March 18, 2013

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

Internal Revenue Service
Room 5203
POB 7604
Ben Franklin Station
Washington, DC 20044

RE: Shared Responsibility for Employers Regarding Health Coverage

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the Notice of Proposed Rulemaking on the Shared Responsibility for Employers Regarding Health Coverage ("NPRM"), published in the Federal Register on January 2, 2013, and issued by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS").[1] The Proposed Rule proposes regulations, consistent with the Patient Protection and Affordable Care Act, as amended by the Health Care and Education and Reconciliation Act of 2010, ("PPACA") regarding the requirement, effective in 2014, that certain applicable large employer offer affordable, minimum value health coverage to their full-time employees and dependents.[2]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 States. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. These comments

[1] Notice of Proposed Rulemaking on Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 218-253 (January 2, 2013). (to be codified at 26 C.F.R. pts 1, 54 and 301) [hereinafter referred to as "NPRM"]. http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. (2010). [hereinafter referred to as "PPACA"]

have been developed with the input of member companies with an interest in improving the health care system.

OVERVIEW

The Chamber and our member companies want quality health care to be readily available at an affordable price, a central goal of PPACA. The Chamber has long advocated for efforts to support the employer sponsored system and remain concerned that the new employer mandate requirement will instead erode this valued coverage.

The Chamber welcomes the NPRM and commends Treasury and IRS for the efforts to address the challenges that employers will face during the implementation of the PPACA. Regulations implementing the employer-shared responsibility provisions will be one of the most critical components of health care reform for the employer community.

Particularly, we appreciate the IRS's acknowledgement of the importance of providing "employers sufficient time to implement these changes" and their proposals to "provide transition relief" in a number of instances in this NPRM.[3] Given the complexity and number of the new requirements that employers must meet in 2014 under the PPACA, we urge Treasury and IRS to promulgate final rules that afford a non-enforcement period for the first year, coupled with significant flexibility and transition relief to employers. Particularly, as our country and economy continue to recover from a significant recession and high unemployment and underemployment rates, we urge Treasury and IRS to afford employers an appropriate non-enforcement period before penalties are imposed.

The Chamber is concerned about several substantive components of the NPRM such as: (1) the challenge for employers to comply with a requirement that still remains opaque; (2) the challenge for employers in states that choose not to expand Medicaid eligibility; (3) the importance of encouraging wellness program participation when assessing affordability; (4) the difficulty in reflecting different industries standards as to what constitutes a seasonal worker; and (5) liability questions for businesses following corporate transactions. We believe that Treasury and IRS need to clarify certain other rules and as well as how the rules will apply in some special situations.

Therefore, we urge Treasury and IRS to quickly issue sub-regulatory guidance that provides:

- A one-year non-enforcement period to allow employers to work to comply with the requirement without fear of tremendous and potentially business eviscerating penalties;
- An exemption that parallels the individual mandate penalty exemption for would-be Medicaid eligible individuals;
- A clarification that all available premium discounts from possible wellness program participation may be considered in assessing the affordability of self-only premiums from the lowest cost coverage;
- A good faith seasonal employee determination standard for employers, since the definition of seasonality varies from industry to industry;

[3] NPRM, 78 Fed. Reg. at 221, 227, 232, 236

- Additional information as to the ability of employers to negotiate liability as part of their corporate transactions;
- Further clarification on certain issues, and;
- Flexibility for employers in certain circumstances.

1. Non-enforcement Period for Employers Who Are Making Good Faith Efforts to Comply with the Employer Mandate

The Chamber urges the Treasury and IRS to adopt a non-enforcement period during the first year while employers struggle to understand and comply with PPACA. The law's employer shared responsibility requirement is complicated. As Treasury and IRS mention in the NPRM, it has been necessary to issue multiple prior Notices and now this 53 page NPRM to implement this requirement. We appreciate Treasury and IRS's laudable efforts to ease implementation, but the time it has taken to get this guidance means that employers have far too little time to fully understand their obligations. Therefore, we urge the Treasury and IRS to adopt a non-enforcement approach during the calendar year of 2014 for employers that make good faith efforts to comply with the employer mandate but fail to do so.

2. Employer Penalty Parity Regarding Would-Be Medicaid Eligible Individuals

As originally enacted, PPACA contained three provisions designed specifically to expand coverage: the individual mandate; the employer mandate; and the state mandate to expand Medicaid eligibility. The Supreme Court struck down the Medicaid eligibility mandate on states, making it voluntary. In response to this, the Department of Health and Human Services ("HHS") has proposed an individual mandate exemption for those individuals who would have been eligible for Medicaid had a state expanded the Medicaid eligibility criteria, based on the law as enacted. Given the interrelatedness of the three coverage expansion provisions, the Chamber believes this exemption from the individual mandate penalty is appropriate, but also believes there must be parity afforded to employers. Just as an individual who would have been covered under Medicaid will not (and should not) be fined under the individual mandate penalty provision for failing to obtain coverage, an employer should also not be penalized based on failing to offer affordable, minimum value coverage to that individual. Employers should be afforded the same protection from shared responsibility penalties in states where Medicaid eligibility is not expanded. If an employer penalty is only triggered by a would-be Medicaid eligible employee, that trigger should be exempted or excused.

