November 16, 2015

Submitted via email to Notice.comments@irs counsel.treas.gov

CC: PA:LPD:PR (Notice 2015-68)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2015-68 – Section 6055 – Information Reporting on Minimum Essential Coverage

Dear Sir or Madam:

We write on behalf of the American Benefits Council (“Council”) to provide comment in connection with Notice 2015-68 (“Notice”) regarding contemplated regulations under Internal Revenue Code (“Code”) Section 6055. As added by the Patient Protection and Affordable Care Act (“ACA”), Code Section 6055 requires issuers of insured health coverage and plan sponsors of self-insured group health plans (e.g., employers) to file an annual report with the IRS and issue annual statements to covered individuals indicating the calendar months in a given year in which individuals were enrolled in “minimum essential coverage” (“MEC”) offered/sponsored by the issuer or plan sponsor, as applicable.

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 Council appreciates continued efforts by the Department of the Treasury and the Internal Revenue Service (collectively, the “Department”) to involve the public in formulating guidance regarding the MEC reporting requirement. We have previously conveyed our concerns about the new information reporting requirements under the ACA and their implementation. Employers have expended a considerable amount of time and resources on these reporting requirements and there continue to be unanswered question as the initial deadline for reporting rapidly approaches. The regulations contemplated by Notice 2015-68 are an opportunity for the Department to provide important guidance to the employer community.

**MEC Reporting for Supplemental Coverage**

The Council generally supports the approach toward MEC reporting for supplemental coverage as set forth in Notice 2015-68. Notice 2015-68 suggests that the rule providing that “reporting generally is not required for an individual’s [MEC] for which an individual is eligible only if the individual is covered by other [MEC] for which § 6055 reporting is required” will apply for employer coverage only if the two types of coverage are eligible employer-sponsored coverage of the same employer. As discussed below, the Council encourages the Department not to limit this rule unnecessarily, since there may be instances in which employer-sponsored coverage supplements coverage sponsored by another entity and MEC reporting for the supplemental coverage would serve little to no purpose.

Currently, Treas. Reg. § 1.6055-1(d)(2) provides that no reporting is required for:

*minimum essential coverage that provides benefits in addition or as a supplement to a health plan or arrangement that constitutes minimum essential coverage if—*

(i) The primary and supplemental coverages have the same plan sponsor; or

(ii) The coverage supplements government-sponsored coverage (as defined in section 5000A(f)(1)(A) and the regulations under that section) such as Medicare.

As Notice 2015-68 acknowledges, “this rule has proven to be confusing.” In the draft 2015 Instructions for Forms 1094-B and 1095-B (August 6, 2015), the Department indicated that primary and supplemental coverage “isn’t provided by the same plan sponsor if they aren’t reported by the same reporting entity. Thus, an insured group health plan and a self-insured health reimbursement arrangement covering the employees of the same employer aren’t supplemental.” An insured group health plan and a self-insured health reimbursement arrangement, however, typically do have the same plan sponsor (within the meaning of Section 3(16)(B) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”)). As a result, the draft instructions did not appear to reflect the plain language of Treas. Reg. § 1.6055-1(d)(2).
In the final Instructions for Form 1094-B and 1095-B (September 16, 2015), this explanation was amended. The final Instructions convey that:

*If an individual is covered by more than one type of minimum essential coverage, reporting is required of only one of the types, if one of the following rules applies.*

- If an individual is covered by more than one type of minimum essential coverage provided by the same provider, the provider is required to report only one of the types of coverage.

- A provider of minimum essential coverage generally is not required to report coverage for which an individual is eligible only if the individual is covered by other minimum essential coverage for which reporting is required. (For employer-sponsored coverage, this exception applies only if both types of coverage are under group health plans of the same employer).

Notice 2015-68 generally reflects the approach laid out in the Final Instructions. Specifically, Notice 2015-68 indicates that the Department anticipates proposing regulations that would replace the current language of Treas. Reg. § 1.6055-1(d)(2) with rules “providing that (1) if an individual is covered by multiple minimum essential coverage plans or programs provided by the same provider, reporting is required for only one of them; and (2) reporting generally is not required for an individual’s minimum essential coverage for which an individual is eligible only if the individual is covered by other minimum essential coverage for which § 6055 reporting is required.”

