sequence of events based on the cost of covering a worker's dependents.

Workers who must contribute more than 9.5% of household AGI for self-only coverage under their company's plan are eligible for PTCs. So are their dependents. That entitlement, as discussed above, is not due to their mention in 5000A. Rather, it is because section 36B creates that entitlement.¹⁷

The proposed rule seeks to amend the statute by concocting an affordability test for dependents of workers with ESI.

The NPRM incorrectly characterizes 5000A(e)(1)(C) (which determines whether an uninsured dependent is exempt from the tax penalty on the uninsured) as a "modification" of the affordability test for workers established by 5000A(e)(1)(B) and of the affordability test in 36B(c)(2)(C)(i).¹⁸ The only permissible reading of 5000A(e)(1)(B) is that it exempts workers who are not offered MEC from penalties if they remain uninsured. The affordability test in subparagraph (C) is similarly a "special rule" for determining whether certain uninsured dependents qualify to join the lengthy list of uninsured individuals exempt from tax penalties.

To arrive at their erroneous understanding of the statute, the agencies run roughshod over the structure and purpose of section 5000A.

5000A(a) requires "applicable individuals" to maintain minimum essential coverage. Subsections (b)&(c) establish tax penalties on applicable individuals who do not maintain such coverage.¹⁹ Subsection (d) excludes specific categories of people from the definition of "applicable individual." This means they face no penalty for failing to maintain minimum essential coverage.

Subsection (e) exempts specific categories of uninsured applicable individuals from the tax penalty. Paragraph (e)(1) exempts uninsured "individuals who cannot afford coverage."

¹⁴ 26 USC 36B(c)(2)(B).

¹⁵ 26 USC 4980H(b).

¹⁶ 26 USC 4980H(b)(1)(B).

¹⁷ 26 USC 36B(c)(2)(C).

¹⁸ 87 FR 20357.

¹⁹ Congress has subsequently reduced this tax penalty to \$0 but did not repeal section 5000A.

Subparagraph (e)(1)(A) establishes the general rule for determining whether an individual meets this test: An uninsured individual is exempt from the tax penalty if the cost of ACA-compliant individual insurance – their "required contribution" -- exceeds 8 percent of their AGI.²⁰

Subparagraphs (B)&(C) establish special rules for workers and dependents offered ESI. Subparagraph (B) provides that if a worker's "required contribution" for self-only coverage under their company's health plan exceeds 9.5 percent of household income, the uninsured worker is exempt from the tax penalty.

Subparagraph (C) establishes a special rule for individuals related to employees. For those who are "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 the required contribution of the employee*" (*emphasis added*).²¹

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. The calculation of such dependents' "required contribution" is based on subparagraph (C) rather than on the general rule in subparagraph (A).

The "required contribution" of a dependent of a worker with ESI is not based on the premiums for a qualified health plan offered in the individual market but by reference to the required contribution of the worker to the employer plan.²²

This exemption from tax penalties does not create an entitlement to PTCs.

Dependents whom 5000A(e)(1)(C) exempts from tax penalties are no different from numerous other categories of individuals listed in subsections 5000A(d)&(e). These include exemptions for members of certain religious sects,²³ individuals enrolled in health sharing ministries,²⁴ individuals not lawfully present in the U.S.,²⁵ incarcerated individuals,²⁶ taxpayers with incomes below the filing threshold,²⁷ members of Indian tribes,²⁸ 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."²⁹

All these individuals are exempt from the tax penalty established in section 5000A, and none of them, by virtue of that exemption, are eligible for PTCs.

The agencies' defense of its unlawful affordability test is unavailing.

In attempting to transform an exemption from penalties into an entitlement to subsidies, the NPRM asserts that its misinterpretation would "promote consistency between the affordability rules" and 42

²⁰ 26 USC 5000A(e)(1)(A).

²¹ 26 USC 5000A(e)(1)(C).

²² 26 CFR 1.5000A(e)(1)(C).

²³ 26 USC 5000A(d)(2)(A).

²⁴ 26 USC 5000A(d)(2)(B).

