June 6, 2022

The Honorable Charles P. Rettig, Commissioner
Internal Revenue Service
United States Department of Treasury
1111 Constitution Ave, NW
Washington D.C., 20224

RE: IRS REG-114339-21, Affordability of Employer Coverage for Family Members of Employees

Submitted electronically on *Regulations.gov*

Dear Commissioner Rettig:

Families USA, a leading national voice for health care consumers, is dedicated to the achievement of high-quality, affordable health care and improved health for all. We strongly support the April 7, 2022 Internal Revenue Service (IRS) proposed rule, "Affordability of Employer Coverage for Family Members of Employees," 1.36B-2(c)(3)(v)(A)(2) of Title 26 of the Internal Revenue Code.

The proposed rule would amend the existing regulations regarding eligibility for the premium tax credit ("PTC") to provide that affordability of employer-sponsored minimum essential coverage for family members of an employee is determined based on the employee's share of the cost of covering those family members – and not on the cost of coverage for the employee alone. Below we provide information about the need for this change. We also support the two other clarifications made by this proposed rule.

The current rule, which determines that employer sponsored coverage is affordable to a family based on the employee's cost of self-only coverage without accounting for affordability for other family members, is contrary to the goals of the Patient Protection and Affordable Care Act (ACA) to ensure that everyone has access to affordable health coverage. We strongly agree that this should be changed. Under the current affordability test, employer-sponsored coverage is considered to be affordable to an employee *and to the employee's family* as long as the cost to the employee for self-only coverage does not exceed 9.61 percent[1] of the employee's household income. When the employer offers family coverage, the current rule does not provide the employee's family members the option to enroll in marketplace coverage with premium tax credits, even if premium contributions for the *family's* coverage under the employer sponsored plan would far exceed 9.61 percent of the household's income.

Families USA commented both on October 31, 2011 (p.11) and again on August 21, 2012 (p. 6) that the current IRS rule is an incorrect interpretation of statute. It is not plausible that Congress would have considered the cost of dependent coverage under 26 U.S.C. §5000(A)(e)(1)(C), which modifies section 5000A(e)(1)(B)(i), in determining whether a family was subject to penalties for going without coverage, yet ignored the cost of dependent coverage in determining whether family members were eligible for premium tax credits. This is why Congress referenced section 5000A(e)(1)(B), as modified by section 5000A(e)(1)(C), in its special rule on affordability for those with job-based coverage under 26 U.S.C. § 36B(c)(2)(C)(i)(II).

The proposed rule would address this problem: for family members ("related individuals"), if the required employee contribution for family coverage exceeded 9.61 percent of household income, the offer of coverage for those family members would be considered unaffordable and the family members could enroll through the marketplace with premium tax credits. We agree that in determining family affordability, sections 5000(e)(1)(B) and 5000(e)(1)(C) of the statute must be read together.

The rule addresses an affordability problem that has been documented by research and by individual experiences. In 2012, the Government Accountability Office (GAO) recommended that IRS and Treasury consider an alternative approach for determining family eligibility for premium tax credits, noting that as of 2009, about 460,000 children would remain uninsured if the test for affordability of family coverage was not altered.[i] In 2021, Kaiser Family Foundation estimated that of the millions of people affected by the high costs of employer sponsored family coverage, 451,000 were uninsured and 315,000 were buying individual market coverage at high, unsubsidized costs.[ii] In 2021, the employee contribution was at least $12,000 for family coverage for 20 percent of employees in small firms – an amount that would consume over a quarter of income for a family of three at 200 percent of poverty.[iii] The Bureau of Labor Statistics (BLS) has found that the average employee share of family premiums is 40% or more for the quarter of workers with the lowest wages, especially for workers in service occupations.[iv]

Navigators with the Virginia Poverty Law Center explain that the families they serve experience both dire and systemic problems due to this so-called "family glitch":