The Council supports the Department’s clarification of when MEC reporting is required for supplemental coverage as set out in the Final Instructions. As the Department has noted, the information reported under Code Section 6055 is intended to “allow taxpayers to establish and the IRS to verify that the taxpayers were covered by minimum essential coverage and their months of enrollment during a calendar year.” 78 Fed. Reg. 54986, 54987. In this regard, there is no benefit to a taxpayer who receives multiple statements demonstrating that he or she was covered by MEC under different coverage arrangements for the same period of time during a particular year. In fact, such duplicative statements are more likely to confuse the taxpayer, if anything.

The IRS also receives no value from receiving multiple reports verifying that a taxpayer was covered under different MEC arrangements during the same period. From the MEC provider’s standpoint, the preparation, furnishing, and filing of unnecessary MEC reports simply expends resources (in many cases, plan assets) that could be used for alternative purposes that truly benefit plan participants and beneficiaries.

We believe it is in the best interests of all stakeholders— including taxpayers, MEC
providers, and the Department – if the broadest possible rule is adopted limiting the need to report supplemental coverage. As discussed below, we recommend that the second prong of the proposed rule be further clarified, in a manner that would eliminate unnecessary duplicative MEC reporting while ensuring that taxpayers and the IRS receive information that fulfills the purpose of Code Section 6055.

The first prong of the rule set forth in Notice 2015-68 for future proposed regulations is relatively straightforward. Under this prong, if an individual is covered by multiple minimum essential coverage plans or programs provided by the same provider, reporting is required for only one of them. As we understand this rule, if an individual is enrolled in an employer-sponsored self-insured group health plan and also has a self-insured health reimbursement arrangement (“HRA”) sponsored by the same employer, the employer would only have to report one type of coverage for that individual. Alternatively, if an individual is enrolled in an insured group health plan, and is also covered by ancillary insured benefits (e.g. vision or dental) that constitute MEC and are provided by the same insurer, the insurer would only have to report on one type of coverage for that individual.

The second prong of the proposed rule provides that reporting generally is not required for an individual’s minimum essential coverage for which an individual is eligible only if the individual is covered by other minimum essential coverage for which Code Section 6055 reporting is required. Notice 2015-68, however, limits this rule somewhat by stating that “it is anticipated that, for employer coverage, this rule will apply only if the two types of coverage are eligible employer-sponsored coverage of the same employer.” We are concerned that this limitation is unnecessarily restrictive.

As an initial matter, we believe that any new regulation should clearly reinforce the language currently set forth in Treas. Reg. § 1.6055-1(d)(2), which provides that no MEC reporting is required for employer-sponsored MEC that supplements government-sponsored coverage (as defined in section 5000A(f)(1)(A) and the regulations under that section) such as Medicare. For example, many employers sponsor self-insured retiree HRAs that supplement Medicare coverage. These retiree HRAs typically limit eligibility to individuals who are actually enrolled in Medicare coverage. Notice 2015-68 specifically states that “Under the second rule... reporting would not be required for Medicare or TRICARE supplements providing benefits only to an individual enrolled in other coverage for which reporting is required...” It is our understanding that under Treas. Reg. § 1.6055-1(d)(2), and the approach set forth in Notice 2015-68, MEC reporting would not be required for these retiree HRAs.

As noted above, however, Notice 2015-68 also states “It is anticipated that, for employer coverage, this rule will apply only if the two types of coverage are eligible employer-sponsored coverage of the same employer.” We are concerned that if this sentence is applied literally to the second prong of the proposed rule, it would undercut the exception and require reporting for all employer-sponsored Medicare supplement
plans, since Medicare and the supplemental employer-sponsored plan are not “eligible employer-sponsored coverage of the same employer.” Treas. Reg. § 1.6055-1(d)(2) as currently formulated clearly states that reporting is not required under these circumstances. To avoid confusion we recommend that believe any amendment to Treas. Reg. § 1.6055-1(d)(2) clearly reaffirms that MEC reporting of coverage that supplements government-sponsored coverage such as Medicare or TRICARE supplemental coverage is not required.

