



AMERICAN BENEFITS

COUNCIL

January 2, 2018

L. Brimmer
Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington, DC 20224

Re: Proposed Extension of Information Collection Request Submitted for Public Comment; Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans

Dear Sir or Madam:

We write on behalf of the American Benefits Council (“Council”) to provide comment regarding the above-referenced information collection requirement, as described in the Notice published in Vol. 82, No. 210 of the Federal Register on November 1, 2017 (“Notice”).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The information reporting requirement at issue in the information request was enacted pursuant to the Patient Protection and Affordable Care Act (“ACA”). Specifically, the ACA added a new Code section 6056, which requires each “applicable large employer member” (“ALE member”) to file a return with the IRS after the close of each calendar year and issue annual statements to full-time employees about the coverage (if any) offered to the employee, by month, including the lowest employee cost self-only coverage offered. These returns provide information regarding the ALE member’s compliance with the employer shared responsibility provisions under section 4980H of the Code, and the statements may be used by employees to determine their potential eligibility for a premium tax credit under section 36B of the Code. Form 1094-C is the transmittal form to be used for Code section 6056 reporting, and Form 1095-C is the reporting form for Code section 6056 reporting.

The Notice requests comments on: (a) whether the collection of information is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

The Council strongly believes that the Code section 6056 reporting requirements should be simplified. Based upon continued conversations with our members it is clear that the Code section 6056 reporting requirements have imposed onerous, complex, and costly obligations on employers. Employers continue to expend significant time and expense due to the ongoing burden of maintaining benefit and payroll systems in order to meet those requirements, and the need to coordinate with third party record keepers. Employers also have had to train human resources, benefits, and tax personnel and modify existing recordkeeping practice and procedure for no reason other than to be able to meet their information reporting obligations.

ACCURACY OF THE AGENCY'S ESTIMATE OF THE BURDEN OF THE COLLECTION OF INFORMATION

The Notice estimates that for the Form 1094-C, the estimated number of respondents is 400,000 with an estimated time per respondent of 4 hours, for an estimated total annual burden hours of 1,600,000. For Form 1095-C, the estimated number of respondents is 105,000,000 with an estimated time per respondent of 12 minutes, for an estimated total annual burden hours of 21,000,000. It is not clear from the Notice how these estimates were derived, but we believe they materially understate the total annual burden hours for both Form 1094-C and Form 1095-C.

The Treasury Inspector General for Tax Administration ("TIGTA") issued a report titled "Affordable Care Act: Assessment of Efforts to Implement the Employer Shared Responsibility Provision" on April 7, 2017, with a Reference Number of 2017-43-027 ("TIGTA Report"). On p. 3 of the TIGTA Report, it states, "As of October 28, 2016, the IRS had processed 439,201 Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, and nearly 110 million Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage." In addition, on p. 16 of the TIGTA Report, it notes that approximately 16,020 paper Forms 1094-C had been received but not processed as of October 28, 2016. Therefore, the estimated number of respondents for both the 1094-C and 1095-C as set forth in the Notice appears to be well less than the actual number of Forms received by the IRS for the 2015 reporting year (filed in 2016). [As demonstrated by the TIGTA report itself, the Notice would seem to clearly understate the estimated number of respondents for both Forms 1094-C and 1095-C.]

It is also unclear as to how the Department determined that preparation of each Form 1095-C should take only 12 minutes. We believe that this may significantly understate the time

needed to prepare each Form 1095-C given the numerous data elements and complexity involved in completing the Form 1095-C for any particular employee. Some of the specific issues that can arise when completing a single Form 1095-C are:

- Ascertaining which codes apply on Lines 14 and Lines 16 of the Form 1095-C, which can vary depending on many different scenarios, including how the ALE member is determining who its full-time employees are, whether the employee was on COBRA for part of the year, foreign employees who only work in the United States for part of the year, whether an “affordability safe harbor” under the Code section 4980H regulations was met, etc.
- Employers may have employees and/or business operations in U.S. territories, such as the U.S. Virgin Islands or Puerto Rico. Determining if and how Code section 4980H applies to such employees and/or operations is a complex determination that can often turn on the nature and extent of the services being provided, whether the business is domiciled and/or incorporated in Puerto Rico, and whether the employee is a resident of Puerto Rico.
- Employees may work for multiple ALE members in the same controlled group and therefore may need to receive Forms 1095-C from each of those ALE members.
- Employees may be covered by multiemployer plans, and thus require the ALE member to coordinate with the multiemployer plan to obtain necessary information (which is needed even if the multiemployer interim rule relief applies).
- Acquired companies may not have been immediately integrated into the reporting company’s benefit and payroll systems. This generally necessitates the use and review of multiple payroll and benefit eligibility systems to complete the Form 1095-C for employees of such acquired companies, which, in turn, results in additional needed time to complete the requisite reporting.

