June 6, 2022

Submitted via www.regulations.gov

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

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

Dear Sir or Madam,

I write on behalf of the American Benefits Council ("the Council"), in connection with the proposed regulations entitled Affordability of Employer Coverage for Family Members of Employees, issued by the U.S. Treasury Department and the Internal Revenue Service (IRS) (the "proposed regulations").

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

By way of background, the proposed regulations impact eligibility of *the family members* of an employee for the premium tax credit (PTC), a tax credit that subsidizes coverage on the Affordable Care Act (ACA) exchanges for certain low-income individuals. Among other rules, an individual is not eligible for the PTC if she or he has an offer of "affordable" employer-sponsored coverage that provides "minimum value" or if she or he is enrolled in employer-sponsored coverage, regardless of whether the coverage is affordable or provides minimum value. Under current rules, an offer of

employer-sponsored coverage *to an employee* is considered "affordable" if the portion of the premium the employee is required to pay for self-only coverage does not exceed 9.5% (as adjusted) of the employee's household income (HHI).[1] And under current regulations, to determine if *the family members of an employee* received an affordable offer of employer-sponsored coverage, the rules also look to whether the employee had an affordable offer of self-only coverage. The current regulations also provide that an employer-sponsored plan is considered to provide minimum value if it has at least a 60% actuarial value, based on benefits provided to the employee, and it provides substantial coverage of inpatient hospital services and physician services.

The proposed regulations do not amend how affordability and minimum value are determined for employees but would amend these existing regulations with regard to family members of employees. Specifically, the proposed regulations provide that affordability of employer-sponsored coverage for family members of an employee is determined based on the cost of family coverage, not the cost of self-only coverage. The proposed regulations also provide that when determining whether coverage provides minimum value for a family member of an employee, that determination is based on the level of coverage provided to the family members under the employer-sponsored plan.

We understand that the goal of these proposed changes is to "save hundreds of thousands of families hundreds of dollars a month," to provide additional insurance options for low-income families and to prompt uninsured individuals to enroll in coverage, and that these actions are part of the administration's broader efforts to expand affordable, quality health coverage.[2] We note that employers have long worked to provide high-quality, affordable coverage to many millions of employees and their families and we share the goals of the administration, including as reflected in the proposed regulations, of ensuring widespread access to affordable, high-value health coverage.

Moreover, because our membership generally consists of large employers, we note that we view the proposed regulations through the large employer lens and, accordingly, wish to address the ACA provisions related to the PTC which most directly impact large employers – the employer shared responsibility provisions under Internal Revenue Code ("Code") Section 4980H (the "employer mandate") and the

[1] Affordability for the PTC is based on HHI even though it can be based on certain safe harbor amounts for purposes of the employer mandate.

[2] See https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/05/fact-sheet-biden-harris-administration-proposes-rule-to-fix-family-glitch-and-lower-health-care-costs/ and https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/05/executive-order-on-continuing-to-strengthen-americans-access-to-affordable-quality-health-coverage/.

employer reporting obligations under Code Section 6056 (the "employer reporting requirements").

As a general matter, we wish to thank Treasury and the IRS for crafting regulations that are narrowly tailored to impact only the PTC for family members of employees and which do not impact the employer mandate or the employer reporting requirements. While the Council appreciates the goals of the proposed regulations, it is also extremely important to our members that the changes to PTC eligibility for family members not directly or indirectly change in any way the obligations or liability for employers under the employer mandate or the employer reporting requirements. This is not only important to our members due to the extensive efforts they have taken since the enactment of the ACA to come into compliance with these provisions and the immense burdens that would come with revising these requirements, it is also the outcome necessitated by the statute.

