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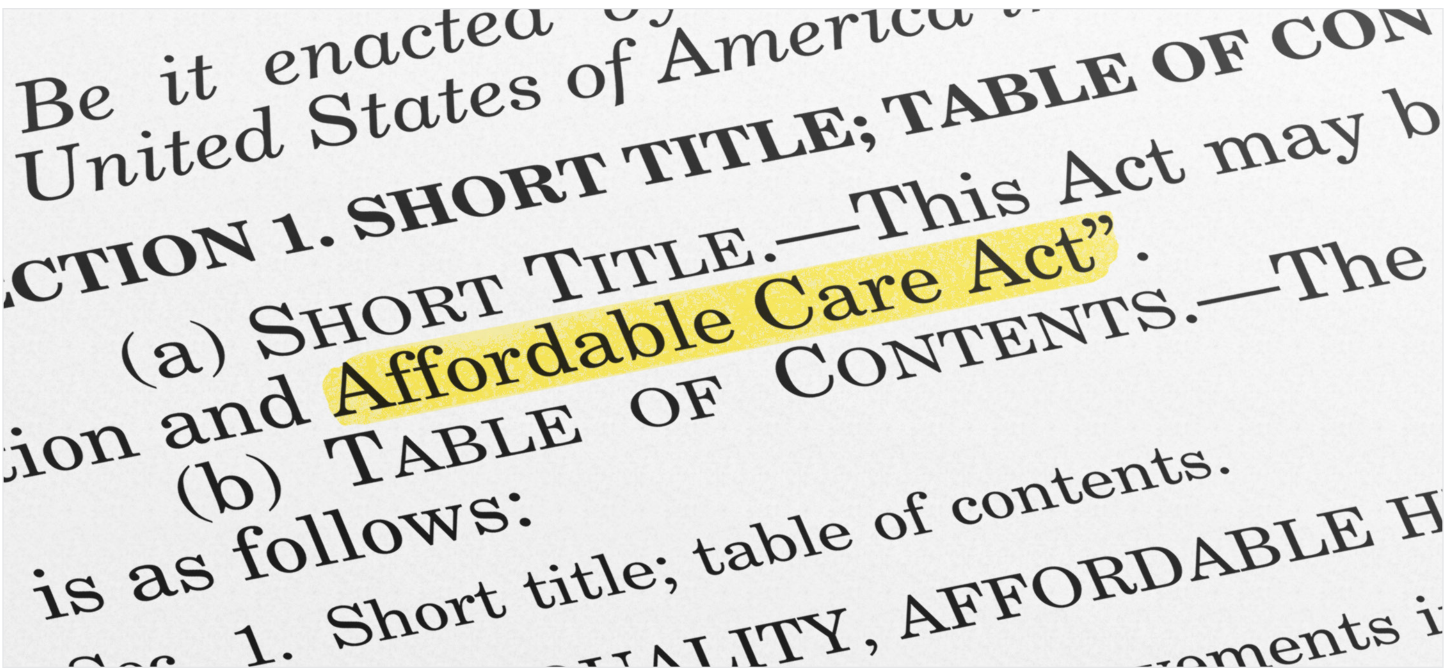

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A Biden Administration Regulatory "Fix" to the "Family Glitch" Would Be Illegal and Harmful

By Brian Blase, PhD

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OVERVIEW

Biden administration officials are reportedly 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, reducing the number of uninsured people by hundreds of thousands. There would, however, be many adverse consequences, such as workers' and their family members losing employer health insurance, more family members on separate insurance policies, greater employer mandate penalties, and much higher federal spending.

Media reports suggest that Biden political appointees, who may be less concerned with the displacement of employer coverage and burgeoning federal deficits, may be pushing career officials to revisit the definitive conclusion they arrived at during the Obama administration that such a "fix" could not be accomplished without legislation. The "family glitch" is the result of a haphazard legislative process to enact the ACA after Senator Kennedy's death brought the Democrats' Senate majority below 60 seats and key issues could not be worked out by Congress. Given the ACA's complicated structure and how various components interact with other components, such as how employees' eligibility for premium tax credits (PTCs) affects employer mandate penalties, the "family glitch" is not a glitch at all but rather the only valid conclusion of a proper legal and policy review of the statute. Like the 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."

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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.

What Is the Family Glitch?

