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Submitted Through the Federal E-rulemaking Portal

CC:PA:LPD:PR (REG-114339-21)
Room 5203
Internal Revenue Service
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The Honorable Lily Batchelder
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Re: Affordability of Employer Coverage for Family Members of Employees – NPRM Request for Comments (REG-114339-21)

Dear Ms. Batchelder and Mr. Paul:

We are pleased to submit this comment on the Notice of Proposed Rulemaking published by the Department of the Treasury and the Internal Revenue Service in the Federal Register on April 7, 2022.[1] We are experts in tax law and the ACA offering input on statutory analysis relevant to the proposed rule. Huang and Kaercher are staff of the Tax Law Center at NYU Law. Levitis is employed by the Urban Institute, but the views in this public comment are his own and should not be attributed to the Urban Institute, its trustees, or its funders.

Sincerely,

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Jason Levitis
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[1] Affordability of Employer Coverage for Family Members of Employees, REG-114339-21, 87 Fed. Reg. 20,354 (April 7, 2022).

[2] Support for the Urban Institute's contribution to this comment letter was provided by the Robert Wood Johnson Foundation. The views expressed here do not necessarily reflect the views of the Foundation.

Michael Kaercher
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Enclosure

cc: Clara Raymond
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Comment on NPRM - Affordability of Employer Coverage for Family Members of Employees

This comment has two parts. First, a brief background of the affordable employer coverage rule that is known as the "family glitch," analyzing the different statutory interpretations taken by the final regulations published on February 1, 2013[1] (the "2013 Final Regulations") and a Notice of Proposed Rulemaking published on April 7, 2022[2] (the "2022 NPRM"). Second, a close reading and statutory analysis of the Affordable Care Act ("ACA").[3] Based on closely reading the ACA, we conclude that the affordability rule in the 2013 Final Regulation was incorrect, and that the rule in the 2022 NPRM is faithful to the ACA's plain language, statutory construction, and legislative intent.

I. Background on the Family Glitch

This part of the comment provides a brief background and history of the family glitch, starting with passage of the ACA, and walking through the regulatory history to date.

1. The ACA and the Affordability Test

The ACA was enacted in 2010. A (perhaps the) primary goal of the ACA is to expand health coverage by making affordable healthcare available to more people.[4] In furtherance of this goal, the ACA included a premium tax credit ("PTC"). The PTC is a premium subsidy that helps address the high cost of health insurance premiums for families with modest incomes who do not

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[1] Health Insurance Premium Tax Credit, T.D. 9611, 78 Fed. Reg. 7,264 (February 1, 2013) ("2013 Final Regulations").

[2] Affordability of Employer Coverage for Family Members of Employees, REG-114339-21, 87 Fed. Reg. 20,354 (April 7, 2022) ("2022 NPRM").

[3] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 1199 (2010).

[4] *See, e.g.*, H.R. Rep. No. 111-299, pt. 3, at 57–60 (2009) (describing the purpose of H.R. 3200—a House precursor to the ACA—as being "to provide affordable, quality health care for all Americans and to reduce the growth in health care costs. . . . It provides for comprehensive reform in three key areas: [(i)] Affordable Health Care Choices [(ii)] Medicare and Medicaid Improvements, [and (iii)] Public Health and Workforce Development"); S. Rept. 111-89, at 8 (2009) (describing the goals of S. 1796—a Senate precursor to the ACA—as "expanding health care coverage to the uninsured, reducing health care costs and improving the quality of care by transforming the health care delivery system") Health and Human Services, *About the ACA* (last accessed May 26, 2022) (noting that the three primary goals of the ACA are 1) to make affordable health insurance available to more people, 2) to expand the Medicaid program to cover all adults with income below 138% of the federal poverty level, and 3) to support innovative medical care delivery methods designed to lower the costs of health care generally). Note that, primarily because there was no conference committee for the ACA, the committee reports to the precursor bills cited in this footnote are some of the most illuminating legislative history available.

qualify for affordable coverage through employer-sponsored plans or government plans like Medicaid. An estimated 13 million people purchased coverage with the help of a PTC this year.[5]

