



PROPOSED ACTION
MEMORANDUM

Fixing the Affordable Care Act’s “Family Glitch”

Department of Treasury
December 2020

I. Summary

Millions of low- and middle-income individuals are currently barred from receiving premium tax credits (PTCs) for Affordable Care Act (ACA) coverage, because someone in their family has an offer of employer-sponsored coverage that is considered “affordable” for just that employee. This “family glitch” stems from a Treasury Department (Department) interpretation that an employer’s offer of coverage is affordable based on the cost of employee-only (rather than family) coverage. Thus, when an employee is offered affordable employee-only coverage, the employee *and* their family members are ineligible for PTCs—even if the cost of employer-sponsored family coverage exceeds the ACA’s affordability threshold.

This memorandum proposes that the Department, in consultation with the Department of Health and Human Services (HHS), adopt an alternative interpretation of the affordability test to account for the cost of coverage for all eligible family members. This would separate the affordability determination for employee-only and family coverage, and enable millions of low-income family members to receive PTCs for ACA coverage. (Employees with an offer of affordable employee-only coverage would still be barred from receiving PTCs, but their family members would not be.) The Department should adopt this new interpretation using notice-and-comment rulemaking.

II. Justification

The family glitch is inconsistent with the goals of the ACA and unfairly penalizes family members of low-income workers, who face higher premiums as a result. Given the need to expand access to affordable coverage, promote financial security, and respond to the COVID-19 crisis, the Department should revise its affordability test to account for the cost of family coverage.

Job-based family coverage is increasingly unaffordable, especially for low-income families. The vast majority of employers continue to offer family coverage, but average premiums and employee contribution have increased significantly over time.¹ The average employee contribution for family coverage (27% in 2020) has increased by 13% since 2015 and 40% since 2010.² The average contribution rate is even higher (38% in 2020) at employers with a relatively large share of lower-wage workers.³ Six percent of covered employees, including 17% of those in small firms, are in a plan with an employee contribution of at least \$12,000 for family coverage.⁴

Fixing the family glitch would extend PTC eligibility to millions, providing substantial financial relief to working families. One study suggests that 2.3 million people would gain access to PTCs, thereby reducing the ranks of the uninsured by about 700,000 people.⁵ A second study found that eligibility would extend to more than three million people, reducing the uninsured by about 406,000 people.⁶ Of those who would gain access

¹ Kaiser Family Foundation, 2020 Employer Health Benefits Survey at 52 (Oct. 8, 2020), <https://www.kff.org/report-section/chbs-2020-summary-of-findings/>. Average annual premiums for family coverage (\$21,342 in 2020) have increased by 22 percent over the last five years and 4 percent from 2019 to 2020 alone. *Id.* at 6.

² *Id.* at 8. In 2020, the average annual employee contribution for employee-only coverage was \$1,243 compared to \$5,588 for family coverage. The average employee contribution for family coverage was slightly lower in 2020 (27 percent) than in 2019 (30 percent).

³ *Id.*

⁴ *Id.*

⁵ Sarah A. Nowak et al., Alternatives to the ACA’s Affordability Firewall, RAND Corporation (2015), at 3, https://www.rand.org/pubs/research_reports/RR1296.html.

⁶ Matthew Buettgens et al., “Marketplace Subsidies: Changing the ‘Family Glitch’ Reduces Family Health Spending But Increases Government Costs,” *Health Affairs* (2016) 35(70): 1167-75. Not all those eligible would transition to Exchange coverage, but those who would are those with the lowest incomes.

to PTCs, more than 68% would be under age thirty-four.⁷ Fixing the family glitch would thus increase Exchange enrollment among younger and healthier enrollees, improving the health of the overall risk pool, and helping lower Exchange premiums for all enrollees. Some estimates of expected relief are even higher: the Agency for Healthcare Research and Quality estimated that 10.5 million adults and children were affected by the family glitch in 2014.⁸

