A Biden Administration Regulatory "Fix" to the "Family Glitch" Would Be Illegal and Harmful

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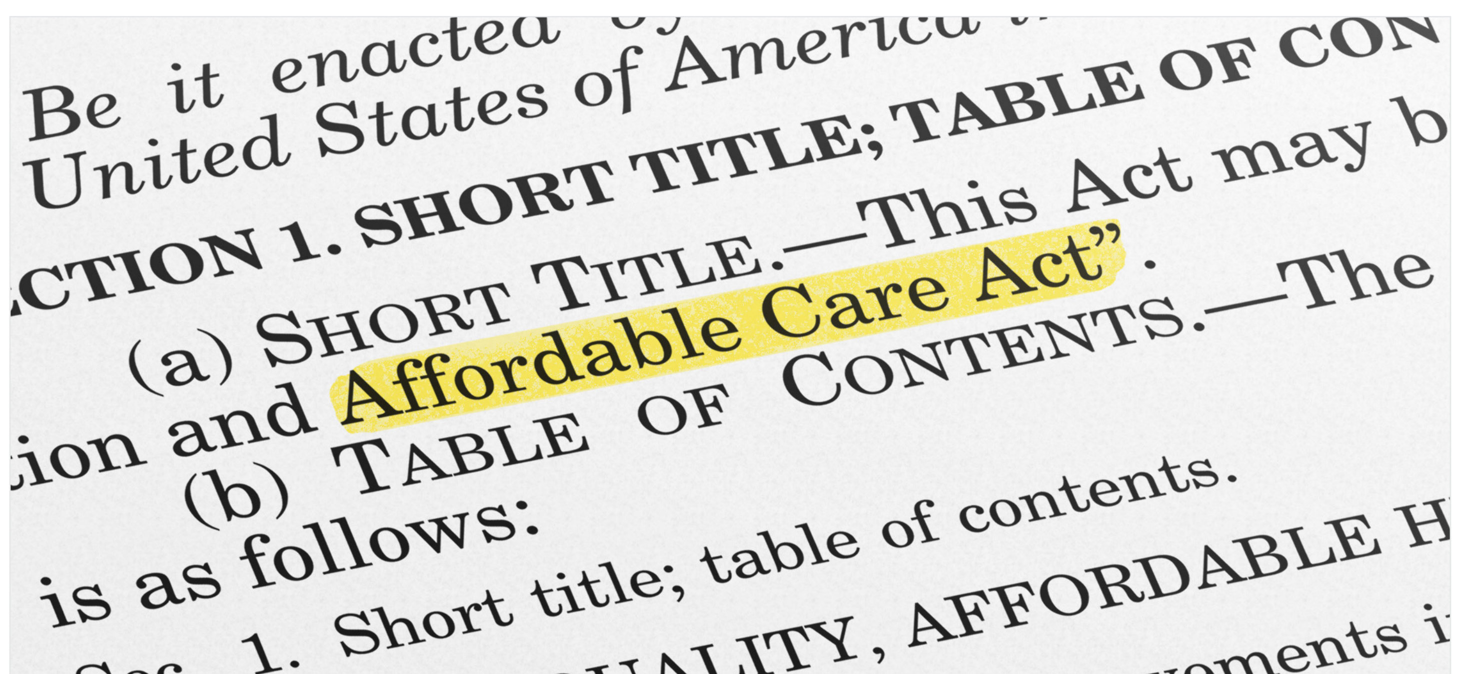

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P.O. Box 130

Paeonian Springs, VA 20129

galen.org

(703) 687-4665

galen@galen.org

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A Biden Administration Regulatory "Fix" to the "Family Glitch" Would Be Illegal and Harmful

By Brian Blase, PhD

Senior Fellow at the Galen Institute

OVERVIEW

Biden administration officials reportedly are exploring whether they can use the regulatory process to "fix" the so-called family glitch in the Affordable Care Act (ACA).[1] Doing so would extend ACA premium tax credits (PTCs) to millions more individuals, potentially reducing the number of people who are uninsured by hundreds of thousands. There would, however, be many adverse consequences, such as workers' family members losing employer health insurance, more family members being on separate insurance policies, and much higher federal spending, most of which go to subsidies for people who already have coverage.