The PTCs are available to people in households with income above 100 percent of the federal poverty level (FPL) until they reach an income level where the benchmark plan[2] premium no longer exceeds about 8.5 percent of household income and so long as they are not eligible for a government health care program or do not receive an offer of "affordable" employer coverage.[3] 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. An employer plan is considered "affordable" if it offers specified "minimum value" coverage and the worker's premium is no more than about 8.5 percent of household income *for a self-only plan*. Thus, even if family coverage is not offered by the employer or if it is cost prohibitive, no one in the worker's family can receive a PTC to purchase an exchange plan if the employee receives an offer of individual coverage from his or her employer that meets the ACA's affordability test.

As a result of this provision, it is not just an employee who is prevented from receiving a PTC if he or she receives an offer of affordable coverage; the entire family is firewalled. The Treasury Department, the Internal Revenue Service (IRS), and Congress's Joint Committee on Taxation have determined that this is clear statutory interpretation of the language in the ACA.

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.

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

[3] 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.

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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.[4] The creation of so-called "grandmothered" plans is a prime example. The ACA outlawed insurance plans that did not 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, then President Obama apologized to people who were misled by his promise that people would not lose coverage that they liked, and he instructed the government to fix the problem.[5] 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).

If President Biden's administration now wants to "fix" the family glitch through administrative actions, his administration would need to create a legal justification that eluded the Obama administration. 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.[6] 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."[7]

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[4] 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/.

[5] 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.

[6] 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.

[7] 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.

Moreover, the IRS and Treasury made this determination despite both significant political pressure at the time to adopt a different interpretation[8] and when the Obama administration had, in numerous other instances, made decisions that stretched, if not occasionally skirted, the law in implementing the ACA. The legal issues have not changed since the Obama administration spent considerable time examining this issue. Thus, if President Biden now wants to fix the family glitch through administrative actions, his administration would need to create a legal justification that eluded the Obama administration.

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 last decade when this issue was decided. 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?

There are numerous policy and political reasons why the ACA constructed 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 first decade cost of the ACA under $1 trillion as President Obama desired the cost to be below $900 billion.[9]

To keep the overall cost of the PTCs manageable, the ACA included a provision that prevented employees from choosing between the PTC to buy an

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8 "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.

9 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.

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.

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 that had been set at 400 percent of the FPL.[10] This creates very 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).[11] 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.[12] 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.[13]

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[10] 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.

[11] Ibid.

[12] 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.

[13] "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.

Negative Consequences of an Administrative Fix

Using the price of family coverage to determine the affordability of employers' insurance for purposes of the ACA would have negative implications for businesses, families, and taxpayers. Because employers with at least 50 full-time employees (applicable large employers, or ALEs) are subject to penalties if they fail to offer affordable coverage, such a fix would broaden their potential tax penalties. In addition to the policy concerns, it would extend these penalties beyond what the statute authorized so it would carry significant litigation risk.[14] Such a change may also require ALEs to collect information about the total household income of their employees since that information would be necessary for determining the applicability of the penalty if affordability is based on family coverage.

If a fix could somehow be concocted to exempt ALEs from these penalties (it is unclear a legal justification could be created to do this), the federal budgetary costs would be even more significant since businesses that currently offer family coverage would be incentivized to either stop offering coverage or make family coverage unaffordable. 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 gaming of such a fix and the potential cost would be much larger if the enhanced PTCs from the American Rescue Plan Act were to be made permanent.[15]

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 loathe to open the door to this type of lawsuit.

For context, it is worth noting that the family glitch is estimated to affect 5.1 million people.[16] However, only an estimated 451,000 of these individuals are currently uninsured—or less than 9 percent of the people who fall into the

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[14] Employers would be harmed if their current coverage offers would expose them to potential new penalties or they were forced to change coverage—including being required to offer dependent coverage when they previously only offered self-only coverage in order to avoid potential penalties.

[15] Blase, "Expanded ACA Subsidies."

[16] 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/.

family glitch. The large taxpayer cost of "fixing" the family glitch would thus overwhelmingly benefit people who already have coverage—simply replacing private spending with government spending.

Moreover, more than 85 percent of people in the family glitch are dependents who currently receive employer coverage, largely under a spouse's or parent's plan. Since the vast majority of people affected by the family glitch are dependents who are covered by a family member's policy, another cost of fixing the family glitch is that families would no longer have a single insurance plan to navigate but would instead have different plans for the employee and the employee's dependents.

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 by the Joint Committee on Taxation, affordability of employer coverage is based on the premium of self-only coverage. 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 subject many employers to unauthorized penalties under the employer mandate, lead to families on separate insurance policies, cause a massive shift from employer health insurance to heavily taxpayer-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.

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 should 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.

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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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