December 13, 2011

Submitted electronically via Notice.Comments@irscounsel.treas.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2011-73)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2011-73: Request for Comments on Health Coverage Affordability Safe Harbor for Employers (Section 4980H)

Sir or Madam:

We write to provide comments on behalf of the American Benefits Council ("Council") in response to Notice 2011-73 ("Notice") regarding a proposed health coverage affordability safe harbor ("Affordability Safe Harbor") for employers under section 4980H of the Internal Revenue Code of 1986, as amended ("Code"). 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 the consideration and issuance of the proposed Affordability Safe Harbor by the Treasury Department and the Internal Revenue Service (collectively, the "Service"). With appropriate modifications as recommended below, the Council believes the Affordability Safe Harbor will provide an efficient and practical method for employers to determine whether the coverage they seek to offer their employees is affordable for purposes of the employer shared responsibilities set forth in Code section 4980H. Accordingly, the Council respectfully requests that the Affordability Safe Harbor, with requested modifications, be included in any final rulemaking.

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BACKGROUND

Code section 4980H was added to the Code by section 1513 of the Patient Protection and Affordable Care Act, as amended by section 1003 of the Health Care and Education Reconciliation Act of 2010. Section 4980H is effective for months beginning after December 31, 2013. Very generally, Code section 4980H includes two excise taxes that could be imposed against an applicable large employer (as defined in Code section 4980H(c)(2)) for failing to comply with subsections (a) and (b) thereof.

Regarding the first excise tax provision set forth in Code section 4980H(a), an applicable large employer is subject to an assessable payment if a full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage. Such penalty is generally calculated based on the number of full-time employees within the controlled group, regardless of whether such employees are eligible for minimum essential coverage.

Regarding the second excise tax provision set forth in Code section 4980H(b), an applicable large employer is subject to an assessable payment if a full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage. Such full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction to the extent that the minimum essential coverage offered by the employer either is unaffordable or does not provide minimum value.

For purposes of Code section 4980H(b), the determination of affordability will be based on an employee's household income. In the Notice, the Service proposes a safe harbor whereby an employer may use an employee's Form W-2 Box 1 wages to determine affordability for a year. Although the ultimate determination of affordability would be made at the end of a year, Box 1 wages could be used prospectively to assist the employer in making (and keeping) coverage affordable.

The Notice announces the intent of the Service to publish proposed regulations on the proposed Affordability Safe Harbor and other issues relating to Code section 4980H. The Council greatly appreciates the Service's issuance of the Notice seeking comment on the proposed Affordability Safe Harbor and its announced intent to issue proposed regulations providing an opportunity for further comment with respect to not only the proposed Affordability Safe Harbor but also other issues arising under Code section 4980H.

Finally, we urge the Service to move forward as expeditiously as possible with the rulemaking process, as employers are in need of clarification of the employer shared responsibility provisions as they consider current and future responsibilities under the statute.

USE OF FORM W-2 WAGES

The Council appreciates that Form W-2 wages may be used in lieu of household income for purposes of determining whether an employer-sponsored plan imposes a premium that is affordable under Code section 4980H(b). Code section 4980H(b) would otherwise require employers to use an employee's household income for purposes of determining affordability and whether they are subject to penalty. Practical difficulties, if not impossibilities, would arise if household income were the measuring stick, because it is very difficult, if not impossible, for employers to know each employee's total household income and employees may not want to disclose such information to their employers. Additionally, requiring the use of household income to determine affordability would raise significant privacy concerns.

The proposed Affordability Safe Harbor represents an important step toward crafting a rule that will ensure that employers have available to them the information necessary to provide qualifying, affordable minimum essential coverage and, thus, avoid unwanted penalties under Code section 4980H(b).