The "family glitch" is the result of a haphazard legislative process to enact the ACA after Senator Edward Kennedy's death in 2009 brought the Democrats' Senate majority below 60 seats and key issues could not be worked out by Congress given the legislative maneuvers Democrats employed. Given the ACA's complicated structure and how various components interact with each other, the "family glitch" is actually not a glitch at all. The statute is clear, and the "family glitch" was the result of policy and political constraints at the time, such as minimizing disruption to employer coverage and keeping the cost of ACA spending below levels specified by then-President Obama.

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. This conclusion is the only one consistent with the statute. There have not been any changes to the law's relevant provisions around the family glitch since March 2010, so, like the

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[1] Amy Lotven, "Administration Eyes Regulatory Path to Fix Family Glitch," *Inside Health Policy*, April 5, 2021, https://insidehealthpolicy.com/daily-news/administration-eyes-regulatory-path-fix-family-glitch.

Obama administration, the Biden administration does not have the authority to address the family glitch through regulation. It is up to Congress to decide the policy considerations and tradeoffs in making such a "fix."

The advocates of an administrative fix do not want Congress to have to pay for it, preferring instead to have the executive branch substantially expand federal subsidies, directed toward health insurance companies, for their political goal of maximizing exchange enrollment. Most importantly, the Internal Revenue Service (IRS) must enforce the tax law impartially and consistent with statute, remaining indifferent to the political desires of the White House or certain policy advocates. Succumbing to such pressure would mean that the IRS would turn into an overtly political organization.

Update: *This is an updated version of a paper initially released by the Galen Institute on May 3, 2021. This version more clearly describes the family glitch, particularly around employers' obligations to offer coverage and the interactions between the offer of employer coverage and the availability of premium tax credits. While the analysis is largely unchanged, this version reflects more detailed information subsequently learned about the administration fix apparently being pushed by the Biden administration that would permit employees' dependents greater access to premium tax credits without broadening the scope of the employer mandate penalties. While an administrative fix would increase the number of dependents eligible for a PTC, I am now skeptical that an administrative fix would broaden the reach of the employer mandate. The employer mandate penalties are triggered only when an employee, and not an employee's dependents, becomes eligible for and receives a PTC for exchange-based coverage.*

What Is the Family Glitch?

The ACA made PTCs available to people in households with income between 100 percent and 400 percent of the federal poverty level (FPL) so long as they are not eligible for a government health care program or do not receive an offer of "affordable" employer coverage.[2] For 2021 and 2022, the American Rescue Plan Act made the PTCs more generous and removed the subsidy cap previously at 400 percent of the FPL. For these two years, the PTCs are available until people reach an income level where the out-of-pocket premium payment for the benchmark plan[3] no longer exceeds 8.5 percent of household income. The PTCs result in federal taxpayers picking up all or part of the cost of an exchange plan, and they phase down as household income increases.

The ACA contained an employer mandate that required applicable large employers (ALEs)—employers with at least 50 full-time equivalent employees—to offer coverage to their employees and employees' children or face tax penalties. The requirement to offer coverage did not extend to employees' spouses although most firms that offer coverage include spousal benefits. There is a second set of tax penalties if the offer of coverage to the employee for self-only coverage is not affordable. Employers are assessed this penalty for employees who turn down the offer of unaffordable coverage and utilize a PTC to purchase a plan in the exchange. There is not an affordability requirement for dependent coverage.