As you know, in general, large employers must offer affordable, minimum value coverage to ACA-defined full-time employees in order to avoid an employer mandate penalty. This is because under the statute, in general, receipt of the PTC *by a full-time employee* gives rise to the penalty (and can impact the amount of the penalty). The employer can avoid penalty liability by offering full-time employees affordable, minimum value coverage, which has the effect under the statute and existing regulations of rendering them ineligible for the PTC. In clear contrast, per the statute, receipt of the PTC by a family member of an employee does not give rise to an employer mandate penalty and so there is no commensurate requirement that employers offer affordable, minimum value coverage to family members of employees.[3] Moreover, the employer reporting provisions are intended to support enforcement of the employer mandate provisions, and as Treasury and the IRS are aware, any changes to the employer reporting requirements or the related forms and instructions impose an extensive burden on employers and should be avoided (and if pursued, subject to notice and comment rulemaking).

As such, we emphasize that we appreciate that the proposed regulations do not appear to impact, or result in any changes to, the employer mandate or employer reporting obligations, in that the regulations impact only the affordability determination for dependents, rather than employees. We urge Treasury and the IRS, in finalizing the regulations, to be very deliberate in avoiding any impacts or changes under those provisions and to state explicitly in the preamble that the regulations are

[3] To avoid an employer mandate penalty under Code Section 4980H(a) a large employer must offer coverage to at least 95% of its full-time employees *and their dependents* (as defined in 26 CFR § 54.4980H-1(a)(12)) but for this purpose, an employer is considered to offer coverage to dependents without regard to whether the coverage offered is affordable or provides minimum value. *See* 26 CFR § 54-4980H-4(a). That is, while large employers must generally offer coverage to dependents to avoid an employer mandate penalty, they are not required to offer *affordable, minimum value* coverage to dependents.

not intended to, and do not impact, the employer mandate or employer reporting provisions.[4]

On a more practical level, we urge Treasury and the IRS to work closely with the U.S. Department of Health and Human Services (HHS) to ensure that clear resources be made available for families considering whether to enroll in exchange coverage and elect the PTC, instead of employer-sponsored coverage, in light of the new rules. This is particularly important because, as explained by Treasury and the IRS, while for some families "split coverage" (*i.e.*, the employee enrolling in employer-sponsored coverage and the family enrolling in the exchange) could lead to lower premiums for the family as a whole, 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, two out-of-pocket limits could also increase costs for families, and moving family members from employer-sponsored coverage to exchange coverage could mean lower health reimbursement arrangement or health savings account contributions from employers. Treasury and the IRS note that many families who will be newly eligible for the PTC would not see savings in the combined cost of premiums and cost-sharing and they also note that many families may prefer benefits and provider networks of employer coverage, compared to exchange coverage. They also note that taking all of this together, new take-up for exchange coverage may be modest for eligible families.

Accordingly, it is essential that the Treasury Department, the IRS and HHS (and the states) work together to provide clear resources to individuals both generally and as part of the exchange application, to ensure that the families who choose to enroll in split coverage are the families that will benefit from doing so. We note that our employer members are thinking about ways to educate employees affected by this new change on the factors to consider in making their enrollment decision, but ideally clear, accessible resources would be made available from Treasury, IRS and HHS that could be shared with employees.

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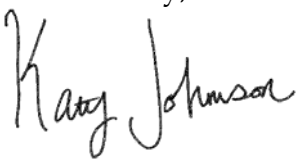
[4] For the sake of completeness, we note that a situation has to been brought to our attention in which the proposed regulations could have an indirect impact on employer mandate penalty liability – namely, for a large employer that does not offer affordable, minimum value coverage to some of its full-time employees, it could see an increase in employer mandate liability for full-time employees who previously were ineligible for the PTC due to an offer of coverage by their spouses' employer (because it was considered affordable and minimum value under the current regulations) but who become newly eligible for and receive the PTC under the proposed regulations (if the offer of coverage from the spouse's employer is no longer affordable or minimum value). We do not have a sense of how many employers might be impacted and the vast majority of our members offer their full-time employees affordable, minimum value coverage (and so this set of facts would generally not apply). However, we note the issue for Treasury and IRS to consider, to the extent that the intent of the proposed regulations is solely to expand PTC eligibility for dependents, not to impact the employer mandate.

Thank you for the opportunity to submit these comments. If you have any questions or would like to discuss these recommendations further, please contact us at (202) 289-6700.

Sincerely,



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