The proposed interpretation would also promote enhanced economic security, a need made even more urgent by the pandemic and recession. People with incomes below 200% of the Federal poverty level (FPL) currently spend, on average, 14% of their income on premiums and out-of-pocket costs, compared to 7.9% for people whose income is between 200% and 400% of the FPL.⁹ Low-income families facing high costs would be among those most helped by a fix to the family glitch: most gaining eligibility have incomes between 200% and 400% of the FPL, with the greatest premium reductions for those under 138% of the FPL.¹⁰ The disproportionate impact of the family glitch on low-income children, in particular, is among the reasons why the U.S. Government Accountability Office recommended that the Department consider an alternative interpretation.¹¹

III. Current State

Under the ACA, individuals and families qualify for PTCs if: (i) their income is between 100% and 400% of the FPL, and (ii) they are not eligible for another source of minimum essential coverage (MEC), including certain employer-sponsored plans.¹² An employee is not treated as eligible for MEC (and thus qualifies for PTCs if they meet the income requirement) if: (i) they contribute more than 9.5%, adjusted annually, of household income towards premiums (i.e., the plan is not “affordable”), or (ii) their plan fails to cover at least 60% of total allowed costs (i.e., the plan does not offer “minimum value”).¹³ If an employee receives PTCs, their employer may face penalties under the ACA’s shared responsibility requirement on employers (the “employer mandate”).¹⁴

The ACA is clear that low- and middle-income employees qualify for PTCs only if their employer fails to offer an employer-sponsored plan at all, or if the offered plan fails to be affordable or of minimum value. But a question left open by the ACA is whether an employer-sponsored plan is “affordable” based on the cost of coverage only for the employee—or if this affordability test accounts for the cost of coverage for the employee’s family as well (i.e., whether family members are eligible for PTCs when an employer offers unaffordable family coverage).

⁷ *Id.* at 1170.

⁸ See Medicaid and CHIP Payment and Access Commission, Report to the Congress on Medicaid and CHIP (Mar. 2014), at 7, <https://www.macpac.gov/wp-content/uploads/2014/03/March-2014-Report-to-Congress-on-Medicaid-and-CHIP.pdf>.

⁹ Gary Claxton, Bradley Sawyer, and Cynthia Cox, “How Affordability of Health Care Varies by Income Among People with Employer Coverage,” Kaiser Family Foundation (Apr. 14, 2019), <https://www.healthsystemtracker.org/brief/how-affordability-of-health-care-varies-by-income-among-people-with-employer-coverage>.

¹⁰ Tara Straw, Trapped by the Firewall: Policy Changes Needed to Improve Health Coverage for Low-Income Workers, Center on Budget and Policy Priorities (Dec. 3, 2019), <https://www.cbpp.org/research/health/trapped-by-the-firewall-policy-changes-are-needed-to-improve-health-coverage-for-low>.

¹¹ U.S. Government Accountability Office, Children’s Health Insurance: Opportunities Exist for Improved Access to Affordable Insurance, GAO-12-648 (Jun. 22, 2012) at 12-17, <https://www.gao.gov/products/GAO-12-648>.

¹² I.R.C. §§ 36B(c), 5000A(f). Individuals must meet other criteria as well. For instance, married couples must file a joint tax return and an individual cannot be claimed as a dependent by another person.

¹³ I.R.C. § 36B(c)(2)(C). The required contribution percentage for 2020 is 9.78 percent. I.R.S. Rev. Proc. 2019-29. The Obama administration previously concluded that plans fail to provide “minimum value” if they do not provide substantial coverage for in-patient hospitalization services or physician services. Internal Revenue Service, Group Health Plans That Fail to Cover Inpatient Hospitalization Services, Notice 2014-69, <https://www.irs.gov/pub/irs-drop/n-14-69.pdf>.

¹⁴ I.R.C. § 4980H. The employer mandate applies to “applicable large employers” with 50 or more full-time equivalent employees. Penalties vary based on whether the employer fails to offer coverage at all or fails to offer affordable, minimum value coverage to full-time employees and dependents.

Currently, the Department bars an employee's family members from accessing PTCs when an employer offers coverage that is deemed "affordable" for the employee only.¹⁵ As a result, the employee *and* their family members are barred from PTC eligibility when the employee is offered affordable employee-only coverage. This is true even if the cost of employer-sponsored family coverage exceeds the ACA's affordability threshold of 9.5% of household income.