An employer plan is considered affordable if it offers specified "minimum value" coverage and the worker's premium is no more than about 9.83 percent of household income for a *self-only plan*. If a worker receives an offer of affordable self-only coverage from their employer, then the worker is ineligible for a PTC. The workers' dependents offered coverage by the firm also would be ineligible for PTCs, even if the firm does not provide any contribution toward the family coverage. Thus, if a firm offers affordable self-only coverage, every other family member who is offered coverage by the employer is ineligible for PTCs in the exchanges. Even though they are ineligible for PTCs, the employees' dependents remain eligible to purchase exchange plans.

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[2] From 2014 through March 2021, eligibility of PTCs was limited to households with income between 100 percent and 400 percent of the FPL. However, a provision of the American Rescue Plan Act reduced the percentage of income that people must pay for a benchmark plan and lifted the eligibility cap, which previously was set at 400 percent of the FPL. The expanded subsidies were authorized for 2021 and 2022.

[3] The second lowest-cost silver exchange plan in a region.

Some claim that the ACA's construction created a "family glitch" for households where family coverage offered by the employer is unaffordable, and those dependents offered coverage are ineligible for PTCs to purchase a plan on the exchanges. But the family glitch is clearly in the ACA's statutory construction. According to ACA expert Louise Norris, "The glitch was not an accident—basing affordability on the whole family's premiums would have increased federal costs significantly."[4]

The Statute Limits the Availability of PTCs to Employee Dependents Based on the Price of Self-Only Coverage

In ACA Section 36B(c)(2)(C), the law states that an employer 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." (There are small adjustments to that percentage over time, and it is 9.83 percent of income in 2021.) For "required contribution," the statute refers to the definition in 26 U.S. Code §5000A(e)(1)(B), which pertains to the requirement to attain minimum essential coverage. The relevant excerpt is below. It shows that the premium for self-only coverage is used in the affordability calculation for both the employees and for their family members offered coverage through the employer plan.

> *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**, or*
>
> *(ii) in the case of an individual eligible only to purchase minimum*

[4] Norris outlined the statutory provisions as follows: "In 36B, the law states that an employer plan is affordable as long as the employee's required contribution doesn't exceed 9.5% of income (but that's indexed annually; it's 9.83% in 2021, unless the IRS reduces it to 8.5% to align affordability with the newly enhanced premium subsidies under the American Rescue Plan). And to clarify 'required contribution' we're referred to the definition in 5000A, which states that it's the amount that must be paid for *self-only* coverage." https://www.healthinsurance.org/obamacare/no-family-left-behind-by-obamacare/#mandate.

essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees

For 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 required contribution of the employee****.*

[Emphasis added]

Obama Administration Determined That There Is No Legal "Fix" for the Family Glitch

Congress often writes legislation in a manner that gives federal departments and agencies wide discretion in implementation. Departments and agencies issue regulations, notices, or guidance documents for how they intend to implement and enforce statutes passed by Congress.

One of the top priorities of the Obama administration, if not the top priority, was the success of the ACA. The fact that the Obama administration did not "fix" the family glitch is telling since the Obama administration desired maximum enrollment in the new programs and employed legal gymnastics in implementing the ACA, often stretching—and sometimes skirting—the law to fulfill its political objectives.[5] The creation of so-called "grandmothered" plans is a prime example. The ACA outlawed insurance plans that did not

[5] Grace-Marie Turner, "Testimony: 'Examining the Use of Administrative Actions in the Implementation of the Affordable Care Act,'" Galen Institute, May 20, 2015, https://galen.org/2015/examining-the-use-of-administrative-actions-in-the-implementation-of-the-affordable-care-act/.

meet its new requirements unless those plans were in existence as of March 23, 2010. These "grandfathered" plans were exempt from the ACA's health insurance requirements. After a storm of criticism, in early November 2013 then President Obama apologized to people who were misled by his promise that people would not lose coverage that they previously had and liked, and he instructed the government to fix the problem.[6] Without any legal basis, the administration permitted states to allow people to maintain and renew plans that people entered after March 23, 2010—in essence creating a new class of non-ACA-compliant plans ("grandmothered" plans).