The PTC is codified in section 36B of the Internal Revenue Code (the "Code"),[6] which provides the PTC for applicable taxpayers "who meet certain eligibility requirements, including that a member of the taxpayer's family enrolls in a qualified health plan ('QHP') through an Exchange for one or more 'coverage months.'"[7] Importantly, the PTC is generally not available if the taxpayer could enroll in other minimum essential coverage ("MEC") such as employer-sponsored coverage.[8] However, an individual is not considered eligible to enroll in employer-sponsored coverage if it is not "affordable," defined as the employee's required contribution exceeding the affordability percentage, which is currently 9.61% of household income.[9] The employee's required contribution is determined "within the meaning of section 5000A(e)(1)(B)."[10] Section 36B also extends this affordability requirement for employer-sponsored coverage "to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee," such as a spouse or a child.[11] An offer of employer-sponsored coverage generally prevents PTC eligibility only if the coverage provides minimum value, by covering at least 60% of total allowed costs.[12]

2. The 2011 Proposed Regulations and the 2013 Final Regulations

Proposed affordability rules were made public as part of a larger rulemaking published on August 17, 2011 (the "2011 Proposed Regulations").[13] These proposed regulations built out significant architecture for implementing the ACA, including rules related to the affordability test for employer-sponsored coverage. One issue these proposed regulations grappled with is how to determine whether an offer of employer-sponsored coverage is affordable for a related

[5] *See* Cynthia Cox & Krutika Amin, *For ACA Enrollees, How Much Premiums Rise Next Year is Mostly up to Congress*, Kaiser Family Foundation (May 18, 2022). The American Rescue Plan Act temporarily expanded the PTC in 2021 and 2022, increasing the number of people eligible for PTCs. *See* Pub. L. No. 117-2, sections 9661-9663, 135 Stat. 4, 182-84 (2021).

[6] Unless otherwise noted, all references to the "Code" are to the Internal Revenue Code of 1986, as amended, all references to "section" are to sections of the Code, and all references to "Treas. Reg. §" are to Treasury regulations issued thereunder.

[7] 2022 NPRM, 87 Fed. Reg. at 20,355.

[8] Section 36B(c)(2)(B) and (C).

[9] *See* section 36B(c)(2)(C) and Rev. Proc. 2021-36, 2021-35 I.R.B. 357 (August 30, 2021). The affordability percentage was initially set at 9.5%, for 2014. *See* section 36B(c)(2)(C). It is adjusted annually, as required by section 36B(c)(2)(C)(iv), and has ranged from the initial 9.5% to 9.86%. *See* Rev. Proc. 2018-34, 2018-23 I.R.B. 748 (May 22, 2018).

[10] *See* section 36B(c)(2)(C)(i)(II).

[11] Section 36B(c)(2)(C) (flush language).

[12] *See* section 36B(c)(2)(C)(ii).

[13] Health Insurance Premium Tax Credit, REG-131491-10, 76 Fed. Reg. 50,931 (August 17, 2011) ("2011 Proposed Regulations").

individual of an employee. On this point, the preamble to the 2011 Proposed Regulations stated that:

> an employer-sponsored plan [is] affordable for a related individual for purposes of section 36B if the employee's required contribution for self-only coverage under the plan does not exceed 9.5 percent of the applicable taxpayer's household income for the taxable year, even if the employee's required contribution for the family coverage does exceed 9.5 percent of the applicable taxpayer's household income for the year.[14]

Here is an example of how this rule can play out: Employee has household income of $50,000 for the year. Employer offers Employee employer-sponsored health coverage that satisfies the minimum value test. Employee's required contribution for the year is $2,000 (4% of income) for self-only coverage and $7,500 (15% of income) for family coverage. Employee has a spouse and a child. Because the offer of self-only coverage to the employee is affordable, the entire family is considered to have an offer of affordable coverage. As a result, Employee, Employee's spouse, and Employee's child are all ineligible for the PTC. This is the case even though family coverage costs more than 9.61% of the taxpayer's household income for the year (i.e., the affordability threshold for 2022). Because this rule leaves the family members with no coverage options deemed "affordable" under the ACA's own standards, it is known as the "family glitch."