The Department concluded that the affordability test should be based on the cost of employee-only coverage (not family coverage) from I.R.C. Section 36B(c)(2)(C)(i), Section 5000A(e)(1)(B), and a 2011 analysis from the Joint Committee on Taxation (JCT). Under Section 36B(c)(2)(C)(i), an employer-sponsored plan is not affordable and thus does not qualify as MEC if "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." The provision then states that "[t]his 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 latter clause strongly suggests that family coverage could be included in the affordability test, but the Department concluded otherwise, based on the reference to Section 5000A(e)(1)(B), which defines the term "required contribution" as "the portion of the annual premium which would be paid by the individual ... for self-only coverage." The Department relied on this text to conclude that the affordability test for employers *and* family members must be based on employee-only coverage.¹⁶ As discussed below, the Department's analysis ignored Section 5000A(e)(1)(C), which lays out special rules for individuals related to employees.

The Department's interpretation also relied on a 2011 report from the JCT, in which the JCT also adopted this narrow interpretation of the affordability test.¹⁷ But, as discussed below, the JCT does not have legal authority over such matters and reached the opposite conclusion in earlier analyses while the ACA was being debated in Congress. An early Senate Finance Committee report also suggested that the affordability test would be based on family coverage.

To summarize, when an employee is offered affordable employee-only coverage (i.e., the employee's contribution towards premiums for *employee-only* coverage does not exceed 9.5% of household income), the employee *and* their family members are ineligible for PTCs. This is true even if the cost of family coverage would otherwise be unaffordable (i.e., the employee's contribution towards premiums for *family* coverage would exceed 9.5% of household income). While that interpretation was applauded by employer stakeholders, it was widely criticized by members of Congress and consumer advocates, and has prevented millions of low-income people from accessing PTCs for affordable ACA coverage.¹⁸

IV. Proposed Action

To eliminate the family glitch, the Department should amend 26 C.F.R. § 1.36B-2(c)(3)(v)(A)(2) as follows:

Affordability for related individual. Except as provided in paragraph (c)(3)(v)(A)(3) of this section, an eligible employer-sponsored plan is affordable for a related individual if the portion of the

¹⁵ 26 C.F.R. § 1.36B-2(c)(3)(v)(A)(2); 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (specifying that the affordability test for related individuals is based on the cost of self-only coverage and adding an example to confirm this interpretation); *see also* 77 Fed. Reg. 30377, 30380 (May 23, 2012); 76 Fed. Reg. 50931, 50935 (Aug. 17, 2011).

¹⁶ 78 Fed. Reg. at 7265; 76 Fed. Reg. at 50935.

¹⁷ JCT, General Explanation of Tax Legislation Enacted in the 111th Congress, JCS-2-11 (Mar. 16, 2011) at 265, <https://www.jct.gov/publications.html?func=startdown&id=3775> (stating that, for purposes of PTC eligibility, "[u]naffordable is defined as coverage with a premium required to be paid by the employee that is more than 9.5 percent of the employee's household income, based on the self-only coverage").

¹⁸ Julie Appleby, "Advocates Fear Tax-Credit Rule Will Exclude Some From Health-Care Benefit," *Washington Post* (Apr. 15, 2012); *see also* Tricia Brooks, The Family Glitch, *Health Affairs*, Health Policy Brief (Nov. 10, 2014), <https://www.healthaffairs.org/doi/10.1377/hpb20141110.62257/full/>.

annual premium the employee must pay for ~~self-only coverage~~ *coverage for all eligible related individuals* does not exceed the required contribution percentage, as described in paragraph (c)(3)(v)(A)(1) of this section. ...

This change would require the affordability test for related individuals to be based on family coverage without disturbing the affordability test for employees, which is in a separate provision in § 1.36B-2(c)(3)(v)(A)(1).

We recommend that the Department use standard notice-and-comment rulemaking procedures by issuing a notice of proposed rulemaking, accepting public comment for sixty days, and then issuing a final rule. Though the Department should use standard procedures, it should revise its interpretation without delay.¹⁹ The pandemic has resulted in widespread economic disruption, especially for low-income workers and their families, and the relief offered by the proposed interpretation is urgently needed to respond to the crisis and its ongoing effects.