The PTCs are under the purview of the Department of Treasury and the IRS. A congressional investigation revealed that the family glitch was one of the most significant issues considered by IRS and Treasury in promulgating rules around the PTCs early in the last decade.[7] During the Obama administration, the IRS issued PTC rules after going through the standard public notice and comment rulemaking process. Those rules clearly state that the language of the ACA bases determination of "affordability" on self-only coverage. For example, in a final rule ("Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit"), the IRS stated that "section 36B(c)(2)(C) [of the ACA] provides that the affordability of coverage for related individuals under section 36B is based on the cost of self-only coverage."[8] The Treasury and IRS interpreted the statute the only legal way they could and in the way that the Joint Committee on Taxation and the Congressional Budget Office had previously interpreted it.

Moreover, the IRS and Treasury made this determination despite both significant political pressure at the time to adopt a different interpretation[9] and when the Obama administration had, in numerous other instances, made decisions that stretched and skirted the law in implementing the ACA. The legal issues

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[6] Todd, Chuck, "Obama personally apologizes for Americans losing health coverage," *NBC News*, last updated November 8, 2013, https://www.cnbc.com/2013/11/07/obama-personally-apologizes-for-americans-losing-health-coverage.html.

[7] U.S. House of Representatives Committee on Oversight and Government Reform, and Committee on Ways and Means, "Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies," joint staff report, February 5, 2014, https://republicans-oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final2.pdf.

[8] IRS, "Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit," *Federal Register*, December 18, 2015, https://www.federalregister.gov/documents/2015/12/18/2015-31866/minimum-value-of-eligible-employer-sponsored-plans-and-other-rules-regarding-the-health-insurance.

[9] "A Glitch in Health Care Reform," *The New York Times*, August 25, 2012, https://www.nytimes.com/2012/08/26/opinion/sunday/a-glitch-in-health-care-reform.html.

have not changed since the Obama administration spent considerable time examining the family glitch.

Career civil servants at IRS and Treasury and potentially at the Office of Management and Budget, which reviews and clears all federal regulations, will likely balk if they receive direction from political appointees to revisit this issue since the legal issues remain the same as they were when this issue was decided in the last decade. Political appointees can override career officials, but they tend to be especially wary of this at the IRS because of concerns about political interference with the enforcement of the tax code. Moreover, there would be major litigation and policy concerns with a different legal position.

Why the Need for a Firewall?

The ACA included a provision that prevented employees from choosing between the PTC to buy an exchange plan and enrolling in employer-sponsored coverage. In essence, the ACA's designers included the firewall to prevent people from ditching employer coverage for a heavily subsidized exchange plan if the employer provided "affordable" coverage.

There are numerous policy and political reasons for the ACA's construction of a firewall between affordable employer coverage and PTC eligibility and why affordability was linked to self-only coverage. First, doing so minimized disruption of employer coverage since many political leaders were concerned while the ACA was being debated that it would cause a large loss of employer coverage. Second, the firewall avoided broadening the politically unpopular and economically damaging employer mandate penalties. Third and perhaps most importantly, the firewall and the employee-only affordability definition served as a budget constraint. The cost of the PTCs generally is much greater than the value of the tax exclusion for employer coverage so limiting eligibility kept the overall cost of the ACA in the first decade to under $1 trillion as President Obama directed the cost to be below $900 billion.[10]

The ACA's PTCs are very large, particularly for middle-age and older individuals with lower incomes. The American Rescue Plan Act, passed in March 2021 on a strictly party-line vote, made the PTCs even larger and removed the cap

[10] Kimberly Amadeo, "Obama's Health Care Reform Plan," *The Balance*, last updated October 30, 2020, https://www.thebalance.com/obama-s-health-care-reform-plan-3305753.