The preamble to the 2011 Proposed Regulations describes the statutory analysis that led to this rule as follows:

> Section 36B(c)(2)(C)(i) prescribes the standards for determining whether employer-sponsored coverage is affordable for an employee as well as for other individuals. In the case of an employee, under section 36B(c)(2)(C)(i), an employer-sponsored plan is not affordable 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" for the taxable year. This percentage may be adjusted after 2014.
>
> In the case of an individual other than an employee, section 36B(c)(2)(C)(i) provides that "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 cross-referenced section 5000A(e)(1)(B) defines the term "required contribution" for this purpose as ''the portion of the annual premium which would be paid by the individual * * * for self-only coverage.[15]

The preamble then cites a Joint Committee on Taxation ("JCT") (the "2011 JCT Report") report as additional justification for this rule.[16]

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[14] *Id.*, at 50,935. *See also* Treas. Reg. § 1.36B-2(c)(3)(v)(A)(*2*) in the 2013 Final Regulations.

[15] 2011 Proposed Regulations, 76 Fed. Reg. at 50,935 (footnotes omitted).

[16] *Id.* (citing Joint Committee on Taxation, JCS–2–11, *General Explanation of Tax Legislation Enacted in the 111th Congress* 265 (2011)) ("[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").

More than 200 comments were submitted on the 2011 Proposed Regulations. Many of these comments specifically discussed the affordability rule. For example, a comment submitted by the Service Employees International Union (SEIU) provided a detailed analysis arguing that the affordability rule in the 2011 Proposed Regulations was inconsistent with the plain meaning and intent of the statute.[17]

The affordability rule was finalized without changes in the final regulations published on February 1, 2013[18] ("2013 Final Regulations"). The preamble explains this decision by simply restating the argument that

> The language of section 36B, through a cross-reference to section 5000A(e)(1)(B), specifies that the affordability test for related individuals is based on the cost of self-only coverage.[19]

The preamble then draws a contrast in the context of the individual shared responsibility provision, stating that "[b]y contrast, section 5000A, which establishes the shared responsibility payment applicable to individuals for failure to maintain minimum essential coverage, addresses affordability for employees in section 5000A(e)(1)(B) and, separately, for related individuals in section 5000A(e)(1)(C)."[20]

3. The 2022 NPRM

On January 28, 2021, President Biden issued an Executive Order to the Secretaries of the Department of the Treasury ("Treasury Department"), the Department of Labor, and the Department of Health and Human Services to review prior agency actions to determine if they were inconsistent with the policy to protect and strengthen the ACA.[21] On April 7, 2022, the Treasury Department and the Internal Revenue Service ("IRS") published the 2022 NPRM.[22] If finalized, these proposed regulations would provide that affordability of employer-sponsored coverage for related individuals is determined based on the employee's share of the cost of covering the employee and those related individuals, not the cost of covering only the employee.

The 2022 NPRM focuses its legal analysis on the text in section 36B(c)(2)(C)(i)(II). The preamble to the 2022 NPRM frames the statutory interpretation analysis as follows:

> Under one reading of section 36B(c)(2)(C)(i)(II), the affordability rule for related individuals is determined solely by reference to section 5000A(e)(1)(B), without the modification to that section for related individuals provided by section 5000A(e)(1)(C). This reading results in affordability being determined based on the cost of self-only

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[17] *See* Dania Palanker (SEIU), Comment Letter on Health Insurance Premium Tax Credit (November 10, 2011); *see also* Jean Ross (California Budget Project), Comment Letter on Health Insurance Premium Tax Credit (October 31, 2011).

[18] 2013 Final Regulations, 78 Fed. Reg. at 7,264.

[19] *Id.*, 78 Fed. Reg. at 7,265.

[20] *Id.*

[21] Exec. Order No. 14009, 86 Fed. Reg. 7,793 (February 2, 2021).