We also note that current Treasury guidance does not address many of the situations that employers have to navigate when complying with their Code section 6056 reporting obligations. For example, numerous questions remain regarding how the reporting requirements apply when an employer is acquired and/or changes controlled groups mid-year in the context of a merger or acquisition, or how the reporting requirements apply to expatriates and related coverage). These situations can be quite complex and require employers to expend significant amount of time to (i) determine whether Code section 6056 applies, (ii) determine how Code section 6056 applies to respective employee or business, and (iii) aggregate the necessary data to complete the Form 1095-C to the extent reporting is required.

Finally, we note that even if the 12 minutes per Form 1095-C estimate were an accurate estimate of the time required to prepare a Form 1095-C, the quantity of Forms 1095-C that must be completed and filed by certain respondents presents an extraordinary burden for employers. For example, an employer that files 400,000 Forms 1095-C annually, at 12 minutes per Form would take 80,000 hours (theoretically requiring the dedicated work of 40 full-time employees a year, assuming they work 40 hours a week for 50 weeks).

WAYS TO ENHANCE THE QUALITY, UTILITY, AND CLARITY OF THE INFORMATION TO BE COLLECTED

Proposal: Allow employers access to IRS and/or SSA databases prior to filing for purposes of name/SSN matching.

One aspect of the ACA tax reporting requirements that has been particularly challenging for employers involves the solicitation, reporting and verification of social security numbers (“SSNs”) for non-employee family members, such as spouses and children. Employers do not have a method of verification (as they do in the W-2 context) because the Social Security Administration (“SSA”) database cannot be accessed by employers for Code section 6056 reporting purposes. At a minimum, Treasury could provide a means for employers to access IRS/SSA databases prior to filing for purposes of name/SSN matching. Additionally, Treasury should permit employers to identify employees and family members by using a non-SSN identifier, such as a member ID number that the employee could also report on his or her Form 1040.

WAYS TO MINIMIZE THE BURDEN OF THE COLLECTION OF INFORMATION ON RESPONDENTS

Proposal: Maintain the relief from penalties for employers who make good faith efforts to comply with the information reporting requirements.

For the first three calendar years for which information reporting was required (2015, 2016 and 2017), Treasury stated that it will not impose penalties under Code sections 6721 and 6722 on employers that can show they made good faith efforts to comply with the information reporting requirements. This relief was most recently set forth in Notice 2018-06, which was issued on December 22, 2017.

As employers continue work through the on-going compliance challenges raised by these reporting requirements (*e.g.*, see discussion above regarding reporting challenges with respect to mergers and acquisitions as well as expatriates), we encourage Treasury to extend the good faith relief beyond the 2017 calendar year such that penalties will not be assessed against employers, provided they are continuing to act in good faith.

Proposal: Provide needed relief from the furnishing deadline.

Currently, employers are generally required to provide Forms 1095-C to employees by no later than January 31 of the year following the end of the year for which the reporting is required. It is very difficult for many employers to accurately complete and issue the forms by January 31, as they need to compile a significant amount of information, prepare the forms, and leave sufficient time to print the forms and prepare the mailing.

As just one example of the difficulties that employers face in completing the Forms 1095-C by January 31st, employees who are terminated in October through December of one year may not even make a COBRA election until January through March of the following year, which may

significantly affect the information which has to be reported on the relevant form.

Notably, employers also have other significant reporting and other administrative obligations at the end of the year, including the preparation and mailing of Forms W-2, preparation of fourth quarter financial reports, closing out of year-end accounting records, etc.

In apparent recognition of the year-end reporting challenges faced by employers, the IRS provided an automatic extension of the January 31 furnishing deadline for the first three calendar years for which reporting was required (2015, 2016 and 2017). *See* Notice 2018-06. In a similar vein, the Department could allow employers to obtain an automatic 30-day extension to furnish the Forms 1095-C to individuals, similar to the automatic extension for Forms 1095-C filed with the IRS, provided that the reporting entity sends a letter to the IRS that is postmarked no later than by January 31 and includes (i) filer name and TIN, (ii) type of return, (iii) an explanation of the reason for the need for the extension.

Suggestion: Allow employers to report on a controlled group versus ALE basis.

Under the current rules, each individual employer in a controlled group must separately file Forms 1094-C and 1095-C if they have full-time employees. This is true even though ALE status is determined on a controlled group basis. The requirement that each individual employer report separately has been problematic for many employers, because often times they may utilize a common paymaster in the controlled group to issue/file the Forms W-2. Additionally, it may not be entirely clear in every instance who is the specific common law employer of a given employee. The only apparent reason to require separate filing relates to determining whether each employer in the controlled group is offering coverage to at least 95% of its full-time employees (in accordance with the employer shared responsibility rules as set forth in Code section 4980H(a)). As an alternative to requiring that each controlled group member report separately, the IRS could allow the controlled group to report as a whole, and merely add a column to the Form 1094-C allowing the controlled group to attest whether each member offered coverage to at least 95% of its own full-time employees. (In the event of a subsequent IRS audit or enforcement action of a controlled group member with respect to its compliance with Code section 4980H, the controlled group member would then be responsible for demonstrating that it, in fact, offered qualifying coverage to at least 95% of its full-time employees.)

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Thank you for considering these comments submitted in response to the Notice. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



Kathryn Wilber
Senior Counsel, Health Policy