Because some employers may have relied upon the enrollment of low-income family members in setting current premiums, the Department should set a delayed effective date with sufficient lead time, requiring the revised interpretation to go into effect for plan years beginning on or after January 1, 2022. Because some employer plans do not run on a calendar year basis, HHS should confirm that family members who are newly eligible for PTCs under the revised interpretation qualify for a special enrollment period through all Exchanges, even if not currently enrolled in MEC.

Legal and Policy Justifications for Fixing the Family Glitch

The Department has the authority to reinterpret Section 36B(c)(2)(C) and revise its policy with respect to the family glitch. This includes the discretion to change a prior interpretation so long as the interpretation is “rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.”²⁰ Policy changes are permissible and expected, and agencies can reconsider prior interpretations of statutory ambiguities to reflect new circumstances or a change in policy preferences.²¹

Fixing the family glitch would undoubtedly be a permissible construction of Section 36B(c)(2)(C)—indeed, the proposed interpretation is more faithful to the statute and consistent with the text, structure, and goals of the ACA. In revising its interpretation, the Department must explicitly acknowledge its change in policy, the arguments it made to justify its prior position, why it no longer finds those arguments to be persuasive, and its new view that the statute allows for an alternative reading. The Department must also address the effect on any reliance interests that would be affected by reversing prior policy (identifying such interests and explaining how they have been taken into account or why it is not appropriate to do so).²²

First, the Department’s current interpretation ignores the statutes’ special rules for family coverage. The current interpretation relies on the reference in Section 36B(c)(2)(C)(i)(II) to Section 5000A(e)(1)(B). Because this part of Section 5000A refers to self-only coverage, the Department believed its hands were tied. But that is not so. Congress expressly addressed coverage for family members in special rules in Sections 36B(c)(2)(C)(i) and 5000A(e)(1)(C). The Department ignored both provisions to conclude instead that the affordability test is the same for family members as for employees. The Department has never reconciled its

¹⁹ For context, prior rulemaking on the family glitch took about 1.5 years. The Department issued a notice of proposed rulemaking in August 2011 but did not finalize the rule for related individuals in its final rule issued in May 2012. Instead, the Department asked for additional comment and issued a subsequent final rule with the current interpretation in February 2013.

²⁰ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotations and citations omitted).

²¹ *Id.*

²² *Dep’t of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2575-76 (2019); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (1999) (*Fox*). The agency’s burden is not to convince a reviewing court that the new policy is better than the old policy, but that the new policy is permissible under the relevant statute, there are good reasons for it, and the agency believes it to be better. *Fox* at 515.

interpretation with these provisions or the fact that Congress, had it intended the family glitch, would not have included special rules in the ACA for related individuals.

Notably, the Department reached a *different* conclusion regarding a related provision on the exemption to the individual responsibility requirement (the “individual mandate”). In interpreting Section 5000A(e)(1)(C), the Department concluded that an employee’s required contribution towards *family* coverage, not employee-only coverage, dictated affordability for purposes of the exemption to the individual mandate.²³ The Department thus adopted inconsistent interpretations for adjacent statutory provisions, by considering the cost of *employee-only* coverage for PTC eligibility but the cost of *family* coverage for exemptions to the individual mandate. Although the penalty for failing to maintain MEC was set to \$0 beginning in 2019, the federal government should still ensure consistency among its interpretations of adjacent statutory provisions.

Had Congress intended the special rules for dependents to use the same measure as for employees, it could have used similar language—or it could have omitted the special rules altogether. Instead, in requiring the use of the same test for affordability as for the individual mandate, Congress intended that the entire provision be applied, including the special rule in (e)(1)(C) that qualifies the application of the affordability test for employees in (e)(1)(B). Any reference to Section 5000A(e)(1)(B) in I.R.C. § 36B encompasses 5000A(e)(1)(C), because the meaning of Section 5000A(e)(1)(B) is always subject to the special rule in Section 5000A(e)(1)(C). In directing the Department to use the test in Section 5000A(e)(1)(B), Congress likely intended that the special rule should also apply.