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that had been set at 400 percent of the FPL.[11] This creates large PTCs available to middle-age and older employees with middle- and upper-middle incomes (and well into very-high-income households in areas of the country where premiums are higher).[12] In essence, the American Rescue Plan Act makes maintaining the firewall by limiting affordability of employer-based coverage to self-only plans even more important from a policy and budgetary perspective, particularly because the vast majority of the people who would gain eligibility for a PTC from a family glitch "fix" already have coverage.

Without the firewall, tens of millions of people would either replace or lose their employer coverage, with profoundly negative budgetary effects. Policy analyst Chris Jacobs estimated that eliminating the firewall would cost $2.2 trillion over a decade as 24 million Americans drop employer coverage to enroll in more heavily subsidized ACA plans.[13] Jacobs's estimates were also well below estimates from Avalere Health. Avalere projected that a similar proposal that eliminated the firewall would reduce the number of people covered by employer plans by 33 million, with 18 million migrating to the exchanges voluntarily and the rest forced there because their employers stopped offering coverage.[14]

Negative Consequences of an Administrative Fix

Aside from the constitutional problems with an administrative fix to the family glitch, using the price of family coverage to determine the affordability of employers' insurance for purposes of the ACA would lead to three inter-related and significant problems: displacing private spending with government spending as people replace employer coverage with subsidized exchange coverage, making coverage more complicated for families, and significantly increasing federal spending.

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[11] Brian Blase, "Expanded ACA Subsidies: Exacerbating Health Inflation and Income Inequality," Galen Institute, February 2021, https://galen.org/assets/Expanded-ACA-Subsidies-Exacerbating-Health-Inflation-and-Income-Inequality.pdf.

[12] Ibid.

[13] Chris Jacobs, "Your Company Health Plan Isn't Safe in a Biden Presidency," *Wall Street Journal*, September 21, 2020, https://www.wsj.com/articles/your-company-health-plan-isnt-safe-in-a-biden-presidency-11600709029.

[14] "Medicare Extra: Universal Coverage for Less Than $3 Trillion and Lower Health Care Costs for All," Center for American Progress, July 2019, https://cdn.americanprogress.org/content/uploads/2019/07/22132250/Medicare.-Extra.pdf.

First, the family glitch is estimated to affect 5.1 million people.[15] However, only an estimated 451,000 of these individuals are currently uninsured—or less than 9 percent of the people who fall into the family glitch.

Most of those categorized as being in the family glitch—more than 85 percent—are dependents who currently receive employer coverage, generally under a spouse's or parent's plan. So, the great majority of dependents caught in the family glitch already have coverage, primarily on an "unaffordable" employer plan. For the most part, these families have determined that such coverage is in fact affordable as they made the decision to purchase it. On average, employers finance most of the premium, paying 83 percent of the premium for single coverage and 73 percent of the premium for family coverage in 2020.[16] The large taxpayer cost of "fixing" the family glitch thus would overwhelmingly provide taxpayer support to people who already have coverage—simply replacing private spending with government spending.

Another cost of fixing the family glitch is that families no longer would have a single insurance plan to navigate but would instead have different plans for the employee and the employee's dependents. The employee would be covered by the employer plan and the dependents would be covered by an exchange plan, likely with very different networks, benefit structures, etc.

If the Biden administration were to change the affordability measure to family coverage rather than self-only coverage, ALEs that currently offer family coverage would have an incentive to make it unaffordable, potentially by not contributing anything toward that coverage. Making family coverage unaffordable would allow the worker to be insured through the employer plan and the worker's dependents to qualify for a PTC to purchase an exchange plan. The employer would be protected from an employer mandate penalty so long as the company offered affordable self-only coverage to their employee and just offered dependent coverage with little, if any, employer contribution. The gaming of such a fix and the potential cost would be much larger if the enhanced PTCs from the American Rescue Plan Act are made permanent.[17] According to a CBO estimate from last year, a family glitch fix

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[15] Cynthia Cox et al., "The ACA Family Glitch and Affordability of Employer Coverage," Kaiser Family Foundation, April 7, 2021, https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/.

