Congress of the United States

Washington, DC 20515

June 6, 2022

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Secretary Yellen and Commissioner Rettig:

The Internal Revenue Service recently issued a proposed rule that, if finalized, would unlawfully expand eligibility for taxpayer-subsidized health insurance under ObamaCare.[1] This proposed rule is inconsistent with both the statutory text and a rule that the IRS finalized nearly a decade ago.[2] Although the IRS acknowledges that its existing rule is the product of "considerable deliberation" and "a comprehensive analysis of the issue," the agency now seeks to reverse itself.[3] Partisan politics appears to be driving the IRS's sudden change.[4] Because of Democrats' previous weaponization of the IRS and the likelihood that this new rule will lead to tens of billions of dollars in new spending, we write to request information about this rulemaking.

ObamaCare allows eligible employees to enroll in a plan through a public health insurance exchange and to then claim a premium tax credit.[5] An employee is ineligible for the

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[1] *See generally* Affordability of Employer Coverage for Family Members of Employees, 87 Fed. Reg. 20354 (Apr. 7, 2022); *see also* Brian Blase, *Paragon's Work Featured Prominently By* Wall Street Journal *This Week*, PARAGON HEALTH INST. (Apr. 8, 2022), https://paragoninstitute.org/paragons-work-featured-prominently-by-wall-street-journal-this-week/ [hereinafter "Blase, *Paragon's Work Featured Prominently*"]; Brian Blase, *ACA Reality Check & The Potential Politicization Of The IRS*, PARAGON HEALTH INST. (Apr. 4, 2022), https://paragoninstitute.org/aca-reality-check-the-potential-politicization-of-the-irs/ [hereinafter "Blase, *Potential Politicization Of The IRS*"].

[2] *See* Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013).

[3] 87 Fed. Reg. at 20355, 20356.

[4] *See* Blase, *Paragon's Work Featured Prominently*, *supra* note 1; Blase, *Potential Politicization Of The IRS*, *supra* note 1; Brian Blase, *A Biden Administration Regulatory "Fix" to the "Family Glitch" Would Be Illegal and Harmful*, GALEN INST. 3 (May 2021) ("Media reports suggest that Biden administration political appointees, who may be less concerned with the displacement of employer coverage and burgeoning federal deficits, are pushing career officials to revisit their *definitive* conclusion during the Obama administration that such a 'fix' could not be accomplished without legislation." (emphasis added)), https://galen.org/assets/Regulatory_Fix_to_Family_Glitch_Would_Be_Illegal_and_Harmful.pdf [hereinafter "Blase, *Illegal and Harmful*"].

[5] *See* 26 U.S.C. § 36B(a) ("In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year.").

tax credit, however, if his employer offers coverage that is "affordable."[6] Under the text of ObamaCare, the same restriction applies for the employee's dependent. If an employer offers coverage to the employee's dependent, the dependent may not enroll through the exchange and claim a subsidy if the employer's plan is "affordable."[7] To determine if an employer plan is "affordable"—for either the employee or his dependent—the text of ObamaCare requires looking to the employee's premium for self-only coverage, *not* the employee's premium for family coverage.[8] Critics of this provision have referred to this test for "affordability" as ObamaCare's "family glitch" because they dislike the standard Congress set.[9]

The Biden Administration's new rule proposes to "fix" this "problem" by changing how the agency determines whether an employee's dependent is eligible for a premium tax credit.[10] Under the Biden Administration's revised approach, "affordability" would be based on the premium amount for family coverage instead of the self-only coverage.[11] The IRS's reversal is unlawful, and it is bad policy. By deploying the IRS for partisan political ends, the Biden Administration is returning to its playbook from the Obama-Biden Administration in weaponizing the IRS to achieve partisan goals.

First, the proposed rule is unlawful in that it contradicts the plain language of ObamaCare. In ObamaCare, Congress purposefully tied the determination of affordability to the employee's premium amount for self-only coverage, in large part to lower the cost of ObamaCare.[12] Indeed, the proposed rule relies on an impermissible reading of the law that the

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[6] *Id.* § 36B(b)(1) (explaining that the premium tax credit must be for a "coverage month"); *id.* § 36B(c)(2)(B) (excluding from the definition of "coverage month" any month when an individual "is eligible for minimum essential coverage"); *id.* § 36B(c)(2)(C)(i) (explaining that an employee is not "eligible for minimum essential coverage" unless the employer-sponsored plan is "affordable"). The plan must also provide "minimum value." *Id.* § 36B(c)(2)(C)(ii).

[7] *Id.* § 36B(c)(2)(C) (explaining that § 36B(c)(2)(C) "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"); *see also* 26 C.F.R. § 1.36B–1(d) (defining "taxpayer's family" as "the individuals for whom a taxpayer properly claims a deduction for a personal exemption under section 151 for the taxable year").