Thus, the better reading—which the Department adopted for the purpose of determining eligibility for the exemption from the individual mandate—is that the measure of affordability should be “the required contribution of the employee” for family coverage. This is a better and more reasonable construction of the statute: the reference to Section 5000A(e)(1)(B) in Section 36B(c)(2)(C)(i) is a reference to Section 5000A(e)(1)(B) *as clarified by* the special rule in Section 5000A(e)(1)(C).

There is further support for the proposed interpretation, based on the statutory duties that the Secretary of HHS must fulfill in making PTC eligibility determinations. Under 42 U.S.C. § 18081(a)(3), the Secretary must determine whether an *individual’s* coverage (rather than an *employee’s* coverage) under an employer-sponsored plan is unaffordable.²⁴ Exchange enrollees who are eligible for PTC coverage because “the enrollee’s (or related individual’s) employer” fails to offer affordable MEC must report certain information to HHS.²⁵ This information includes “the lowest cost option for the enrollee’s or individual’s enrollment status and the enrollee’s or individual’s required contribution” towards the employer-sponsored plan.²⁶ There would be no reason for the statute to repeatedly distinguish between required contributions for an “enrollee” and an “individual,” or for HHS to require a related individual to report their required contribution for a plan, if the only relevant factor for the affordability test is the cost of employee-only coverage. These provisions were not cited and presumably not considered by the Department in its prior rulemaking.

These arguments provide a more-than-sufficient basis for the Department to conclude that the proposed interpretation is a better interpretation of the affordability test. As commenters noted, a “more cohesive and logical reading” is that Congress referenced Section 5000A(e)(1)(B) because it intended for the entire rule (including the special rule for related individuals) in Section 5000A(e)(1) to be applied to PTC eligibility.²⁷

²³ 78 Fed. Reg. 53646, 53659 (Aug. 30, 2013) (adopting 26 C.F.R. § 1.5000A-3(e)(3)(ii)(B)); 78 Fed. Reg. 39494, 39503 (Jul. 1, 2013) (“[T]he required contribution is the portion of the annual premium that the employee would pay for the lowest cost option for family coverage that would cover the employee and all individuals who are included in the employee’s family and are not otherwise exempt.”).

²⁴ See also 42 U.S.C. § 18081(e)(4)(B)(iii) (“If the Secretary notifies an Exchange that an enrollee is eligible for a premium tax credit ... because the enrollee’s (or related individual’s) employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage, the Exchange shall notify the employer of such fact and that the employer may be liable for the payment assessed under section 4980H of title 26.”).

²⁵ 42 U.S.C. § 18081(b)(4).

²⁶ *Id.* at § 18081(b)(4)(C).

²⁷ See, e.g., National Women’s Law Center, Proposed Rulemaking for the Health Insurance Premium Tax Credit (Oct. 31, 2011), <https://www.regulations.gov/document?D=IRS-2011-0024-0131>.

Section 36B(c)(2)(C) should thus be read with Section 5000A(e)(1) as a whole and Section 18081 to reach a consistent result for family coverage.

(Contrary to the Department's prior assertions that the statute commands the current interpretation, the Department could have reached an alternative interpretation. At a minimum, the statute is ambiguous on the question of how an offer of employer-sponsored family coverage should be treated for purposes of PTC eligibility. This view is supported by ideologically diverse observers, who have long recognized that the statute is ambiguous,²⁸ and conflicting evidence from the ACA's legislative history.²⁹ Despite conflicting interpretations in JCT reports, it appears that JCT excluded the costs of PTCs for eligible family members when scoring the ACA in 2010.³⁰ The Department's interpretation has been attributed more to policy considerations, such as a desire to avoid higher federal outlays and administrative burdens on employers and brokers.³¹)

Second, the proposed interpretation is more consistent with the ACA's goal of expanding access to affordable health insurance. The current interpretation unfairly penalizes low-income workers and their families, and creates barriers to affordable coverage. Observers and commenters raised just that point, noting that the current interpretation "excludes people Congress intended to cover" and is "simply incongruent" with Congress's intent.³² Despite many comments with detailed legal analysis, alternative interpretations, and a public hearing on November 17, 2011, the Department included virtually no response to these concerns in final rulemaking to adopt the current interpretation.³³