²⁵ 26 USC 5000A(d)(3).

²⁶ 26 USC 5000A(d)(4).

²⁷ 26 USC 5000A(e)(2).

²⁸ 26 USC 5000A(e)(3).

²⁹ 26 USC 5000A(e)(5).

USC 18081. That section instructs the HHS Secretary to establish a program for determining eligibility for PTCs and cost-sharing reductions.³⁰ It does not create an entitlement to those subsidies. Instead, it delegates to the HHS Secretary the task of determining who is eligible for them. It is purely ministerial.

The agencies nevertheless note that 18081(b)(4)(C) "requires exchange applicants to separately provide the required contributions of employees and of related individuals in order to determine PTC eligibility."³¹ That subparagraph states:

"If the employer provides such minimum essential coverage, the lowest cost option for the enrollee's or individual's enrollment status and the enrollee's or individual's required contribution (*within the meaning of 5000A(e)(1)(B) of title 26*) under the employer-sponsored plan" (*emphasis added*).

This subparagraph merely instructs the HHS Secretary to determine "the portion of the annual premium which would be paid by the individual ... for *self-only coverage*" under the employer-sponsored plan, which is the language referenced in 5000A(e)(1)(B).

The agencies assert that this subparagraph:

"...requires exchange applicants to separately provide the required contributions of employees and of related individuals in order to determine PTC eligibility; in the Treasury Department's and the IRS's view, the requirement to provide this information would make little sense if PTC eligibility depended only on the cost to the employee of self-only coverage."³²

Although it may "make little sense" to the agencies to condition PTC eligibility on self-only coverage, section 18081(b)(4)(C) cross-references 5000A(e)(1)(B), which bases PTC eligibility on the cost of *self-only coverage*, not family coverage.

Contrary to the agencies' conjecture, the provision makes a good deal of sense. As we have seen, 36B(c)(2)(C)(i) provides that if the cost to a worker with ESI for self-only coverage exceeds 9.5% of AGI, then that worker and that worker's dependents are eligible for PTCs. The "required contribution within the meaning of 5000A(e)(1)(B)" can only be understood as the amount the worker pays for self-only coverage. As with 36B, there is no reference to the special rule for determining a dependent's required contribution for employer-sponsored coverage, which appears at 5000A(e)(1)(C). The agencies conjure the cross-reference into existence in both cases.

The agencies' groping after a rationale to create a new entitlement doesn't stop there. In a footnote that appeared in the preamble, they note that the Joint Committee on Taxation's March 2010 technical explanation of the ACA's tax provisions erroneously described the affordability test as applicable to individual and family coverage.³³ The JCT corrected its error on May 4, 2010. In its "ERRATA for JCX-18-10," it noted that the determination of affordability is "based on self-only coverage."

³⁰ 42 USC 18081(a).

³¹ 87 FR 20357.

³² 87 FR 20357.

³³ *Ibid*, footnote 5.

The JCT staff thus made an error and later corrected it, as it did with the ten other errors it corrected in that document, including erroneous descriptions of the tax penalty on the uninsured and the so-called "Cadillac Tax" on certain employer-sponsored plans.³⁴ In its correction, the staff quoted directly from the statute's text. The agencies mischaracterize this error as "differing interpretations by the Joint Committee staff," which "further demonstrate the statutory ambiguity that renders either interpretation available under the ACA."³⁵

But that is not how the Joint Committee staff characterize the document. They entitled their May 2010 publication "ERRATA" – Latin for "mistakes," not "differing interpretations" or "ambiguities." By their own admission, staff got it wrong on this and other matters in their March 2010 description of various ACA tax provisions; they corrected their mistakes six weeks later.

By contrast, the agencies correctly interpreted the statute in 2013 and, nine years later, are fabricating a statutory construction that the staff of the Joint Committee long ago acknowledged as erroneous.

The NPRM, unlike the agencies' longstanding regulations, is thus contrary to statute and should be withdrawn.

The proposed rule proposes to legislate a "minimum value" test for dependents.