[8] *See* 26 U.S.C. § 36B(c)(2)(C)(i)(II) (explaining that an employer-sponsored plan is not affordable when "the employee's required contribution (*within the meaning of section 5000A(e)(1)(B)*) with respect to the plan exceeds" a certain percentage of household income (emphasis added)); *id.* § 5000A(e)(1)(B) (defining "required contribution" as "the portion of the annual premium which would be paid by the individual . . . *for self-only coverage*" (emphasis added)); *see also* 26 C.F.R. § 1.36B–2(c)(3)(v)(A)(*2*) ("[A]n eligible employer-sponsored plan is affordable for a related individual if the portion of the annual premium the employee must pay for self-only coverage does not exceed the required contribution percentage . . . .").

[9] Brian Blase, Commentary, *To 'Fix' the ObamaCare 'Family Glitch,' Biden Politicizes the IRS*, WALL ST. J. (Apr. 7, 2022) [hereinafter "Blase, *Biden Politicizes*"].

[10] *See* 87 Fed. Reg. at 20354.

[11] *Id.* (explaining that the proposed rule "would amend the existing regulations regarding eligibility for the premium tax credit . . . to provide that affordability of employer-sponsored minimum essential coverage . . . for family members of an employee is determined based on the employee's share of the cost of covering the employee and those family members, not the cost of covering only the employee").

[12] *See* 26 U.S.C. §§ 36B(c)(2)(C)(i)(II), 5000A(e)(1)(B); 78 Fed. Reg. at 7265; Blase, *Potential Politicization Of The IRS*, *supra* note 1 ("This issue has been dubbed the 'family glitch' although the law was written this way intentionally. . . . 'The glitch was not an accident – basing affordability on the whole family's premiums would have increased federal costs significantly.'" (citation omitted)).

Obama-Biden Administration had rejected because, as the IRS explained in 2013, the statute "specifies that the affordability test for related individuals is based on the cost of self-only coverage."[13]

The IRS's attempt to rewrite the regulation also contravenes the Administrative Procedure Act (APA). Under the APA, courts *must* "hold unlawful and set aside agency action" that violates a statute.[14] All of the Biden Administration's attempts to rewrite statutes have been troubling,[15] but this one is especially so because Congress has declined to amend the text of ObamaCare in this way time and again.[16] The Biden Administration's attempt to circumvent the law tramples on the Constitution and ignores the will of the American people. Likewise, the rule runs the risk of ignoring reliance interests that the almost-decade-long previous policy—which faithfully interpreted the statute—has created.[17]

Second, the IRS's proposed rule is poor policy and will cost billions of taxpayer dollars. Most people that the rule will affect already have coverage under employer health insurance plans.[18] Because the rule will make more dependents eligible for taxpayer-subsidized plans,

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[13] *See* 78 Fed. Reg. at 7265 (noting that "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" and rejecting that reading because "[t]he 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"); Blase, *Potential Politicization Of The IRS*, *supra* note 1 ("Back in 2011 and 2012 when the Obama administration was writing regulations to implement Obamacare, they spent enormous time on the family glitch. Many progressives pushed for a broader interpretation with affordability measured on family coverage instead of self-only coverage. But the Treasury Department, the IRS, the Government Accountability Office, the Joint Committee on Taxation, and the Congressional Budget Office all reached the same conclusion—the statute based affordability on the cost of self-only coverage."); Blase, *Illegal and Harmful*, *supra* note 4, at 8 (noting that the Obama-Biden IRS reached its conclusion despite "significant political pressure at the time to adopt a different interpretation"); *see also* Blase, *Biden Politicizes*, *supra* note 9 ("Mr. Obama's presence at the White House was ironic given that the IRS's proposed policy reverses its decision from a decade ago, when he was president. At that time, the IRS believed it had to follow the law as written."); Editorial Board, *About That ObamaCare 'Glitch,'* WALL ST. J. (Apr. 6, 2022) ("In 2013 even the Obama-era IRS ruled that the subsidy was tied to the cost for the individual. Congress has tried—and failed—to fix the glitch. None of this stopped President Obama from appearing at the White House this week to cheer this subsidy expansion that his own Administration didn't think could be done without new legislation.").

[14] *See* 5 U.S.C. § 706(2)(A), (C).

[15] *See, e.g.*, Adam Liptak, *Supreme Court Blocks Biden's Virus Mandate for Large Employers*, N.Y. TIMES (Jan. 13, 2022); *US judge throws out Biden mask mandate for planes and trains*, BBC (Apr. 19, 2022); Letter from Rep. Jim Jordan et al., Ranking Member, H. Comm. on the Judiciary, to Hon. Lina Khan et al., Chair, FTC, at 2 (July 29, 2021) ("The Democratic [FTC] Commissioners have imposed new obligations on American businesses that exceed the agency's authority in statute.").