Third, there are several factual and policy reasons that would justify the Department's alternative interpretation. To insulate maximally the policy change from judicial vacatur, the Department should explain why it believes the revised interpretation is better policy (and not merely legally permissible). The Department

²⁸ See, e.g. Avik Roy, *Obamacare Bombshell: 4 Million People Who Thought They Were Gaining Coverage, Won't*, *Forbes* (Aug. 10, 2011) ("The reasoning behind the JCT's narrow interpretation is not obvious."); Brittany La Couture & Conor Ryan, *The Family Glitch*, American Action Forum (Sep. 18, 2014), <https://www.americanactionforum.org/research/the-family-glitch/> ("Since several provisions of the law are rather ambiguous, they unfortunately combine to create a perfect storm where obtaining affordable health insurance is practically impossible."); Tim Jost, *Implementing Health Reform: Premium Tax Credits*, Health Affairs Blog (Aug. 13, 2011), <https://www.healthaffairs.org/doi/10.1377/hblog20110813.013019/full/> ("The statute is not entirely clear, however, whether the 9.5 percent applies only to the cost of self-only coverage or also to the cost of family coverage when the taxpayer has a family."); Larry Levitt & Gary Claxton, *Measuring the Affordability of Employer Health Coverage*, Kaiser Family Foundation (Aug. 24, 2011), <https://www.kff.org/health-costs/perspective/measuring-the-affordability-of-employer-health-coverage/> ("While it's clear how this applies to a single worker without any dependents, determining a family's eligibility for premium tax credits is far less clear in the law."); Brooks, *supra* note 18 ("While rooted in the ambiguity of the ACA with respect to affordability for family members, the problem emerges from a narrow interpretation of 'affordable'")

²⁹ An October 2009 report from the Senate Finance Committee noted that the affordability test would account for the cost of family coverage by being "based on the type of coverage applicable (e.g., individual or family coverage)." S. Rep. 111-89, 111th Cong., 1st Sess. at 39 (Oct. 19, 2009), <https://www.finance.senate.gov/imo/media/doc/prb102109a3.pdf>. Similar language was included in a JCT analysis released on the day that the U.S. House of Representatives passed the ACA on March 21, 2010. See JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, In Combination With the "Patient Protection and Affordable Care Act,"* JCX-18-10 (Mar. 21, 2010) at 15, <https://www.jct.gov/publications.html?func=startdown&id=3673> ("Unaffordable is defined as coverage with a premium required to be paid by the employee that is 9.5 percent or more of the employee's household income, based on the type of coverage applicable (e.g., individual or family coverage)."); see also Roy, *supra* note 28 ("[T]he JCT's narrow point of view wasn't apparent at the time that PPACA was being voted upon, because on the day the final vote took place in the House, the JCT told Congress something different."). The same JCT analysis included a contradictory conclusion in a later footnote, and the JCT issued a correction for the first reference in May 2010, long after the ACA was enacted. *Id.* at 33, Footnote 70 ("Although family coverage costs more than 9.5 percent of income, the family does not qualify for a tax credit regardless of whether the employee purchases self-only coverage or does not purchase self-only coverage through the employer."); see JCT, *Errata for JCX-18-10: Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, In Combination With the "Patient Protection and Affordable Care Act,"* JCX-27-10 (May 4, 2010) at 1, <https://www.jct.gov/publications.html?func=startdown&id=3682>.

³⁰ See Roy, *supra* note 28.

³¹ Brooks, *supra* note 18 ("The primary concern was that employers would raise the employee's share of family coverage, driving even more families to opt for premium tax credits. Ultimately, these concerns overrode other legal interpretations and fairness arguments when the IRS finalized the rule as proposed and actualized the family glitch.")

³² Letter from Congressman Sander M. Levin, et. al. to Secretary Timothy Geithner, Department of Treasury (December 6, 2011); see Appleby, *supra* note 18 and comments from organizations such as the Center on Budget and Policy Priorities, First Focus, the National Health Law Program, the National Women's Law Center, and the Service Employees International Union. All comments are available here: <https://www.regulations.gov/document?D=IRS-2011-0024-0001>.