The statement in Notice 2015-68 limiting this exception if MEC is provided by different employers may result in duplicative reporting in other circumstances, as well. For example, it is feasible that an employee could be covered in a union-sponsored or a multiemployer health plan¹ and also be covered by an employer-sponsored supplemental benefit plan (covering, e.g., prescription drug, dental, or vision benefits) that also constitutes MEC. Under these circumstances, there is no benefit to the taxpayer or the IRS if both coverage providers are required to provide MEC reporting. We therefore encourage the Department, in drafting regulations, to consider situations where it may be appropriate to not require reporting for supplemental coverage even if two types of coverage are not sponsored by the same employer. It may be appropriate for the Department to consider a “tiebreaker” rule under which reporting generally would not be required for an individual’s MEC if the individual is covered by “other MEC” for which Code Section 6055 reporting is required, and the “other MEC” meets certain requirements determined by the Department to reflect the characteristics of major medical coverage.

**TIN Solicitation**

As Notice 2015-68 indicates, the preamble to the final regulations under Code Section 6055 states that to avoid penalties for not reporting missing taxpayer identification numbers (“TINs”), health coverage providers must solicit the TINs following the TIN solicitation rules in the “reasonable cause exception” regulations set forth in Treas. Reg. § 301.6724-1. 79 Fed. Reg. 13220, 13223. Notice 2015-68 notes that reporting entities have since asserted that these rules are “not practical in the context of § 6055 reporting.” The Council agrees that the requirements for TIN solicitation under Treas. Reg. § 301.6724-1(e) are not practical for purposes of Code Section 6055 reporting.

Notice 2015-68 solicits comments regarding the application of the rule under Code section 6724 to Code Section 6055 reporting, and in particular application of Treas. Reg. § 301.6724-1(e). In this regard, Notice 2015-68 provides that “pending the issuance of additional guidance, reporting entities will not be subject to penalties for failure to report a TIN if they comply with the requirements of § 301.6724-1(e) with the following modifications: (1) the initial solicitation is made at an individual’s first enrollment or, if

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¹ Multiemployer plans are typically sponsored by a joint board of trustees, association, committee, or similar group of representatives.
already enrolled on September 17, 2015, the next open season, (2) the second solicitation is made at a reasonable time thereafter, and (3) the third solicitation is made by December 31 of the year following the initial solicitation.”

We would support a permanent rule that is similar to the rule set forth in Notice 2015-68. Under such a rule, one solicitation would be required at the employee’s initial open enrollment or open season. A second solicitation would be required at a reasonable time thereafter (not less than one month from the first solicitation). The third solicitation would be made by December 31 of the year following the initial solicitation (and could be made sooner). If no response was received after three solicitations, the employer could use the DOB for the covered individual going forward. Under this rule, the employer could compress the three solicitations into the same year (if it chose to do so) to eliminate the need to make multiple requests in multiple years. We also recommend that the rule provide that solicitations can be made by any reasonable method (including mail, telephone, and email).

Treas. Reg. § 301.6724-1(e)(2) contains a number of specific rules relating to TIN solicitation that the Council believes create unnecessary burdens for employers. Specifically, the regulation states that a solicitation under this section must inform the individual that he/she must provide his/her TIN, or he/she is subject to a $50 penalty imposed by the IRS under section 6732. See Treas. Reg. § 301.6724-1(e)(2). The preamble to the final regulations for Code Section 6055 restates many of the TIN solicitation rules; however, it does not mention this $50 penalty. In addition, this regulation provides that a mail solicitation must include a Form W-9 or an acceptable substitute form.

As a practical matter, many employers have taken the position that the specific requirements set forth in Treas. Reg. § 301.6724-1(e)(2) are not practical in the context of soliciting TINs for Code Section 6055 reporting. The Council urges the Department to clarify that the rules set forth in Treas. Reg. § 301.6724-1(e)(2) are not applicable under these circumstances.

We also support the rule set forth in Notice 2015-68 providing that no solicitation is necessary after an individual’s coverage is terminated. We believe this principle also should be incorporated into the forthcoming regulations.

STATEMENTS TO INDIVIDUALS COVERED BY EXPATRIATE HEALTH PLANS

Notice 2015-68 states that the proposed regulations will provide that statements reporting coverage under an expatriate health plan may be furnished in electronic format unless the recipient affirmatively refuses consent or requests a paper statement. The Council supports this proposed rule, and believes that rules are needed that facilitate electronic delivery more broadly for all plans. We encourage the Department to consider ways in which this the rules under Treas. Reg. §1.6055-2 can be liberalized to
allow domestic health plans additional leeway to furnish statements to individuals in electronic format.

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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