



Charles N. Kahn III  
President and CEO

June 6, 2022

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

Submitted electronically via <http://www.regulations.gov>

**RE: Affordability of Employer Coverage for Family Members of Employees (IRS Reg-114339-21)**

Dear Commissioner Rettig,

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services.

The FAH appreciates the opportunity to submit comments to the Internal Revenue Service (IRS) regarding its proposed rule published in the Federal Register on April 7, 2022 proposing changes to its existing regulations that implement section 36B of the Internal Revenue Code of 1986 (IRC) with respect to eligibility for the premium tax credit (PTC) to provide that affordability of employer-sponsored minimum essential coverage (employer coverage) for family members of an employee is determined based on the employee's share of the cost of covering the employee and those family members, not the cost of covering only the employee. The proposed regulations would also add a minimum value rule for family members of employees based on the benefits provided to the family members.

## I. Affordability Rule for Related Individuals

The FAH supports the proposed rule’s alternative interpretation of the relevant statutory provisions for the test of what constitutes affordability with respect to employer coverage and eligibility for premium tax credits to address what is commonly referred to as the “family glitch.” Eligibility for PTCs in the ACA Marketplaces is based not only on whether or not the employee is offered affordable employer-sponsored coverage, but also whether the employee’s family is offered affordable employer-sponsored insurance. Under current regulations, the definition of affordable, for both the employee and the family, is based only on the cost of individual (self-only) coverage; it fails to take into account the cost of family coverage, which is substantially more expensive. The impact of this interpretation is that the family members of many low-income workers cannot get access to PTCs even though the cost of family coverage is clearly unaffordable. Because of the current interpretation of the relevant statutory provisions, affordable Marketplace coverage has been unavailable to hundreds of thousands of families because they do not qualify for PTCs under the current regulatory criteria.

The FAH agrees that the proposed statutory interpretation that would revise the test of affordability is not only consistent with the policy goal of the ACA to expand access to affordable, comprehensive health insurance to uninsured [and underinsured] Americans, but that the interpretation is in fact consistent with the language of the relevant statutory provisions in IRC sections 36B(c)(2) and 5000A(e)(1). This interpretation would also be consistent with the regulatory interpretation of IRC section 5000(c)(1), which established the test for determining affordability of employer coverage for purposes of the penalty under the individual mandate (which has since been zeroed out) in section 1.5000A-3(e)(3)(ii)(B) of the regulations. The same definition of affordability should apply for purposes of eligibility for the premium tax credit. In 2021, the affordability standard for employer-sponsored coverage was 9.83 percent of family income.<sup>1</sup> In 2021, the average employee contribution for self-only coverage was \$1,299.<sup>2</sup> As an example, for a family of three with income of 150 percent of the Federal Poverty Level (FPL),<sup>3</sup> or annual income of \$32,940, that average self-only contribution represents 3.94 percent of the family’s income, well below 9.83 percent standard—thus deemed “affordable” and making the employee *and* family members ineligible for PTCs. However, the average contribution toward family employer-sponsored coverage in 2021 was \$5,969,<sup>4</sup> or 18.12 percent of income for this low-income family. Having to pay 18 percent of a family’s income toward health insurance is clearly “unaffordable” and, in this example, is the appropriate amount to consider for this family’s affordability test, not based on the self-only coverage (4 percent). When two interpretations of the statutory provision are possible, it is puzzling that the existing rule would overlook the qualifying language of the flush material following section 36B(c)(2)(C)(i)(II) and

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<sup>1</sup> IRS Rev. Proc. 2021-23, <https://www.irs.gov/pub/irs-drop/rp-21-23.pdf>.

<sup>2</sup> Kaiser Family Foundation, “2021 Employer Health Benefits Survey,” Nov. 10, 2021, <https://www.kff.org/report-section/ehbs-2021-summary-of-findings/>.

<sup>3</sup> Calculated from 2021 Poverty Guidelines for the 48 contiguous states and the District of Columbia, HHS, “Annual Update of the HHS Poverty Guidelines,” 86 FR 7733, <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-01969.pdf>.

<sup>4</sup> Op cit.

instead adopt a standard inconsistent with similar language in section 5000A(e)(1)(C) as promulgated in regulations at section 1.5000A-3(e)(3)(ii)(B).

The FAH urges the IRS to finalize the alternative interpretation of affordability with respect to employer-sponsored insurance proposed in this rule. It will expand families' access to needed, affordable coverage under ACA Marketplace plans, which in many instances will reduce uninsurance and replace less comprehensive policies many families have opted to enroll in given the lack of access to PTCs under the definition of affordability under the current regulations.

## **II. Minimum Value**

Currently, eligible employer-sponsored plans are considered to provide minimum value if the plan's share of the total allowed cost of benefits provided to an employee is at least 60 percent. The IRS proposes to apply a similar minimum value rule for the employee's family members based on the level of coverage provided to family members under an employer-sponsored plan. The FAH supports this change to align with the change proposed regarding the affordability rule as well as in prior regulations such as section 1.5000A-3(e)(3)(ii)(B). This update is appropriate to ensure consistent assessment of the costs and coverage for not only the employee but also the true costs and coverage of related individuals.

The proposed rule would also clarify that employer-sponsored coverage, in addition to covering at least 60 percent of the total allowed costs of benefits under the plan, must provide "substantial coverage of physician services and inpatient hospital services" for employees and family members to qualify as minimum value coverage. This has been the IRS policy in place since 2014.<sup>5</sup> Simply put, if an employer plan does not cover inpatient hospital and physician services, then it is clearly not providing minimum value. Thus, the FAH supports codifying this longstanding policy into regulation.

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The FAH appreciates the opportunity to offer comments on this proposed IRS regulation to address the family glitch. proposed rule. If you have any questions or would like to discuss further, please do not hesitate to contact me or a member of my staff at (202) 624-1534.

Sincerely,



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<sup>5</sup> IRS Notice 2014-69, "Group Health Plans that Fail to Cover In-Patient Hospitalization Services," <https://www.irs.gov/pub/irs-drop/n-14-69.pdf>.