³³ 78 Fed. Reg. at 7265 ("While several comments supported this rule, other comments asserted that the affordability of coverage for related individuals should be based on the portion of the annual premium the employee must pay for family coverage."); 77 Fed. Reg. at 30380 ("Commentators suggested that the affordability of coverage for related individuals should be based on the portion of the annual premium the employee must pay for family coverage.")

would be expected to cite the data noted above, including the number of low-income people that would gain coverage, a reduction in the number of uninsured people, the burden that the current interpretation places on low-income families, improvements to the health of the Exchange risk pool through higher enrollment, and the need to expand access to affordable coverage during and in the aftermath of the COVID-19 pandemic and recession.

Some of these rationales will be bolstered by the prior rulemaking record. A review of the publicly available comments shows little support for the current interpretation.³⁴ Even some stakeholders that supported the rule acknowledged the need for access to coverage for family members and would likely support an alternative interpretation.³⁵

Fourth, fixing the family glitch as proposed has no impact on potential liability under the employer mandate. While large employers must offer coverage to 95% of full-time employees and their dependents, the employer mandate penalty is only triggered if an *employee* receives PTCs through the Exchange.³⁶ The proposed interpretation would not disturb employee eligibility for PTCs, meaning that low-income workers would still be barred from accessing PTCs if they have an offer of affordable employee-only coverage from their employer—but their families would not be. Thus, employers would not face higher employer mandate penalties simply because an employee’s family members received PTCs through the Exchange.

Employers might try to argue that the revised interpretation could increase employer mandate penalties, since more people will be eligible for PTCs—as described in the footnote below.³⁷ Even if true, any increased liability would only occur because an employer failed to satisfy the employer mandate as it exists now. Employers are only penalized for failing to offer coverage, or failing to offer coverage that is affordable and of minimum value, when an *employee* receives PTCs through the Exchange. The same would be true under the revised interpretation, even if some employers were no longer shielded from liability because of the cost of coverage for an employed spouse.

Concerns could be neutralized through a delayed effective date to give employers time to ensure full compliance with the employer mandate (a requirement they should already be complying with). The Department could solicit comment on this issue to see how widespread these instances would be and, if needed, consider additional safe harbors to the employer mandate or a temporary nonenforcement policy.

³⁴ In contrast to the many commenters opposed to the current interpretation, supportive comments were concentrated among organizations that include Aetna, Aon Hewitt, the Council of Insurance Agents & Brokers, the Employers for Flexibility in Health Care Coalition, the National Association of Health Underwriters, and the National Business Group on Health. Other major insurer stakeholders, such as America’s Health Insurance Plans and the Blue Cross Blue Shield Association, were silent on this issue. The U.S. Chamber of Commerce did not initially comment on this provision but supported the current interpretation in comments filed in 2012. All comments are available here: <https://www.regulations.gov/document?D=IRS-2011-0024-0001>.

³⁵ The American Benefits Council, for instance, recognized that the current interpretation could create barriers for family coverage and expressed its support for a rule that makes PTCs available to family members when family coverage is “otherwise unaffordable for the employee’s spouse or dependent” based on household income. American Benefits Council, Notice of Proposed Rulemaking – Health Insurance Premium Tax Credit (Oct. 31, 2011), <https://www.regulations.gov/document?D=IRS-2011-0024-0062>.

³⁶ I.R.C. § 4980H(b)(1)(B); see 26 C.F.R. § 54.4980H-5(e)(2); 79 Fed. Reg. 8544, 8544 (Feb. 12, 2014) (“An employee’s receipt of a premium tax credit ... with respect to coverage for a dependent only will not result in liability for the employer under section 4980H.”).

³⁷ For instance, if a husband has an offer of affordable self-only (but not spousal) coverage from Employer A, his wife is barred from accessing PTC through the Exchange even though her employer, Employer B, does not offer coverage at all. Under the revised interpretation, the wife would no longer be barred from PTC eligibility and could access subsidies through the Exchange. Since Employer B does not offer coverage, it could be newly subject to employer mandate penalties because the wife, its employee, accessed PTCs through the Exchange.