[22] 2022 NPRM, 87 Fed. Reg. at 20,354.

coverage to the employee. Under an alternative reading, the affordability rule for related individuals is determined by reference to section 5000A(e)(1)(B) taking into account the modification by section 5000A(e)(1)(C).[23]

The preamble then states that the statutory text supports both of these readings. The 2022 NPRM ultimately adopts the alternative reading. The preamble traces through the statutory text in the following manner. First, it looks to the language in section 36B(c)(2)(C)(i)(II), which states that an offer of coverage is not affordable 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."[24] Tracing through the cross-reference to section 5000A(e)(1)(B), the preamble recognizes that this subparagraph describes the required contribution for self-only coverage. However, the preamble's analysis keeps reading, and notes there is a special rule in section 5000A(e)(1)(C) modifying section 5000A(e)(1)(B) when the coverage is for a related individual. Specifically, this language says that "[f]or purposes of [section 5000A(e)(1)(B)(i)], if an applicable individual is 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."[25] The regulations implementing section 5000A interpret this to mean that the required contribution for employee affordability is based on self-only coverage, and the required contribution for related-individual affordability is based on family coverage.[26] There does not appear to be controversy on this point.

The preamble further notes a lack of clarity in the legislative history. As noted above, the 2013 Final Regulations relied in part on the 2011 JCT Report for their reasoning.[27] However, as the 2022 NPRM points out, the 2011 JCT Report language relied upon was actually a change from a prior JCT report.[28] Further, the revised 2011 JCT Report relied upon in the 2013 Final Regulations was published after passage, and so could not have been relied on by Members of Congress or their staff in understanding the meaning of these provisions.

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[23] 2022 NPRM, 87 Fed. Reg. at 20,357.

[24] *Id.*, 87 Fed. Reg. at 20,356 (emphasis added).

[25] Section 5000A(e)(1)(C).

[26] *See* Treas. Reg. § 1.5000A-3(e)(3)(ii)(B).

[27] *See supra* footnote 16.

[28] *See* 2022 NPRM, 87 Fed. Reg. at 50,357 n.5 ("In Joint Committee on Taxation, *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), March 21, 2010 (the JCT report), the Joint Committee staff initially explained that '[u]naffordable 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).' The quoted language was later revised to state that '[u]naffordable 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 self-only coverage.' See *ERRATA for JCX–18–10*, (JCX–27– 10), May 4, 2010. Although the JCT report does not compel any particular reading of section 36B(c)(2)(C)(i)(II) as it relates to family coverage, these differing interpretations by the Joint Committee staff further demonstrate the statutory ambiguity that renders either interpretation available under the ACA.").

Based on this analysis, the 2022 NPRM provides that "an eligible employer-sponsored plan is affordable for related individuals if the portion of the annual premium the employee must pay for family coverage, that is, the employee's required contribution, does not exceed 9.5 percent of household income."[29]

II. Statutory Interpretation

This part of the comment concludes that the affordability rule in the 2013 Final Regulation was incorrect, and that the rule in the 2022 NPRM is faithful to the ACA's plain language, statutory construction, and legislative intent.

1. The 2022 NPRM is More Consistent with the Plain Language and Structure of the Statute Than the 2013 Final Regulations

As discussed herein, the plain text of the statute indicates that a related individual's eligibility for the PTC is based on the cost of family coverage. The alternative result, contained in the 2013 Final Regulations, requires a strained reading of the statute and leads to unnecessary inconsistencies between the PTC provisions and the individual shared responsibility provisions.

i. For related individuals, "required contribution" is defined with respect to coverage in which they may enroll and thus must refer to family coverage

Section 36B(c)(2)(C)(i)(II) states that an employee will not be treated as eligible for MEC – and may therefore be eligible for a PTC[30] – if the employee's "required contribution" to an employer-sponsored health insurance plan would exceed 9.5 percent of their household income. The term "required contribution" is defined, through a cross-reference to section 5000A(e)(1)(B), as "the portion of the annual premium which would be paid by the individual . . . for *self-only coverage*."[31]

A PTC is not available if the taxpayer has access to MEC, such as employer-sponsored coverage.[32] Specifically, section 36B(c)(2)(B)(i) provides that "[t]he term 'coverage month' shall not include any month with respect to an individual if for such month the individual is eligible for [other] minimum essential coverage." This language treats the unit of analysis as the individual, and so whether there is access to MEC is determined on an individual basis.

