June 6, 2022

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

Re: IRS and REG-114339-21

To Whom It May Concern:

On behalf of the Individual and Small Group Markets Committee and Active Benefits Subcommittee of the American Academy of Actuaries' Health Practice Council (Academy),[1] we are pleased to provide comments on the proposed rule for "Affordability of Employer Coverage for Family Members of Employees." Specifically, we are commenting on the provisions addressing the so-called "family glitch" and proposed revision to the employer coverage affordability test. Additionally, we recommend that the U.S. Department of the Treasury (Treasury) work with the Centers for Medicare & Medicaid Services (CMS) to update the Minimum Value (MV) Calculator.

Affordability Test Impact on Individual and Employer Insurance Markets

The proposed revision to the employer coverage affordability test has the potential to expand the number of related individuals (e.g., spouses filing separate tax returns and certain dependents) eligible for individual market subsidies on Health Insurance Exchanges. Under this proposal, when employer family coverage is deemed unaffordable (currently costs equal to or more than 9.61% of household income) after crediting the employer's family subsidy, then affected related individuals may:

- enroll in Exchange coverage,
- be eligible for premium tax credits, and
- potentially receive cost-sharing reductions.

[1] The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

Our understanding is that the proposed revision would have no impact on the determination of employer penalties under Section 4980H(b) of the Affordable Care Act (ACA) because these would continue to be based on the affordability of employee-only coverage. We recommend adding language to the preamble to the final regulations explicitly stating this intention.

Using data from the Census Bureau's Current Population Survey, The Kaiser Family Foundation (KFF) estimated that the pool of individuals who may be affected by this proposal number is approximately 5 million.[2] Of this 5 million, roughly 4 million are enrolled in employer coverage currently, with the remainder split between the individual market and the uninsured. However, we expect the uptake in the individual market to be limited, with similar limited effect on the individual market risk pool for several reasons.

First, employer coverage is typically more generous than individual market benchmark coverage used to determine premium tax credit amounts. This generosity usually takes the form of lower deductibles and cost-sharing and more generous plan networks. Second, employer coverage is less expensive than the individual market for comparable coverage, due to better average population health, even before accounting for more generous provider networks. Third, if a family chooses employer coverage for some and ACA coverage for others, this results in multiple deductibles and maximum out-of-pocket (MOOP) limits for the family because benefits are not connected across markets. For example, if a family of four enrolls the employee and spouse on an employer plan and two children on an Exchange plan, the family's coverage would include separate deductibles and out-of-pocket limitations for children, increasing family expenditures for care—potentially double the family out-of-pocket spending that would otherwise be required if all family members were covered under a single plan. Finally, cafeteria plan rules (section 125 plans) permit individuals to pay for premiums for employer-sponsored coverage with pre-tax dollars, while Exchange coverage is paid for with post-tax dollars.

In addition, switching to individual market coverage also adds premium payment complications a family that uses this flexibility. As noted in the proposed rule, the required employee contribution used to calculate premium tax credits is based on household income, regardless of the number of individuals enrolling. This reduces the available premium tax credit relative to what would have been received if the whole family were eligible to enroll in subsidized individual market coverage. If the related individuals move to Exchange coverage, the family still must pay the employee premium for the employer coverage, as well as their required contribution for ACA coverage. This may be of particular concern when employee and spouse coverage is deemed affordable, but employee, spouse, and child coverage is not due to the lower premiums for children under the ACA's default age curve.

As a result, a family is likely to remain in employer coverage and keep richer benefits. Related individuals who switch to the subsidized individual market coverage likely will do so for premium cost reasons, and may be likely to use fewer services. This has the potential to increase the costs of employer health coverage as the remaining employer population is less healthy, but it is unlikely that magnitude of the impact will be large. The infusion of some of the healthier lives

[2] *The ACA Family Glitch and Affordability of Employer Coverage*; The Kaiser Family Foundation; April 7, 2021.

from the employer pool into the individual market pool is unlikely to significantly impact the health status of the individual market risk pool.