The affordability test for dependents does not entitle them to PTCs but instead exempts them from tax penalties. While there is a minimum value test for workers with ESI, the preamble to the NPRM correctly observes that the statute has no such tests for dependents. The agencies note that "36B(c)(2)(C)(ii) does not specifically mention related individuals."³⁶

"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."³⁷

The agencies are correct in pointing out that there is no statutory minimum value rule for dependent coverage. They err and violate the statute in trying to legislate one. The law contains no such rule because related individuals are not entitled to PTCs unless the cost of self-only coverage under a worker's plan exceeds the statutory threshold.

The provision in question (36B(c)(2)(C)(ii)) stipulates that an employer-sponsored plan, even if it meets the affordability test, does not constitute minimum essential coverage if its actuarial value is less than 60%. Specifically, it states:

³⁴ "Errata for JCX-18-10," Joint Committee on Taxation, JCX-27-10, May 4, 2010.

<https://www.jct.gov/CMSPages/GetFile.aspx?guid=3b4f643f-9f73-4dee-be6a-019649de1012>

³⁵ 87 FR 20357, footnote 5.

³⁶ 87 FR 20358.

³⁷ Ibid.

"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" (*emphasis added*).³⁸

The agencies recognize that the special rule for employer-sponsored minimum essential coverage omits reference to dependents. Instead of recognizing that omission as further evidence that they are misconstruing the statute, they take it as an invitation to amend the law.

The agencies' regulatory improvisation is contrary to the statute. Section 36B doesn't establish a minimum value for dependent coverage because those dependents aren't entitled to premium subsidies unless the worker is offered ESI that does not meet the statutory requirements for MEC.

II. Congress has not amended the statute.

Congress has long been aware of the so-called "family glitch," which the NPRM seeks to address. The statute does not entitle dependents of workers with ESI to PTCs, which imposes hardships on some families. Congress wrote the law that way. The agencies cannot rewrite it through regulation. Only Congress can.

Numerous bills have been introduced over the years to address this issue. None has gained enactment. Most recently, the House in June 2020 passed H.R. 1425, which would have amended the statute to accomplish the goals the agencies seek to achieve through the NPRM.³⁹ That legislation died in the Senate.

Congress's refusal to amend the statute is more remarkable because it has recently enacted vast expansions of the ACA's tax credits. On March 11, 2021, President Biden signed the American Rescue Plan Act into law.⁴⁰ The Act expanded the PTCs in various ways, enlarging them for those already eligible to receive them, entitling more people to receive them by removing the income cap, and making exchange-based coverage free to people receiving unemployment benefits.⁴¹ Congress also incentivized workers to remain in their employer-sponsored plans rather than enrolling in subsidized exchange-based coverage by making COBRA benefits free to former employees.⁴²

Despite those changes, Congress did not amend the statute to make dependents of workers with ESI eligible for PTCs.

Since the enactment of ARPA, President Biden has advocated passage of the Build Back Better Act.⁴³ That bill, which passed the House in November 2021, would build on the PTC expansions made by ARPA. The ARPA expansions are due to expire in December 2022. The Build Back Better Act would extend them

³⁸ 26 USC 36B(c)(2)(C)(ii).

³⁹ "Patient Protection and Affordable Care Act Enhancement Act," H.R. 1425. <https://www.congress.gov/bill/116th-congress/house-bill/1425/text>

⁴⁰ "American Rescue Plan Act of 2021," P.L. 117-2, March 11, 2021. <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>

⁴¹ See sections 9661-9663.

⁴² Section 9501.

⁴³ "Build Back Better Act," H.R. 5376, Rules Committee Print 117-18. <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>

through 2025.⁴⁴ But as with ARPA, this bill does not propose to make dependents of workers with ESI eligible for PTCs.⁴⁵

The ACA, enacted 12 years ago, does not establish a separate affordability test for family coverage that would entitle dependents of workers offered ESI to PTCs. Congress has had numerous opportunities to amend the statute to create such an affordability test and has not done so. The agencies cannot amend the law through rulemaking.