After providing this general definition of MEC, the Code then establishes a rule to determine if employer-sponsored coverage is MEC.[33] Flush language at the end of section 36B(c)(2)(C)(i) 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." Incorporating this flush language into the clause itself, section 36B(c)(2)(C)(i), the affordability rule, reads roughly as follows:

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[29] 2022 NPRM, 87 Fed. Reg. at 20,357.

[30] *See* section 36B(a), (b)(1), & (c)(2)(B).

[31] *See* section 36B(c)(2)(C)(i)(II) (cross-referencing section 5000A(e)(1)(B)) (emphasis added).

[32] *See id.*

[33] *See* section 36B(c)(2)(C).

> [A related individual] shall not be treated as eligible for minimum essential coverage if *such coverage* (I) [is employer-sponsored coverage], and (II) [the related individual's] required contribution (within the meaning of section 5000A(e)(1)(B)) *with respect to the plan* [is too high]. (emphasis added)

Completing the steps of incorporating the flush language into the affordability clause, the language strongly supports a reading that the required contribution refers to family coverage. The passage as completed makes three references to coverage: "minimum essential coverage," "such coverage," and "the plan." The use of "such" in the second instance and the definite article "the" in the third make clear that these instances refer to the first – indeed, no other plan has been mentioned to which the subsequent instances could refer. The first instance makes clear that this plan is one in which the related individual may enroll – otherwise it would be pointless to provide that the individuals shall, in certain cases, be treated as though they are ineligible to enroll. A related individual (i.e., an individual offered coverage by virtue of relation to an employee) may not enroll in self-only coverage (unless the related individual is also an employee of the employer). Thus, for this provision to have any effect, the MEC referred to in the first instance must be family coverage. And since the second and third instance refer to the first, in the context of a related individual, the reference to the "the required contribution…*with respect to the plan*" must be the required contribution with respect to family coverage.

In paragraph (iii) below, we additionally show that, even aside from the "with respect to the plan" language, the plain meaning of section 5000A(e)(1)(B) requires that "required contribution (within the meaning of section 5000A(e)(1)(B))" means the cost of family coverage in the context of a related individual. But even without looking at section 5000A, the plain language and construction of the statute strongly support the reading that, for related individuals, the "required contribution" relates to family coverage.

ii. The structure of section 36B(c)(2)(C) also supports the 2022 NPRM

If Congress intended for the same affordability result to apply to both the employee and related individuals, then it likely would have structured the PTC legislative text differently. As discussed above, the drafting of the affordability exception is unusual in that it is divided into two pieces. The main text under section 36B(c)(2)(C)(i) applies to employees, while the flush language applies to related individuals. The interpretation in the 2013 Final Regulations assumes Congress intended the same rule – using the cost of self-only coverage – for everyone eligible for employer-sponsored coverage. This interpretation ignores the flush language altogether. If Congress had intended that approach, a single passage would have been sufficient and straightforward. It could have simply said that an individual shall not be treated as eligible for employer-sponsored MEC if the required contribution for self-only coverage for the employee is too high. Instead, Congress divided the rule in two: one clause provides the rule for employees, and the separate flush language provides the rule for related individuals. The fact that the rule is provided in two separate pieces suggests Congress intended different results under the two different rules. (This same argument confirms that the regulations correctly interpreted section 5000A(e)(1)(B) and (C) to apply different rules to the same two groups.) Therefore, under this understanding of the construction of the statutory text, affordability of employer-sponsored coverage for family members of an employee should be determined based on the employee's

share of the cost of covering the employee and those family members (as laid out in the 2022 NPRM), not the cost of covering only the employee (as adopted by the 2013 Final Regulations).

iii. Internal cross-references within the ACA further support the 2022 NPRM

The affordability rule contained in the 2013 Final Regulations requires a strained reading of the Code that acknowledges a special rule for purposes of the individual shared responsibility provisions, but ignores this special rule for purposes of the PTC. There is no evidence that Congress intended this result.