[16] Several bills that would have changed the statute to fix the "family glitch" have been introduced in Congress—but none have become law. *See, e.g.*, H.R. 4865, 113th Cong. § 3 (2014); S.2434, 113th Cong. § 3 (2014); S.2132, 115th Cong. § 3 (2017); H.R. 5155, 115th Cong. § 103 (2018); S.2582, 115th Cong. § 205 (2018); S.1935, 116th Cong. § 3 (2019); S.1213, 116th Cong. § 206 (2019); H.R. 1425, 116th Cong. § 103 (2019); H.R. 1870, 116th Cong. § 2 (2019); H.R. 1884, 116th Cong. § 102 (2019); S.4521, 116th Cong. § 102 (2020). *See also* Editorial Board, *supra* note 13 ("Congress has tried—and failed—to fix the glitch.").

[17] *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016).

[18] *See* Blase, *Paragon's Work Featured Prominently*, *supra* note 1 ("The Kaiser Family Foundation estimates that about five million people are affected by the glitch. Nine in 10 of them are currently covered by a spouse's or parent's employer plan." (citation omitted)).

those dependents will likely switch coverage. In other words, the rule "would mostly displace private spending with government spending as dependents replace employer coverage with subsidized exchange coverage."[19] In 2020, the Congressional Budget Office estimated that the change would cost more than $45 billion over ten years.[20] In addition, the dependents who give up private-sector health insurance to enroll in a taxpayer-subsidized plan will likely end up with worse coverage.[21] Families will be forced to navigate multiple plans that could have different networks, benefits, costs, or other disparities.[22] Quite simply, the IRS's rule is another step toward progressive Democrats' goal of "mov[ing] all Americans to government health insurance."[23]

Democrats have no qualms about weaponizing the IRS to advance their partisan political purposes. Beginning in 2010, the IRS targeted conservative groups applying for tax-exempt status. A subsequent bicameral investigation showed how the IRS was "responsive to the partisan policy objectives of the White House and . . . coordinate[d] with political appointees of the Obama Administration."[24] The Obama-Biden Administration also used the IRS to unlawfully

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[19] *Id.* (citation omitted).

[20] *Estimated Effect on the Deficit of Rules Committee Print 116-56, the Patient Protection and Affordable Care Enhancement Act*, CONG. BUDGET OFF. (June 24, 2020) (estimating that it would cost more than $45 billion from 2020 to 2030 to "[e]xpand[] affordability for working families to fix the family glitch"), https://www.cbo.gov/system/files/2020-06/Patient_Protection_and_Affordable_Care_Enhancement_Act_0.pdf; *see also* Blase, *Illegal and Harmful*, *supra* note 4, at 12 (noting that "[a]n updated estimate would likely now show a much higher cost").

[21] *Cf.* Grace-Marie Turner, *Top Reasons Why Obamacare Is Wrong For America*, FORBES (Jan. 17, 2020) ("Obamacare required health insurance to cover a long list of 'essential benefits.' Insurance companies tried to keep premiums as low as they could despite the new benefit mandates so they instead jacked up deductibles and copays and created ultra-narrow networks." (emphasis omitted)), https://www.forbes.com/sites/gracemarieturner/2020/01/17/top-reasons-why-obamacare-is-wrong-for-america/?sh=68250733c846.

[22] *Cf.* Blase, *Illegal and Harmful*, *supra* note 4, at 11; *see also* 87 Fed. Reg. at 20360 (acknowledging that, if the rule were adopted as proposed, some families may have "split coverage"—"self-only employer coverage for the employee plus [premium-tax-credit] subsidized Exchange coverage for related individuals"—and that "split coverage also means multiple deductibles and maximum out-of-pocket limits for the family, which potentially increases out-of-pocket costs for families").

[23] Editorial Board, *supra* note 13 ("Mr. Obama made a revealing remark at Tuesday's rollout, which is that the point of ObamaCare was to 'plant a flag,' to make a down payment. This week's rule is a reminder that the main White House political goal isn't to help the poor or those with terrible ailments, but over time to move all Americans to government health insurance.").