III. The NPRM is contrary to the purposes of the ACA

The preamble to the NPRM argues that it advances the overall goal of the ACA in providing comprehensive, affordable health coverage.⁴⁶ The agencies appear to assume that, by making more people eligible for PTCs, the NPRM advances the ACA's aims. That narrow understanding of the ACA's purposes conflicts with the statute's overall structure, which narrowly limits access to PTCs. The law severely restricts PTC eligibility to avoid supplanting other forms of public and private coverage. By assuming that expanding access to PTCs advances the ACA's purposes, the agencies have promulgated a policy that conflicts with the law's purposes. This section identifies those conflicts.

The NPRM conflicts with the ACA's purpose of making subsidized, exchange-based coverage a last resort.

As noted above, the ACA greatly limits eligibility for PTCs. Anyone with "minimum essential coverage" – including Medicare, Medicaid, CHIP and (with some exceptions) employer-sponsored coverage – cannot claim the tax credits. Medicare has an estimated 61 million beneficiaries.⁴⁷ Nearly 86 million people are enrolled in Medicaid or CHIP.⁴⁸ An estimated 155 million people have employer-sponsored coverage.⁴⁹ The statute thus leaves only a tiny segment of the population eligible for tax credits.

Although PTCs are income-related, the statute renders millions of low-income people ineligible for them. In states that have expanded Medicaid, people with incomes under 138% of FPL cannot claim PTCs. In states that haven't adopted Medicaid expansions, those with incomes below 100% of FPL are ineligible for PTCs.

⁴⁴ *Rules Committee Print 117-18, Text of HR 5376, Build Back Better Act*, House Committee Print 117-18, section 137304, November 3, 2021. <https://www.congress.gov/committee-print/117th-congress/house-committee-print/46234>

⁴⁵ The House-passed bill also temporarily reduced the affordability test for self-only coverage for workers from 9.5 percent to 8.5 percent of household income. It did not, however, establish an affordability threshold for family coverage. *Ibid*, section 137302.

⁴⁶ See, for example, 87 FR 20359.

⁴⁷ "Total Number of Medicare Beneficiaries, 2020" Kaiser Family Foundation, undated.

<https://www.kff.org/medicare/state-indicator/total-medicare-beneficiaries/?currentTimeframe=0&sortModel=%7B%22colld%22:%22Location%22,%22sort%22:%22asc%22%7D>

⁴⁸ Bradley Corallo and Sophia Moreno, "Analysis of Recent National Trends in Medicaid and CHIP Enrollment," Kaiser Family Foundation, April 1, 2022. <https://www.kff.org/coronavirus-covid-19/issue-brief/analysis-of-recent-national-trends-in-medicare-and-chip-enrollment/>

⁴⁹ "2021 Employer Health Benefits Survey," Kaiser Family Foundation, November 10, 2021.

<https://www.kff.org/report-section/ehbs-2021-summary-of-findings/#:~:text=Employer%2Dsponsored%20insurance%20covers%20almost%20155%20million%20nonelderly%20people.&text=To%20provide%20current%20information%20about,with%20three%20or%20more%20workers.>

Indeed, only a small portion of the uninsured population is eligible for premium subsidies. A September 2020 study by the Congressional Budget Office found that of 30 million people who were uninsured in 2019, only 5.7 million were eligible for PTCs.⁵⁰ The rest, comprising more than 80% of the uninsured, were ineligible. These include:

- An estimated 14.4 million (48% of the uninsured) who were eligible for subsidized coverage either through Medicaid or employer-sponsored coverage.
- Nearly four million (13% of the uninsured) who were not lawfully present in the U.S.
- More than three million (11% of the uninsured) with incomes below 100% of FPL who lived in states that have not expanded Medicaid.
- Nearly three million (9% of the uninsured) whose incomes exceeded 400% of FPL.⁵¹

The statute thus has carefully hedged eligibility for PTCs, making them the last resort for those with no other source of coverage. By expanding PTCs to a new group of people, more than 90% of whom already have insurance, the NPRM is discordant not only with the statute but also with one of the ACA's bedrock principles.