3. Affordability Assessed Based On Snap Shot of Premiums After Wellness Incentives Are Applied

The Chamber appreciates the new affordability safe harbors proposed in the NPRM and supports the decision to allow employers to rely on an employee's W-2 wages, an employee's rate of pay, or the federal poverty level when assessing whether the "lowest cost self-only" coverage is affordable for a full-time employee. Given the language in the NPRM, we believe that affordability is based on the self-only premium for an employee who participates and receives any and all available wellness program incentives. For example, if by participating in a smoking cessation program and taking a health risk assessment, an employee's self-only premium would be $85 per month instead of $120 per month, then affordability for this employee should be based on the $85 per month premium. After all, this would be the lowest cost coverage available to the employee.

This view reflects the language used in the NPRM and will also serve to further encourage employees to participate in wellness programs and take responsibility for their health. We suggest that Treasury and IRS clarify this in the next FAQ document and include an example to illustrate the point.

Additionally, we also believe that affordability should be assessed based on W-2 wages or poverty level on the first day of the stability period. Just as Treasury and IRS have proposed measurement and stability periods to ensure predictable and meaningful coverage for employees and employers when hours are variable, a similar approach must be offered for affordability with regard to variable hourly employees. An employer with variable hourly employees must have the option of assessing affordability on the first day of the stability period and given a safe harbor for the remainder of the stability period provided that coverage at that date is affordable.

In this same vein, an employer should be permitted to impute W-2 pay during unpaid or partially unpaid leaves. If an employer is using stability periods and the W-2 safe harbor, it may encounter problems if employees go on unpaid leave since their W-2 pay would be zero for those periods and coverage must continue at least through the end of the then current stability period while the individual is on leave. A similar problem exists if the leave is partially unpaid. In either case, the employer ought to be allowed to impute full W-2 pay during the leave period for affordability purposes. While an employer could shift to one of the other safe harbors, but the poverty level safe harbor might be too low, and the rate of pay safe harbor would be unavailable if the employee has had a pay cut.

4. GOOD FAITH STANDARD FOR SEASONAL EMPLOYEES

The NPRM states that "[u]ntil further guidance is issued, employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker, including a reasonable good-faith interpretation of the standard set forth under the Department of Labor ("DOL") regulations, applied "by analogy" to workers and employment positions not otherwise covered by those DOL regulations."[4] We urge Treasury and IRS to simplify and make permanent the good-faith standard and indicate in an FAQ that: "employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker." Given the number and impact of seasonal employees across a range of industries, employers need latitude and flexibility to apply seasonal assessments based on industry practice. . Alternatively, subsequent guidance should recognize this variability and give employers significant flexibility in determining who is seasonal.

5. "REASONABLY EXPECTED" - ASSESSING NEW EMPLOYERS & EMPLOYEES

In recommending how Treasury and IRS implement the statutory language for a new employer, the Chamber recommends that a new employer be considered to be an applicable large employer after it has operated for 3 consecutive months with 50 or more full-time equivalent employees. Phrased a different way, a new employer should be granted a safe-harbor under the employer

[4] NPRM, 78 Fed. Reg. at 222.

responsibility requirement such that it is not deemed to be an applicable large employer until it has operated for 3 consecutive months with 50 or more full-time employees (or full-time equivalents). At the conclusion of this period, the new employer should have 90 days or 3 months to enroll employees before any penalties are imposed.

Similarly, Treasury and IRS should allow an employer 3 months to assess whether an employee is reasonably expected to work 30 hours or more per week or whether that employee is a variable hour employee. After the conclusion of the 3 month assessment period, an employer should have 90 days, or 3 months, to enroll that employee if he/she is determined to be a full-time employee.

6. CORPORATE TRANSACTIONS

The Chamber recommends that Treasury and the IRS allow businesses involved in a merger or acquisition transaction to negotiate the entity responsible for any potential or actual 4980H liability. Businesses should be able to decide whether the 4980H liability transfers to the buyer in a stock acquisition of an entity or whether it stays with the seller in an asset acquisition.

The NPRM notes that the employment tax rules will apply to determine successor employers for purposes of determining applicable employer status. However, because 4980H is an excise tax, the application of the employment tax rules is of limited benefit in a corporate transaction situation. Note also that the COBRA successor rules do not work for 4980H, because they consider whether a plan is "continuing" as the basis for liability.

The NPRM also states that "State law *may* provide for liability of a successor employer for a section 4980H assessable payment which has been, or could have been, imposed on a predecessor employer. In that case, the liability could be assessed, paid, and collected from the successor employer in accordance with section 6901."[5] We believe that this should only occur in situations where the state bankruptcy law requires the transfer of such liabilities to a successor employer. Generally, however, state laws should not control on successor liability issues.