Section 5000A(e)(1)(B) states that the required contribution for an individual "eligible to purchase" an employer plan is the individual's contribution for self-only coverage. This provision is elaborated by the following subparagraph, section 5000A(e)(1)(C), which states that: "[f]or purposes of subparagraph (B)(i), if an applicable individual is 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."

Notwithstanding the cross-reference between the affordability tests in sections 5000A and 36B, the existing final regulations interpret the tests for related individuals differently between the two sections. For purposes of the shared responsibility provision, the required contribution for related individuals is based on "the portion of the annual premium that the employee would pay … for … family coverage that would cover the employee and all related individuals…."[34] But, for purposes of the PTC, the required contribution for related individuals is based on "the annual premium the employee must pay for self-only coverage."[35]

As noted above, section 36B(c)(2)(C)(i)(II) defines an employee's "required contribution" for affordability purposes by reference to the definition in section 5000A(e)(1)(B). The Treasury Department argued in the 2013 Final Regulations that because section 36B(c)(2)(C)(i)(II) only cross-referenced section 5000A(c)(1)(B) and did not explicitly mention section 5000A(e)(1)(C), eligibility for the PTC must be determined based on the costs of self-only coverage even for employees with family members in need of coverage.

The preamble to the 2022 NPRM notes that that there was no need for section 36B to directly cross-reference section 5000A(e)(1)(C) to justify using the costs of family coverage for PTC eligibility determinations. As a matter of statutory construction, section 5000A(e)(1)(C) explicitly modifies the cross-referenced section 5000A(e)(1)(B). Section 5000A(e)(1)(C) begins "[f]or purposes of subparagraph (B)(i)…," without providing any indication that the modification to section 5000A(e)(1)(B) made by section 5000A(e)(1)(C) does not carry over into section 36B. There are times when Congress chooses to disregard certain exceptions, special rules, or other elements of a definition when defining a term by cross-reference. It can do so through various explicit means, including by adding qualifiers such as "without regard to" to the cross-referencing language, or by adding limiting language to the modifying rule (e.g., "solely for

[34] Treas. Reg. § 1.5000A-3(e)(3)(ii)(B).

[35] Treas. Reg. § 1.36B-2(c)(3)(v)(A)(2).

purposes of this section"). The ACA includes such limiting text in other places, but notably not here.[36] Therefore, the IRS has correctly concluded in the 2022 NPRM that "a specific reference in the flush language of section 36B(c)(2)(C)(i) to section 5000A(e)(1)(C) is not necessary to require the consideration of section 5000A(e)(1)(C) in determining affordability for related individuals for section 36B purposes."[37]

Because the legislative text does not limit the applicability of section 5000A(e)(1)(C) to rules related to the individual shared responsibility provisions, the better reading is that section 5000A(e)(1)(C) modifies the meaning of section 5000A(e)(1)(B) for all purposes, including for the determination of affordability.

2. The 2022 NPRM is More Consistent with the Purposes of the ACA

The result of the 2022 NPRM is also the one that is indicated by the purpose and structure of the ACA.[38]

i. The ACA required employers to offer coverage to both the employee and related individuals, while recognizing that offers of coverage are not meaningful unless they are affordable.

The ACA's employer shared responsibility provision under section 4980H requires that employers with at least 50 full-time equivalent employees[39] offer coverage to virtually all full-

[36] *See, e.g.,* the following examples from the employer shared responsibility provisions: Section 4980H(c)(2)(E) ("Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120."); section 4980H(c)(2)(D) (The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating— (I) the assessable payment under [section 4980H](a), or (II) the overall limitation under [section 4980H](b)(2).")

[37] 2022 NPRM, 87 Fed. Reg. at 20,357 (footnote omitted).