The NPRM conflicts with the ACA's purpose of having PTCs supplement, and not supplant, other forms of coverage

Two recent analyses of proposals to address the "family glitch" found that most dependents who would claim PTCs already have employer-sponsored coverage.

The Kaiser Family Foundation, using 2019 Census data, estimated that of the 5.1 million people who would become eligible for subsidized coverage through the exchanges, 4.4 million currently have employer-sponsored coverage.⁵²

An Urban Institute study estimated that 4.8 million people would become eligible for PTCs, 90% of whom already have ESI.⁵³ The study also estimated that fixing the family glitch would reduce the number of uninsured by only 190,000.

One of the ACA's central purposes is to preserve employer-sponsored coverage by constructing a "firewall" between group coverage and government-subsidized individual insurance. The NPRM conflicts with this purpose.

The NPRM would not appreciably reduce the number of uninsured.

⁵⁰ "Who Went Without Health Insurance in 2019, And Why?" Congressional Budget Office, September 2020 <https://www.cbo.gov/publication/56658>

⁵¹ As noted above, ARPA removed the upper income limitation through December 2022. Legislation is pending in Congress to extend that expiration date.

⁵² Cynthia Cox, Krutika Amin, Gary Claxton and Daniel McDermott, "The ACA Family Glitch and Affordability of Employer Coverage," Kaiser Family Foundation Issue Brief, April 7, 2021.

⁵³ Matthew Buettgens and Jessica Banthin, "Changing the 'Family Glitch' Would Make Health Coverage More Affordable for Many Families," Urban Institute, May 2021.

One of the ACA's purposes is to reduce the number of people who lack insurance. The NPRM will have a negligible effect on the uninsurance rate. As noted above, the Urban Institute estimates that expanding PTC eligibility along the lines envisioned in the NPRM would reduce the number of uninsured by 190,000.

The NPRM thus would not materially advance one of the ACA's chief purposes – reducing the number of people who lack coverage.

IV. The NPRM is bad policy.

The NPRM would produce an inefficient use of federal resources.

The agencies have supplied no assessment of the fiscal, economic and behavioral effects of the NPRM. They write that they are "unable to estimate the size of the population affected by the proposed regulations,"⁵⁴ acknowledge that the NPRM "would likely lead to a decrease in the total amount employers are spending on health insurance as the federal government increases spending on PTC"⁵⁵ but hazard no guesses about their net effect, and opine that "new take-up of exchange coverage may be modest"⁵⁶ while presenting no forecast of the NPRM's coverage effects.

The agencies allude to and, in some cases, explicitly acknowledge that the NPRM would do harm. States, for example, will be harmed when dependents with ESI migrate to Medicaid, which would require higher state expenditures.⁵⁷ Other dependents will shift from ESI to exchange-based coverage. These families will be forced to navigate different provider networks and different prescription drug formularies. As the agencies state in the NPRM, that will saddle these families with multiple deductibles and out-of-pocket spending limits, requiring them to pay more for medical care.⁵⁸

Workers and their families also will be harmed because the NPRM will, as the agencies acknowledge, "likely lead to a decrease in the total amount employers are spending on health insurance."⁵⁹ This decreased contribution will disrupt coverage for many families and drive many of them into other forms of public and private coverage, leaving them with higher medical expenses, fewer choices among medical providers and less generous insurance.

Proposing a rule without assessing its consequences borders on regulatory malpractice. The agencies are promulgating a regulation that affects millions of workers and their dependents in a way that will substantially affect revenues and outlays in a program the agencies themselves administer. And yet they have excused themselves from supplying data essential to gauging the NPRM's consequences.

⁵⁴ 87 FR 20360.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The Urban Institute study cited above 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." Buettgens and Banthin, "Changing the 'Family Glitch.'"

⁵⁸ 87 FR 20360.

⁵⁹ Ibid.

They instead delegate the task of assessing their proposal to the public at large, asking us to "provide data, other evidence or models that provide insight,"⁶⁰ offloading one of their most fundamental responsibilities.