7. CLARIFICATIONS

Measurement/Stability Periods

We urge Treasury and the IRS to clarify that an employer does not have to offer coverage for the length of a stability period if it doesn't elect to use the measurement period option. The NPRM does not state that these periods are optional. For example, Treasury and IRS should state that if an employer provides coverage to all employees, that employer does not have to provide a stability period.

Temporary Inbound Employee Transfers

An employee who generally works outside the United States and is covered by a non-United States health program (including a governmental program), but is temporarily working in the United States, should not be considered a full-time employee any earlier than the first day of the calendar month following 90 days of continuous United States employment.

[5] NPRM, 78 Fed. Reg. at 222.

Clarify 90-Day Waiting Period for New Employees

Some employers would like to impose a 90-day waiting period, with coverage beginning on the first day of the next calendar month. The preamble states that an employer will not be penalized for failing to offer coverage to an employee for up to the "initial three calendar months of employment." We urge Treasury and IRS to clarify that this initial three calendar month period begins on the first day of the first full month of employment. Therefore, for an employee hired mid-month, the initial three full calendar months of employment begin on the first day of the first full month following date of hire. We believe this is consistent with the NPRM's statements that refer to the waiting period as the "initial three **full** calendar months of employment."[6]

8. SPECIAL CIRCUMSTANCES TO CONSIDER

Limit Hour of Service Credits for Paid Leaves

Many employers provide long term disability insurance which pays a percentage of wages to employees while they remain disabled; this benefit can last for decades. Some of these employers do not formally terminate these employees. If hours of service must be given to the disabled full-time employee, he/she will remain a full-time employee no matter how low the wage replacement rate if the Department of Labor's Hour of Service regulations apply.[7] If so, employers will be forced to provide coverage to them - which will be further complicated by affordability issues for example given that their W-2 pay is likely zero. To avoid this, employers will have to terminate their employment. Therefore, there needs to be a cap on how long hours of service credits accrue during paid leaves. The Department of Labor regulations impose a 501 hour cap.[8] This or a similar limit is needed for PPACA purposes as well. The NPRM discusses this issue to some extent with regard to special unpaid leave or employment break periods,[9] but does not seem to address this specific circumstance.

Do Not Require At Least Annual Open Enrollment

Some employer plans only offer once in a lifetime enrollment, with minor exceptions, e.g., HIPAA required special enrollment rights. The reason for this approach is to simplify administration and to avoid adverse selection. At least for employers using this approach in 2013, they should be allowed to continue it if: (a) they offer a one-time open enrollment opportunity at the beginning of their 2014 plan years, and; (b) they offer open enrollment opportunities at least every fifth year thereafter.

Imputing Coverage

The agencies have taken the position that PPACA's employer mandate clearly applies to persons who "really" are full-time employees of an employer subject to that requirement even though the employer does not regard the individual to be its employee. Although there are a myriad of different arrangements, a typical one would be for an employer to use contingent workers employed by a personnel agency, workers that the employer does not regard to be its employees. If the personnel agency, or other entity that employs or purports to employ such contingent workers, offers them coverage that complies with PPACA's employer mandate, that coverage should be deemed also provided by its customer so that, if it turns out that the workers supplied

[6] NPRM, 78 Fed. Reg. at 246.
[7] *See* 29 C.F.R. Section 2520.200(b)-2(b), particularly example (E).
[8] *See* 29 C.F.R. Section 2520.200(b)-2(a)(2)(i).
[9] NPRM, 78 Fed. Reg. at 249.

to the customer "really" are the customer's employees, the customer will have complied with the employer mandate with respect to them.

Similarly, if an individual is simultaneously employed by separate entities that are not treated as a single employer, and the entities agree among themselves as to which one is to offer PPACA-compliant coverage, that offer of coverage should be imputed to each of the entities that agree to the arrangement.

Employees would in no way be adversely affected by this since they would be offered PPACA-compliant coverage. There simply is no reason to require multiple offers of coverage in such cases, and imposing such a requirement will confuse employees and drive up administration costs unnecessarily. Therefore, in situations where an individual is the common law employee of two entities at the same time or is being treated as the employee of one entity while actually the employee of the entity that is not providing health coverage, the coverage that is provided should satisfy the obligation of the other under the employer mandate requirement. We urge Treasury and IRS to impute coverage offered by one entity to other entities in appropriate situations. Specifically, an employer should be exempt from offering coverage to an employee when that employee is transferred to a staffing agency and then leased back.

CONCLUSION

The U.S. Chamber of Commerce would like to thank Treasury and IRS for its pragmatism in promulgating regulations on the employer shared responsibility requirement and appreciate the time afforded to review the NPRM and file comments. We urge the Treasury and IRS to continue to work carefully and cooperatively with the business community to minimize burdens placed on employers as employers work to comply with the law.

We continue to be committed to the employer-sponsored system and hope Treasury and IRS will consider the effects that various implementation choices will have on employers and their ability to continue to offer the coverage that their employees value. We look forward to continuing to work together in the future.

Sincerely,

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