[24] STAFF OF H. COMM. ON OVERSIGHT & GOV. REFORM, THE INTERNAL REVENUE SERVICE'S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICANTS: REPORT OF FINDINGS FOR THE 113TH CONGRESS ii–iii (Dec. 23, 2014), https://republicans-oversight.house.gov/wp-content/uploads/2014/12/December-2014-IRS-Report.pdf; *id.* at 159 ("Documents and information available to the Committee show that the IRS works in conjunction with the [Obama-Biden] Administration and its allies to promote partisan objectives. Evidence suggests that the [Obama-Biden] Administration viewed the IRS as a political and policy extension of the Administration."); *see also* Kimberley A. Strassel, Opinion, *About Those Missing Emails*, WALL ST. J. (June 19, 2014) ("We know from the public record that starting in 2010 the most powerful leaders of the Democratic Party—President Obama, Senate chairmen, House Democrats—ran a ceaseless campaign pressuring the IRS to silence conservative groups. We also know from internal IRS emails that Ms. Lerner, the former head of exempt organizations, was at the epicenter of an agency effort to silence those very groups, in the precise same time frame."); Kimberley A. Strassel, Opinion, *The IRS*

expand an ObamaCare subsidy.[25] It appears the White House is again using the IRS for unlawful ends.[26] As the Committees further explore these issues, we request the following information:

1. All documents and communications sent or received between January 20, 2009, and January 20, 2017, referring or relating to how the affordability determination is made for purposes of premium tax credit eligibility under ObamaCare, including but not limited to all communications sent or received by the following individuals:
    a. Mark Mazur, then-Assistant Secretary for Tax Policy at the U.S. Department of the Treasury;
    b. David Gamage, then-counsel in the Treasury Department's Office of Tax Policy; and
    c. Emily McMahon, then-Deputy Assistant Secretary in the Treasury Department's Office of Tax Policy.

2. The policy memo that David Gamage signed as part of the regulatory-clearance process for the proposed rule that was finalized as the Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264 (Feb. 1, 2013).[27]

3. All documents and communications sent or received between November 3, 2020, and the present referring or relating to how the affordability determination is made for purposes of premium tax credit eligibility under ObamaCare.

4. All communications sent or received between November 3, 2020, and the present between or among any employee (political or otherwise) of the Executive Office of

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Scandal Comes Into Focus, WALL ST. J. (Apr. 10, 2014) ("As the Camp timeline and details show, the IRS responded to liberal calls to go after conservative groups."); *id.* ("We know, too, that Ms. Lerner did some of this in contravention of IRS policy, for instance involving herself in an audit decision that was supposed to be left to a special review committee. We have the story of a powerful bureaucrat targeting an organization and circumventing IRS safeguards against political or personal bias.").

[25] *Cf.* JOINT STAFF OF H. COMM. ON OVERSIGHT & GOV. REFORM & H. COMM. ON WAYS & MEANS, ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW'S TAXES AND SUBSIDIES 34 (Feb. 5, 2014) ("As the non-partisan Congressional Research Service legal analysis noted, the plain language of the statute does not appear to authorize [ObamaCare's] premium tax credits or the resulting penalties in states that elect not to establish exchanges."), https://republicans-oversight.house.gov/wp-content/uploads/2022/06/IRS-Rule-OGR-WM-Staff-Report-Final2.pdf; *id.* at 3–4 ("The evidence gathered by the Committees indicates that neither IRS nor the Treasury Department conducted a serious or thorough analysis of the [ObamaCare] statute or the law's legislative history with respect to the government's authority to provide premium subsidies in exchanges established by the federal government [rather than the states]. IRS and Treasury merely asserted that they possessed such authority without providing the Committees with evidence to indicate that they came to their conclusion through reasoned decision-making.").

[26] *See* Blase, *Paragon's Work Featured Prominently*, *supra* note 1; Blase, *Potential Politicization Of The IRS*, *supra* note 1.

[27] *See* JOINT STAFF OF H. COMM. ON OVERSIGHT & GOV. REFORM & H. COMM. ON WAYS & MEANS, *supra* note 25, at 18 ("When the 36B proposed rule was finalized, the text of the proposed rule was sent to Emily McMahon for review. As part of the regulatory clearance process, a policy memo written by David Gamage, a counsel in Treasury's Office of Tax Policy, accompanied the proposed rule."); *id.* at 19 n.81 (citing the policy memo that David Gamage signed).

the President, including the Office of Management and Budget, the IRS, and the Treasury Department referring or relating to how the affordability determination is made for purposes of premium tax credit eligibility under ObamaCare, including but not limited to all communications sent or received by the following individuals:

a. Topher Spiro, Associate Director for Health at the Office of Management and Budget; and
b. Christen Linke Young, Deputy Director of the White House's Domestic Policy Council for Health and Veterans.

Please produce this information as soon as possible but no later than 5:00 p.m. on June 20, 2022.

As we continue to further investigate this matter, we ask that you arrange an initial staff-level briefing in response to the concerns raised in this letter. Please schedule the briefing as soon as possible but no later than 5:00 p.m. on July 5, 2022. Thank you for your prompt attention to this matter.

Sincerely,

Jim Jordan
Ranking Member
Committee on the Judiciary

James Comer
Ranking Member
Committee on Oversight and Reform

cc: The Honorable Jerrold L. Nadler, Chairman, Committee on the Judiciary
The Honorable Carolyn B. Maloney, Chairwoman, Committee on Oversight and Reform