

# United States Senate

WASHINGTON, DC 20510  
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<http://www.senate.gov>

May 11, 2022

The Honorable Charles Rettig  
Commissioner  
Internal Revenue Service  
1111 Constitution Ave, NW  
Washington, DC 20224

Dear Commissioner Rettig

On April 5, 2022, the Biden Administration announced an Internal Revenue Service (IRS) proposal that, if finalized, would have a profound impact on Americans' health care choices and extend taxpayer subsidies enacted through Obamacare. This action would further the reach of the federal government into Americans' daily lives, placing more federal red tape between patients and their doctors.

The proposal in question runs contrary to the long-held position of the IRS, including under former President Obama. Under Obamacare, individuals are ineligible to claim premium tax credits (PTCs) if they have an offer of affordable employer coverage as determined by the employee's required premium contribution for self-only coverage (9.61% of income in 2022).<sup>1</sup> If the employee's family is also offered coverage, they are also ineligible for PTCs. The IRS is proposing to change the affordability test for employer-sponsored insurance by basing affordability on the cost of family coverage, not self-only coverage. This not only runs counter to the plain reading of the law, but would dramatically expand spending on Obamacare plans and result in a significant shift of individuals out of employer-sponsored insurance and into government-designed and subsidized Obamacare coverage.

Specifically, section 36B(c)(2)(C)(i)(II) of the Internal Revenue Code states that an individual with an offer of employer-sponsored health insurance may be able to claim premium tax credits if they have an offer of employer health coverage through which:

*“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.”<sup>2</sup>*

The required contribution within the meaning of Section 5000A(e)(1)(B) is explicitly based on the portion of premiums an individual would pay for self-only, not family, coverage.

*(B) Required contribution*

*For purposes of this paragraph, the term “required contribution” means—*

*(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage,*

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<sup>1</sup> Internal Revenue Service, Internal Revenue Bulletin: 2021-35, August 30, 2021, [https://www.irs.gov/irb/2021-35\\_IRB#REV-PROC-2021-36](https://www.irs.gov/irb/2021-35_IRB#REV-PROC-2021-36).

<sup>2</sup> The contribution threshold is updated annually.

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The Administration of former President Obama confirmed, on more than one occasion, this feature of the law.<sup>3,4</sup> In 2013, the IRS responded to calls to make the change that has been proposed by noting:

*“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.”*

Separately, the Government Accountability Office (GAO) recommended that the IRS and Department of Treasury look into this issue. Again, President Obama’s Administration stated the law bases affordability on the cost of self-only coverage:

*“In response to our recommendation, the Department reported that it reexamined the provision to determine if an alternate policy could be adopted and also received input from the Congress and the public on the issue. Through these efforts, the Department determined 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, and released final regulations to this effect in February 2013.”*

Article I, Section 8 of the U.S. Constitution empowers the Congress to “lay and collect Taxes, Duties, Imposts and Excises.” The IRS has no constitutional basis for unilaterally changing the laws Congress has enacted and the American people must have confidence that their tax collector is not unilaterally imposing its will onto them.

Moreover, in its proposal the IRS did not include necessary projections of its impacts on cost and coverage. President Biden and White House officials are touting estimates that nearly 1 million Americans who already have insurance would receive additional subsidies, while just 200,000 previously uninsured Americans would gain coverage under the proposal.<sup>5,6</sup> This would suggest an analysis has been conducted, raising questions as to why such an analysis was not published in the proposal.

The American people deserve to know how much of their money the Administration is proposing to spend via unilateral executive fiat. Further, if Americans are going to lose access to employer-sponsored insurance, they should have the opportunity to review and comment on the proposed rulemaking with a full accounting of its potential consequences.

Therefore, in order to give us the opportunity to evaluate this rule and its full effects, please provide the following information by May 27, 2022.

1. A cost estimate of the proposed rule that identifies the sources of all costs to the federal government over one, five, and ten years, including:

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<sup>3</sup> Internal Revenue Service, Health Insurance Premium Tax Credit, February 1, 2013,

<https://www.federalregister.gov/documents/2013/02/01/2013-02136/health-insurance-premium-tax-credit>.

<sup>4</sup> U.S. Government Accountability Office, Children’s Health Insurance: Opportunities Exist for Improved Access to Affordable Insurance, July 23, 2012, <https://www.gao.gov/products/gao-12-648>.

<sup>5</sup> The White House, Background Press Call by Senior Administration Officials on the Administration’s Proposed Rule to Fix “Family Glitch” and Lower Healthcare Costs, April 5, 2022, <https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/05/background-press-call-by-senior-administration-officials-on-the-administrations-proposed-rule-to-fix-family-glitch-and-lower-healthcare-costs/>.

<sup>6</sup> The White House, Remarks by President Biden, Vice President Harris, and Former President Obama on the Affordable Care Act, April 5, 2022, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/05/remarks-by-president-biden-vice-president-harris-and-former-president-obama-on-the-affordable-care-act/>.

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- a. Spending on individuals who already had insurance; and
  - b. Spending on individuals who were previously uninsured.
2. Estimates of the changes in Americans' sources of health coverage, including:
- a. The number of individuals receiving subsidies that already had health insurance;
  - b. The number of individuals that shift from employer-sponsored insurance onto subsidized and unsubsidized Obamacare plans; and
  - c. The number of employers that elect to stop offering health coverage as a result of the proposed change, and the number of affected employees.
3. All documents and communications between IRS and Treasury staff who worked on the proposed rule and political officials within the executive branch, including the Department of the Treasury, IRS, the Office of Management and Budget, and the Executive Office of the President between January 20, 2021, and the date of this letter.

In addition to providing these documents, we ask that you promptly work with our staffs to schedule a staff briefing that occurs no later than May 20, 2022.

Sincerely,



Richard Burr  
United States Senator



Pat Toomey  
United States Senator



Bill Cassidy, M.D.  
United States Senator

CC: The Honorable Janet Yellen