

**Congress of the United States**  
Washington, DC 20515

April 28, 2022

The Honorable Janet L. Yellen  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Dear Secretary Yellen,

We write today to express serious concerns with the Administration's proposed rule aimed at "fixing" the so-called "family glitch" in the Affordable Care Act (ACA). As the Obama Administration ultimately acknowledged, the applicable statutory language does not allow for the revisionist reinterpretation advanced by the Treasury and Internal Revenue Service through this new regulation. Moreover, unilaterally redefining the application of the ACA's insurance affordability standard could result in substantial disruption for workers and job creators alike, in addition to exacerbating 40-year-high inflation through tens of billions in new taxpayer spending. Unfortunately, the proposed rule contains little discussion or analysis of either the coverage or economic effects, including the estimated costs of the regulations. We urge the Administration to pause this misguided approach and undertake a full review of the proposal, including the legal basis for this new interpretation of statute.

Setting aside substantive policy questions, the proposed rule seeks to reverse the legal interpretation of statutory text has been settled for nearly a decade. Whether an accidental drafting error or an intentional attempt to deflate the bill's projected costs for political reasons, the plain language of the ACA states that a plan is considered affordable if it costs 9.5% of an employee's household income or less.<sup>1</sup> The affordability determination is based on the cost of self-only coverage, not family coverage.<sup>2</sup>

After passage, some Members of Congress and other advocates pressured the Obama Administration to "fix" the "glitch."<sup>3</sup> Even under intense pressure to reconsider and reevaluate the interpretation of the statutes, the Obama Administration determined that it lacked the authority to

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<sup>1</sup> 26 U.S.C. § 36B(c)(2)(C).

<sup>2</sup> 26 U.S.C § 5000A(e)(1)(B).

<sup>3</sup> Advocates Fear Tax-Credit Rule will Exclude Some from Health-Care Benefit, Julie Appleby, WASHINGTON POST (April 15, 2012), available at [https://www.washingtonpost.com/politics/advocates-fear-tax-credit-rule-will-exclude-some-from-health-care-benefit/2012/04/15/gIQAJuW6JT\\_story.html](https://www.washingtonpost.com/politics/advocates-fear-tax-credit-rule-will-exclude-some-from-health-care-benefit/2012/04/15/gIQAJuW6JT_story.html).

make such a change.<sup>4</sup> The Obama Administration's determination is consistent with both the statutory text and the Joint Committee on Taxation's analysis of the law.<sup>5</sup>

The Biden Administration's attempt to change statutory law without congressional action is both troubling and illegal.<sup>6</sup> The Obama Administration's Treasury Department reviewed all arguments regarding the proposed interpretation and found them lacking. We ask you to provide information to demonstrate how the Biden Administration justifies such a stark departure from settled legal interpretation.

Congress has a constitutional obligation to oversee all aspects of the administration's actions related to the implementation of the ACA. To assist our understanding of the Treasury Department's initial and revised interpretations of the affordability rule for related individuals under section 36B and 5000A of the ACA, we request documents (from February 2013 through the present) relating to, and an explanation for, the following:

1. The administration's decision to change the affordability rule for related individuals, despite having held an alternative position for more than a decade; and
2. The review of the affordability rule for related individuals initiated by President Biden's Executive Order (EO) 14009.
3. A comprehensive economic impact analysis, as required by Executive Orders 12866 and 13563, including the estimated federal cost of the proposed regulation, along with estimates of the size of the population affected.
4. A thorough analysis of the effects on health insurance coverage, premiums, and federal subsidies across all market segments impacted.
5. Information and guidance related to the feasibility of implementing the new affordability standard prior to the upcoming open enrollment season for 2023.

Additionally, please provide a narrative response to the following questions:

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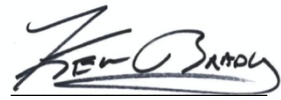
<sup>4</sup> Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264 (Feb. 1, 2013); *see also* Response to GAO Recommendation: "In response to our recommendation, the Department reported that it reexamined the provision to determine if an alternate policy could be adopted and also received input from 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." Available at <https://www.gao.gov/products/gao-12-648>.

<sup>5</sup> 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," Joint Committee on Taxation, May 4, 2010, available at <https://www.jct.gov/publications/2010/jcx-18-10/>.

<sup>6</sup> A Biden Administration Regulatory "Fix" to the "Family Glitch" Would Be Illegal and Harmful, Brian Blasé, PhD, May 19, 2021, available at [https://galen.org/assets/Regulatory\\_Fix\\_to\\_Family\\_Glitch](https://galen.org/assets/Regulatory_Fix_to_Family_Glitch).

6. The Administration's proposed rule states that the Department perceives the statutory language to "support[s] two different readings." If the ACA was the signature achievement of the Obama Administration and it was the stated policy goal of that law to expand access to affordable health coverage, why would the Department of Treasury take nearly three years, including a formal notice and comment rulemaking, to reach the conclusion that the statutory language requires the affordability determination to rely on self-only coverage? Why would the Obama Administration intentionally leave millions of Americans without access to affordable health coverage if there really were "two different readings" available?
7. Prior to the 2013 rule being finalized, did the Department of Treasury recognize or acknowledge "two different readings" of section 36B(c)(2)(C)(i)(II) of the ACA?

Sincerely,

A handwritten signature in black ink that reads "Kevin Brady". The signature is stylized with a large "K" and "B".

Kevin Brady  
Ranking Member  
House Committee on Ways & Means

A handwritten signature in blue ink that reads "Mike Crapo". The signature is stylized with a large "M" and "C".

Mike Crapo  
Ranking Member  
Senate Committee on Finance