In response to the agencies' plea for help in assessing the effects of its rule on the program they administer, we would offer an estimate by the Congressional Budget Office of the costs of a House-passed bill dealing with the family glitch. These estimates are, of course, rough since the legislation differs in some respects from the NPRM. But they do shed light on a critical policy question that the agencies won't bother to answer.

Section 103 of H.R. 1425,⁶¹ which the House passed in June 2020, amended the Internal Revenue Code to give the agencies authority to do what they are unlawfully proposing to do – legislate a new affordability test for dependents of workers who have affordable, employer-sponsored self-only coverage.

According to the CBO analysis, that provision would increase federal deficits by \$45 billion over ten years.⁶² This is an enormous fiscal effect for a rule the administration has characterized as not economically significant.⁶³

While neither the agencies nor CBO have estimated the coverage effects of the NPRM, the aforementioned Urban Institute study offers some guidance.⁶⁴ That study, as noted above, suggests that fixing the family glitch will reduce the number of uninsured by 190,000. Combining this estimate with the CBO's analysis provides a rough approximation of the NPRM's inefficient use of federal dollars. Assuming a fiscal effect averaging \$4.5 billion annually, the average annual cost per newly insured would be \$23,684.

This is a highly inefficient use of federal resources, particularly during a time of inflation, record government borrowing and historically high debt-to-GDP ratio. To avoid further fueling inflation and appropriating tens of billions of dollars in spending in contravention of federal law, the agencies should withdraw the rule.

The NPRM would induce millions of people to forfeit employer-sponsored coverage in favor of less generous exchange-based coverage.

Both the Urban Institute and Kaiser studies cited earlier in the paper find that the NPRM's primary effect will be to make exchange-based coverage more financially attractive to dependents currently enrolled in ESI.

⁶⁰ 87 FR 20361.

⁶¹ "Patient Protection and Affordable Care Act Enhancement Act," H.R. 1425. <https://www.congress.gov/bill/116th-congress/house-bill/1425/text>

⁶² "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

⁶³ "Executive Order Review Schedule Search Results," Office of Information and Regulatory Affairs, Office of Management and Budget, RIN 1545-BQ16. <https://www.reginfo.gov/public/do/eoAdvancedSearch>

⁶⁴ Buettgens and Banthin, "Changing the 'Family Glitch.'"

Dependents who respond to those incentives will generally have less valuable insurance coverage. Exchange-based plans typically have more burdensome cost-sharing, more restrictive access to providers and little or no coverage of out-of-network medical goods and services, relative to ESI.⁶⁵

A 2017 study of ESI by the Bureau of Labor Statistics found that employment-based coverage had a mean actuarial value – the average percentage of covered, in-network services borne by the plan – of 85%.⁶⁶ Benchmark exchange coverage has an actuarial value of just 70%, and the most financially attractive plans for those who qualify for PTCs have a 60% actuarial value.⁶⁷

That difference in generosity is compounded by the fact that ESI typically offers a much broader choice of medical providers. Actuarial value is calculated based on covered in-network services. The narrower networks offered by exchange-based plans mean that consumers will often seek care from non-network providers. That will require out-of-pocket medical spending that measures of actuarial value don't capture.

The NPRM thus is proposing a policy in which the federal government will borrow \$45 billion over ten years and spend most of it to induce many people to migrate to less comprehensive insurance coverage.

Nor does this policy offer families an "additional health insurance option," as the preamble to the NPRM falsely asserts.⁶⁸ Employees and their families will have the same coverage options under the NPRM as under the existing regulations. The only difference is that the federal government will incur tens of billions of dollars in additional debt by incentivizing dependents to drop their ESI and instead use PTCs to purchase exchange-based coverage.

The agencies acknowledge that this tradeoff would be detrimental to many low-income workers and their families. One disadvantage is what the agencies term "split coverage" – a circumstance in which a worker retains ESI while her dependents enroll in subsidized exchange-based insurance.