Uninsured individuals may see some increased access to coverage as a result of the proposed change to the affordability requirements for related individuals. A recent KFF report indicates that, among those with either employer coverage, Exchange coverage, or no coverage, the uninsured are relatively the least healthy.[3] Utilization of subsidies is likely to be anti-selective in nature, particularly due to the multiple plan dynamics previously mentioned. This could cause deterioration of the individual risk pool, but the relative size of the uninsured group limits its potential influence on the risk pool in a broad sense. On a nationwide basis, the entirety of this group is estimated to be about 3% of the overall individual market, and the unhealthy cohort less than 0.5% of the individual market. The significantly larger size of the pool of those currently covered under an employer plan means that even limited uptake among that group has the potential to offset higher proportional take-up among the uninsured. This suggests the potential impact on the individual market is likely to be minor.

It is possible that some employers, particularly small employers, might use the new flexibility under the proposed rule to reduce or eliminate subsidies for non-employee coverage and encourage employees to purchase Exchange coverage for their families. This creates the potential for some reduction in the small group market. It is unclear what effect this might have on the small group risk pool. Given the potential logistical challenges and the role of employer health coverage as a key element of employee compensation, it is likely that relatively few employers may take this approach. Although ultimately the impact is likely to be mitigated because some small employers, including those not subject to employer shared responsibility payments, may have already taken steps to limit or not offer coverage to related individuals. Employers concerned about the cost of coverage for related individuals likely have already taken measures to limit costs or may simply not offer coverage, since they are not subject to the employer shared responsibility penalty.

Minimum Value (MV) Rule

The proposed minimum value (MV) rule specifies that "An eligible employer-sponsored plan provides MV for an individual who may enroll in the plan because of a relationship to an employee of the employer offering the coverage (a related individual) only if the plan's MV percentage, as defined in paragraph (c) of this section, is at least 60 percent based on the plan's share of the total allowed costs of benefits provided to the related individual." Minimum value is currently calculated based on the benefit plan cost-sharing parameters provided to a standard population. The standard population includes both employees and related individuals. The MV calculator uses a standard population based on a population covered by self-insured group health plans, according to the Department of Health and Human Services (HHS) rule on MV (45 CFR 156.145). The proposed rule could be interpreted to require a separate standard population for related individuals. If separate standard populations were used for employees and related individuals, different benefit plans may be required. Typically, employer plans provide the same

[3] Ibid.

plan design for employees and related individuals. To ensure regulatory consistency as well as consistency with benefit design, the proposed minimum value rule should align with the requirements in the HHS minimum value rule including the use of one standard population containing both employees and related individuals.

We recommend that the Treasury work with CMS to update the MV Calculator, which has not been updated since first launched, to reflect more current large group data, and to incorporate appropriate model changes that have been made to the Actuarial Value (AV) Calculator over time. Going forward, we further recommend the MV Calculator be updated regularly, and in a manner consistent with improvements that are made to the AV Calculator, including MOOP limits, fixes to underlying logic, and trend. As the current MV Calculator reflects 2014 plan year experience and plan limits, the calculator cannot accommodate many compliant plan designs offered by employers, and results are increasingly unlikely to provide an accurate representation of the generosity of plan designs in 2023 and beyond. Assuming a 5% cost trend from 2014 through 2023, total cost levels for 2023 plans would be over 55% higher than suggested by the current MV Calculator. This increased level of costs means the current MV Calculator most likely underestimates the generosity of a given plan design when that plan design can even be entered into the calculator.

Given the differences in the underlying population used for the MV Calculator and for the AV Calculator, it is not appropriate to use the AV Calculator to demonstrate compliance with the MV requirement. Of particular concern to the Academy's Health Practice Council is that actuaries working with large employers could increasingly be left without uniform usable federal guidance as to how to assess whether a given plan design complies with the minimum value requirement. In addition, regulators intending to measure the generosity of large employer plans for other purposes do not have a reliable and consistent approach.

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We appreciate the opportunity to provide comments on the proposed rule for "Affordability of Employer Coverage for Family Members of Employees." We welcome the opportunity to speak with you to provide more detail and answer any questions you might have regarding these comments or on other issues. If you have any questions or would like to discuss further, please contact Matthew Williams, the American Academy of Actuaries senior health policy analyst, at williams@actuary.org.

Sincerely,

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