1. *The Family Glitch…not just a "glitch" but life or death for our neighbors fighting cancer or other chronic or serious conditions. One of my clients facing this is Mary. Mary's struggle is similar to thousands of Virginia spouses. She is fighting cancer and is uninsured because although her husband's employer offers an affordable and comprehensive plan to the EMPLOYEE; (as directed by the ACA;) the spousal coverage under the husband's employer plan costs $1200 with a high deductible. Mary and her husband cannot afford to pay a $1200/month employer insurance premium and Mary does not qualify currently for Medicaid or Medicare….AND SHE CANNOT PURCHASE A LIFE SAVING MARKETPLACE PLAN that would cost others NOT in the family glitch around $300/month. Mary goes without insurance, applies for charity care, does not keep up with her cancer treatment and is more likely to die than those with health coverage. This policy must change to allow spouses and children the opportunity to be insured through the marketplace. It is a matter of life and death.*
2. *Some of our most critical employees [in southwest Virginia], those working within Head Start and other Community Action programs, have low wages but are usually over-income for Medicaid. Their employer sponsored coverage is considered to meet the ACA guidelines for required "comprehensive" coverage but paying 60% of expenses is considered to be "comprehensive". Many of these employees pay up to 8% of their income towards the premium of their high deductible employee-only plan which often they cannot use because of the high deductible and their low wages. It is way out of reach for working poor families in this situation to add a spouse or child to this employer plan as the cost is over $1000/month. [The navigator went on to explain how an improvement beyond that proposed in the rule would be of even greater help:] Families should be given the opportunity to apply for ACA marketplace plans for the whole household if the deductibles from employer plans are too high for the employee and/or spousal and family coverage premiums or deductibles are too expensive.*[v]

Among the families affected by the glitch who have told their stories to the press or to social media are families that would have to pay a fourth or nearly half of their income for employer sponsored coverage, though they would be eligible for premium tax credits were it not for the family glitch.[vi] [vii] [viii] Faced with impossible costs, family members go uninsured or buy plans with unaffordable deductibles.[ix]

Changing the test of affordability as proposed could help more than 700,000 people purchase health insurance through the marketplace with premium tax credits.[x] Third Way and Urban Institute have each estimated the substantial savings families will realize.

1. Third Way's estimates are based on premium charges under the enhanced subsidies offered under the American Rescue Plan Act. Their analysis shows that capping family premiums would have saved a typical married family of four with income at 200% of the federal poverty guidelines $4,152 a year in 2021. Families of other sizes and types will also experience significant savings.[xi]
2. Urban Institute's 2021 estimates were based on savings that would result from fixing the family glitch absent the American Rescue Plan Act's enhanced subsidies. Urban Institute found that allowing people to switch from employer-sponsored insurance to marketplace coverage with premium tax credits would help 710,000 people enroll in more affordable marketplace coverage with premium tax credits and would save them an average of $400 per person in premiums. The savings for people under 200 percent of poverty guidelines would be $580 per person.[xii]

Such a change would help families avoid multiple deductibles as well as multiple premiums. Kaiser Family Foundation found in 2021 that more than 5.1 million people fall in the ACA family glitch. Of those, 4.4 million people (85%) were currently enrolled through employer-sponsored health insurance, but "likely spending far more for health insurance coverage than individuals with similar incomes eligible for financial assistance on the ACA Marketplaces and could spend less on premiums if they could enroll in Marketplace plans and qualify for subsidies."[xiii]

This proposed rule would likely improve the nongroup market risk pool, lowering premiums. Both Urban Institute and Kaiser Family Foundation[xiv] have found that the majority of people falling into the family glitch are in good, very good or excellent self-reported health, and that the nongroup market risk pool may benefit from these individuals enrolling through the marketplace. Urban Institute estimated that health insurance premium in the nongroup market would decline about one percent nationwide.

The proposed rule makes two other changes that we support: The rule clarifies that an employer-sponsored plan would have to provide at least a 60 percent minimum value to those family members (that is, cover at least 60 percent of the allowed cost of benefits). This would include inpatient hospitalization and physician services – and if the plan does not provide this minimum value, family members could enroll in a marketplace plan. Finally, the proposed rule clarifies that premium refunds received as a result of medical loss ratios do not count as income since they were not refunded in the same year that the person incurred premium liability. We support these clarifications. These are reasonable and family-friendly policies.

For all of these reasons, we urge the IRS to finalize the rule as proposed on April 7, 2022. Please contact Cheryl Fish-Parcham, Director of Access Initiatives, at cparcham@familiesusa.org, if you have any questions.

Sincerely,

Frederick Isasi, JD, MPH
Executive Director