CALIFORNIA BUDGET PROJECT

October 31, 2011

CC:PA:LPD:PR (REG—131491—10), Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

SUBJECT: Affordability of Employer-Sponsored Minimum Essential Coverage, Proposed Rules Section 1.36B-2(c)(3)(v).

To Whom It May Concern:

I am writing to comment on the proposed rules for determining affordability of employer-based minimum essential coverage.

The California Budget Project (CBP) is a nonprofit organization that engages in independent fiscal and policy analysis and public education with the goal of improving public policies affecting the economic and social well-being of low- and middle-income Californians. Over the past 16 years, the CBP has analyzed the impact of state and federal health policies on California's low-income families. The CBP is concerned about Treasury's proposed rule on determination of affordability of employer coverage. We believe Treasury's interpretation of the law would ultimately undermine the intent of the Affordable Care Act of 2010 (ACA) and make health coverage unaffordable to millions of families.

To ensure that the final rule is consistent with the statute and coverage goals of the ACA, this letter recommends that Treasury base the determination of whether job-based coverage is unaffordable on the employee's contribution for family coverage – both for purposes of the firewall and the exemption from the penalty of not having coverage.

Determination of Affordability of Employer-Based Minimum Essential Benefits

At issue is how eligibility for subsidized coverage in a state insurance exchange is determined. The ACA allows individuals and families to purchase subsidized coverage in state exchanges. The ACA, however, establishes a "firewall" to limit enrollment in state exchanges and preserve job-based coverage. A key factor in determining whether an individual or family is eligible for subsidized coverage through the exchange is whether they have access to affordable coverage elsewhere.

1107 9th Street, Suite 310
Sacramento, California 95814
P: (916) 444-0500
F: (916) 444-0172
cbp@cbp.org
www.cbp.org

In general, individuals with access to job-based coverage are not eligible for subsidized coverage through state exchanges. Therefore, workers who are offered health coverage through their jobs must accept their offer of job-based coverage, even if that coverage is more costly or less comprehensive than health plans in the exchange. Job-based coverage is considered affordable for an employee as long as premium costs are less than 9.5 percent of that employee's income. This rule is straightforward for single workers. However, the affordability test for job-based coverage becomes more complex as applied to families. For dependents of the employee, the ACA includes a special rule that says determining the affordability of coverage "shall be made by reference to the affordability of the coverage to the employee."[1] Treasury's interpretation of the ACA's special rule would apply the same affordability standard for a single employee to dependents of the employee, such as a spouse or children. Section 1.36B-2(c)(3)(v) states that affordability of coverage for a "related individual" would be determined by the cost of self-only coverage for the employee. In other words, Treasury's interpretation of the ACA "firewall" provision does not consider the additional costs of covering dependents.

Treasury, however, interprets the affordability of coverage differently when determining the ACA's individual responsibility requirement for an individual or family. Treasury states it will use the entire cost of family coverage to determine affordability of the coverage for an employee and dependents, rather than the cost for self-only coverage, as it does when measuring affordability for purposes of the "firewall.'' Simply put, Treasury applies two different affordability tests – one when determining the ACA's individual responsibility requirement, and another when determining the affordability of job-based coverage for the "firewall." The CBP recommends that Treasury apply the same rule in all instances, using the premium costs for family coverage against household income to determine affordability.

As an example of how Treasury's proposed rule on the "firewall" would be applied, take a family of three earning twice the federal poverty line, or $37,060. The employee's share of cost for self-only coverage is $200 a month (6.5 percent of household income). The same employee's share of cost for the worker and his or her spouse is $400 (13.0 percent of household income).[2] Under the Treasury rule, because the $200-a-month premium for worker-only coverage is below the 9.5 percent threshold for affordability, this family must accept job-based coverage even though this family would be spending a relatively large share of its income on health premiums costs. The Kaiser Family Foundation (KFF) has estimated that 3.9 million Americans are "dependents" of workers, who have access to affordable self-only coverage, but lack access to affordable job-based family coverage.[3] Under Treasury's proposed rule, these Americans would be excluded from purchasing affordable coverage in health insurance exchanges because they would be viewed as having access to affordable job-based coverage. KFF estimates these families would pay, on average, 14 percent of annual income for premium costs if they opted into costly job-based coverage.

If the rule is adopted as proposed, millions of adults and children who are the dependents of workers who are offered high-cost job-based family coverage would be barred from obtaining subsidized health coverage in the exchanges. By failing to take the cost of family coverage into account in determining eligibility for premium credits and cost-sharing

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[1] Patient Protection and Affordable Care Act (Public Law 111-148).

[2] In this example, the child would be eligible for coverage in the state Children's Health Insurance Program.

[3] Larry Levitt and Gary Claxton, *"Measuring the Affordability of Employer Health Coverage"* (Kaiser Family Foundation: August 24, 2011) downloaded from http://healthreform.kff.org/notes-on-health-insurance-and-reform/2011/august/measuring-the-affordability-of-employer-health-coverage.aspx on October 20, 2011.

subsidies, the Treasury rule would leave many families already struggling to make ends meet paying large portions of their household incomes for family coverage offered by an employer. Many others are likely to go without health insurance because of the high cost. This outcome would undermine the goal of the Affordable Care Act to increase access to affordable coverage.

The CBP requests that Treasury modify Section 1.36B-2(c)(3)(v) to base the cost of covering the whole family on the whole family's income. Such a test is more consistent with the intent of the ACA, which is to expand access to affordable coverage.

Thank you for your consideration. If you have any questions, please contact Hanh Kim Quach or me at (916) 444-0500.

Sincerely,

Jean Ross
Executive Director