[38] The analysis above demonstrates that the plain reading and construction of the statute supports the view that affordability of employer-sponsored coverage for related individuals is determined based on the employee's share of the cost of covering the employee and those related individuals, not the cost of covering only the employee. Some commentators have argued that the provisions are ambiguous. *See, e.g.*, Avik Roy, *Obamacare Bombshell: 4 Million People Who Thought They Were Gaining Coverage, Won't*, Forbes (August 10, 2011) ("The reasoning behind the JCT's narrow interpretation is not obvious."); Brittany La Couture & Conor Ryan, *The Family Glitch*, American Action Forum (September 18, 2014) ("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 (August 13, 2011) ("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 (August 24, 2011) ("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."); Tricia Brooks, *The Family Glitch*, Health Affairs (November 10, 2014) ("While rooted in the ambiguity of the ACA with respect to affordability for family members, the problem emerges from a narrow interpretation of "affordable" …"). However, this section of the comment demonstrates that, even if the statute is ambiguous, the result in the 2022 NPRM is reasonable and, in fact, compelled by the purpose and structure of the ACA.

[39] *See* section 4980H(c)(2)(A).

time employees *and their dependents* or pay a penalty of $2,000 (indexed) per full-time employee (assuming that at least one full-time employee receives the premium tax credit). Under the 2013 Final Regulations, there is no inducement for employers to make family coverage affordable. To the contrary, it levies no liability on an employer that charges even a huge amount for family coverage – so long as the family could enroll at some (any) price.

Not surprisingly, many employers respond to this incentive set by offering family coverage but charging an unaffordable amount for it. The Urban Institute estimates that nearly five million related individuals are in families offered "affordable" self-only coverage but "unaffordable" family coverage.[40] Absent the family glitch interpretation, this behavior would not be a problem, as these related individuals could receive the PTC. Alternatively, if employers were not required to offer dependents coverage, more employers would drop family coverage, which would then allow dependents to receive the PTC.

The current interpretation leads to a uniquely bad outcome given the purpose and structure of the statute. Related individuals must be offered employer coverage but with no incentive to make it affordable, and then are denied PTC regardless of the cost of family coverage. Such a web of rules, intricately coordinated to deny affordable coverage, is contrary to the clear intent of the statute – to make "affordable care" broadly available.

ii. The ACA was intended to provide more people with affordable healthcare, and the Treasury Department's current interpretation undermines that goal.

As noted in Part I of this comment, a primary goal of the ACA is to make affordable health insurance available to more people. The ACA has all demographic groups.[41] However, people are still more likely to be uninsured if they have lower incomes, less education, or are Black or Hispanic.

According to estimates, finalizing the 2022 NPRM would expand coverage options for approximately 5.1 million people.[42] This would be highly consistent with the goals of the ACA. As seven Members of Congress wrote in a letter to the Treasury Department in December 2011, the "interpretation in the [2011] proposed regulation is inconsistent with the goals of the Affordable Care Act to expand health insurance coverage and ensure that such coverage is

[40] *See* Matthew Buettgens & Jessica Banthin, *Changing the "Family Glitch" Would Make Health Coverage More Affordable for Many Families*, Urban Institute (May 2021).

[41] *See* Center on Budget and Policy Priorities, *Chart Book: Accomplishments of Affordable Care Act* (March 19, 2019).

[42] *See* Cynthia Cox et al., *The ACA Family Glitch and Affordability of Employer Coverage*, Kaiser Family Foundation (April 7, 2021).

affordable."[43] Therefore, the legislative intent bolsters the plain language, providing strong support for the 2022 NPRM, and raising difficult questions for the 2013 Final Regulations.

[43] Letter from Sander M. Levin et al., Representatives, House of Representatives, to Timothy Geithner, Secretary, Treasury (December 6, 2011); *see also* S. Rep. 111-89, at 39 (2009) ("Unaffordable is defined as coverage with a premium required to be paid by the employee that is ten percent or more of the employee's income, based on the type of coverage applicable (e.g., individual or family coverage).").