[16] Kaiser Family Foundation, "2020 Employer Health Benefits Survey," October 8, 2020, https://www.kff.org/report-section/ehbs-2020-section-6-worker-and-employer-contributions-for-premiums/.

[17] Blase, "Expanded ACA Subsidies."

would cost $45 billion over a decade.[18] An updated estimate would likely now show a much higher cost.

These problems would be in addition to the most significant problem of the overt politicization of the IRS. If the IRS were to cave to political pressure from the White House and progressive organizations for an administrative fix, it would demonstrate that the IRS's enforcement of the tax code can change depending on which party wins the White House.

There is one additional litigation risk that the IRS and Treasury are almost certainly evaluating: A changed interpretation would give individuals who were harmed by the previous interpretation cause to sue and potentially gain compensation. The IRS and Treasury are loath to open the door to this type of lawsuit.

What Congress Should Do

The Constitution is clear: Congress legislates, and the executive branch enforces those laws. A disturbing trend over the past several decades has been congressional abdication of its primary responsibility, deferring to federal agencies and bureaucracies to make law through administrative rulemaking. However, while those agencies and bureaucracies have substantial discretion in many cases, they remain constrained by the statute. In this case, and as determined by the IRS and Treasury during the Obama administration as well as earlier by the Joint Committee on Taxation and CBO, affordability of employer coverage is unambiguously based on the premium of self-only coverage. The IRS cannot change tax law based on the political or policy preferences of a new presidential administration, and efforts to compel the IRS to do so are noxious.

A new interpretation would create a set of individuals who were harmed by the previous interpretation and could potentially sue the IRS and Treasury for damages. Aside from this problem, an administrative "fix" to the family glitch would lead to families being on separate insurance policies, cause a massive shift from employer health insurance to heavily government-subsidized ACA coverage, and increase federal spending far beyond what Congress authorized. Any fix to the family glitch needs to come from Congress and would ideally avoid the many negative consequences that an administrative fix would cause.

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[18] CBO, "Table 1. Estimated Effect on the Deficit of Rules Committee Print 116-56, the Patient Protection and Affordable Care Enhancement Act," June 24, 2020, https://www.cbo.gov/system/files/2020-06/Patient_Protection_and_Affordable_Care_Enhancement_Act_0.pdf.

In 2014, then-Senator Franken introduced legislation to fix the family glitch.[19] Although the Democrats controlled the Senate at the time, the legislation failed to gain traction, beyond getting 23 cosponsors.

Congress should exercise an appropriate oversight role to ensure that the executive branch fulfills its duty to carry out the laws it enacts and not unilaterally rewrite them to serve political interests. Congress should consider requesting all the relevant documents and communications pertinent to the Obama administration's conclusion that it lacked authority to administratively address the family glitch. If Congress wishes to fix the family glitch, then it must pass legislation to do so. Such legislation would hopefully minimize the numerous adverse effects on many employers, families, and the federal budget that would occur if the Biden administration were to attempt a change through regulatory action.

Brian Blase, PhD, is a senior fellow at the Galen Institute and the Foundation for Government Accountability. From 2017 to 2019, Dr. Blase served as a Special Assistant to the President for Economic Policy at the White House's National Economic Council. In this capacity, he coordinated the Trump administration's health policy agenda, leading the development of the administration's policies to increase health care choice and competition. Dr. Blase has worked for key congressional committees in both the U.S. House of Representatives and the U.S. Senate and has conducted research and analysis at several public policy organizations. He often publishes research and commentaries and is a regular contributor to The Wall Street Journal*,* New York Post*, and* The Hill*, among many other outlets. Dr. Blase has a PhD in economics from George Mason University. He lives in northern Florida with his wife and five children, and he is the CEO of Blase Policy Strategies.*

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[19] S. 2434, "Family Coverage Act," Introduced June 5, 2014, https://www.congress.gov/bill/113th-congress/senate-bill/2434.

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