"Split coverage also means multiple deductibles and maximum out-of-pocket limits for the family, which potentially increases out-of-pocket costs for families."⁶⁹

Given the complexities of these calculations and the uncertainty of future medical expenses, it is likely that workers and their families will overlook or underestimate the costs of split coverage. Government should not subsidize an insurance option that, by the agencies' own admission, could leave millions of Americans worse off.

⁶⁵ Kyle Murphy, "Narrow Network Health Plans Continue to Dominate ACA Exchanges," Intelligence, Private Payers News, undated. <https://healthpayerintelligence.com/news/narrow-network-health-plans-continue-to-dominate-aca-exchanges>

⁶⁶ 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>

⁶⁷ Dependents with household income between 138% and 200% of FPL (100% to 200% 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.

⁶⁸ 87 FR 20361.

⁶⁹ 87 FR 20360.

The NPRM will induce employers to reduce or eliminate contributions to premiums for dependent coverage.

The ACA requires companies with 50 or more full-time employees to offer coverage to dependents of full-time workers but does not require them to contribute to this coverage.⁷⁰ According to the Kaiser Family Foundation, companies that offered health benefits in 2021 paid on average 83% of the premium for self-only coverage and 72% of the premium for family coverage.⁷¹ Employers with a large percentage of low-wage earners contributed significantly less – an average of 65% of premium – for family coverage.⁷²

By making millions of dependents eligible for PTCs, the NPRM incentivizes employers to reduce or eliminate contributions to dependent coverage. This is especially true for smaller companies subject to the employer mandate that employ low-wage workers. The proposed expansion of PTCs creates an incentive for employers and workers to convert the employer contribution to dependent coverage to taxable wages and shift the cost of insuring these dependents onto the federal government.

The agencies themselves acknowledge that employers will reduce their contributions to dependent coverage. The preamble states that the NPRM "would likely lead to a decrease in the total amount employers are spending on health insurance as the federal government increases spending on PTC."⁷³

Such a shift from ESI to PTCs is, of course, a costly one for the federal Treasury. As the CBO estimate indicates, Treasury will book more income and payroll tax receipts but incur tens of billions more in liabilities associated with the refundable PTCs. But it will also impose hardships on dependents of workers with ESI, as employers contribute less – or stop contributing entirely -- to the cost of the plan in which they're currently enrolled.

Conclusion

The ACA – and particularly its creation of PTCs -- has disappointed expectations. Far fewer people have enrolled in exchange-based coverage than CBO and other sources projected, premiums for individual coverage have more than doubled, and choices among insurers and insurance products have contracted.⁷⁴ Most coverage gains attributable to the law have come from its Medicaid expansion and not from federal subsidies for private exchange-based insurance.⁷⁵

⁷⁰ "Employer Shared Responsibility Provisions," Internal Revenue Service, undated.

<https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions>

⁷¹ "Employer Health Benefits: 2021 Summary of Findings," Kaiser Family Foundation, undated.

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

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Edmund Haislmaier and Abigail Slagle, "Premiums, Choices, Deductibles, Care Access, and Government Dependence Under the Affordable Care Act: 2021 State-by-State Review," Heritage Foundation, November 2, 2021. <https://www.heritage.org/health-care-reform/report/premiums-choices-deductibles-care-access-and-government-dependence-under>

⁷⁵ Edmund Haislmaier, "2017 Health Insurance Enrollment: Little Net Change, But Large Drop in Non-Group Coverage," Heritage Foundation, October 30, 2018, Table 1, page 2.

https://www.heritage.org/sites/default/files/2018-10/IB4913_0.pdf

The statute has succeeded, however, in preserving employer-sponsored coverage, including coverage of dependents. The NPRM threatens that achievement. It does so in a way that is contrary to the law and its broader objectives at a substantial cost to the federal Treasury.

Congress has the constitutional authority and the capacity to weigh this policy's pros and cons and amend the statute itself. The agencies do not. They should not finalize the NPRM.

Sincerely,

Doug Badger

Senior Fellow, Center for Health and Welfare Policy
Heritage Foundation

Senior Fellow
Galen Institute⁷⁶

⁷⁶ References to Heritage Foundation and the Galen Institute are for identification purposes only.