Although the Council is supportive of using Form W-2 wages for purposes of determining wages, we note that the proposed Affordability Safe Harbor uses Box 1 wages. The use of Box 1 wages for purposes of the proposed Affordability Safe Harbor seems to create a possible disincentive for employers regarding programs and features designed to increase employee participation in qualified retirement plans and/or for the provision of more comprehensive health and welfare plan coverage. This is because an employee's Box 1 wages are reduced to the extent of an employee's elective deferrals into a 401(k) plan or salary deferrals via a Code section 125 cafeteria plan to purchase health and welfare plan coverage. Thus, for example, someone who defers amounts into a 401(k) plan will have lower wages reported in Box 1 of the Form W-2 and, as a result, his or her employer-provided coverage for purposes of Code section 4980H is more likely to be unaffordable when compared to another employee that makes fewer or no elective deferrals. This is also the case for salary deferrals via a Code section 125 cafeteria plan.

Accordingly, we are concerned that the use of Box 1 wages, without appropriate adjustment to reflect an employee's pre-tax salary deferrals into a 401(k) plan or for the purpose of qualifying health and welfare plan coverage, could encourage some employers to pull back on, or otherwise not pursue, increased participation by employees in 401(k) and other qualified retirement plans (for example, through automatic enrollment of employees into 401(k) plans and/or by providing for automatic annual increases in employee elective contribution rates) or health and welfare plans. One way to address this issue would be, for purposes of the Form W-2 Affordability Safe Harbor, to allow employers to increase Box 1 wages by the amount of an employee's pre-tax salary deferrals into qualified retirement plans and cafeteria plans.

An alternative way could be by reference to Box 5 wages, with any adjustments as necessary.

The Council strongly recommends that the Affordability Safe Harbor be included in any final rulemaking, with certain modifications to reflect pre-tax salary deferrals with respect to qualified retirement and welfare plan participation.

USE OF SELF-ONLY COVERAGE TO DETERMINE AFFORDABILITY

The Council appreciates that the proposed Affordability Safe Harbor would look to the employee's premium cost for self-only or individual coverage under the employer-sponsored plan (rather than the premium cost for dual or family coverage, as applicable) to determine affordability. This comports with the statutory language of Code section 4980H, which on its face clearly determines affordability for purposes of subsection (b) based solely on the cost of self-only coverage offered to a full-time employee. The use of self-only coverage in determining affordability will ensure that employers who seek to provide important health coverage to their employees while avoiding the penalties under Code section 4980H are able to do so. This is because a contrary rule would significantly raise the cost to employers of providing health coverage to their employees and would result in more employees losing access to employer-sponsored coverage – coverage that is often designed to provide the most comprehensive and efficient coverage for the employee.[1]

DEPENDENT COVERAGE

As noted above, Code section 4980H includes two requirements for employers. The first requirement, which is set forth in Code section 4980H(a), requires that certain qualifying coverage, i.e., minimum essential coverage, be offered by an "applicable large employer" to each "full-time employee (and their dependents)." The second requirement, which is set forth in Code section 4980H(b), generally requires that if an employer offers coverage to its full-time employees (and their dependents) it must be affordable and provide minimum value within the meaning of Code section 36B(c)(2)(C)(i) and (ii), respectively and "affordability" is determined on the basis of self-only coverage.

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[1] As set forth in our prior comments, while the Council fully supports a rule that would base the penalty determination under Code section 4980H(b) on employee cost for self-only coverage, we believe that all individuals should have access to meaningful and affordable coverage. Thus, the Council supports a rule that makes the premium tax credit available to an employee's spouse or dependents where dual or family coverage, as applicable, is otherwise unaffordable for the employee's spouse or dependent (measured by the family's household income as defined in Code section 36B(d)(2)). *See* Council Letter dated October 31, 2011, *available at* http://www.americanbenefitscouncil.org/documents/hcr_premium-tax-credit_comments103111.pdf.

The Affordability Safe Harbor proposed in the Notice contemplates that an employer would need to meet certain requirements, "including (1) that the employer must offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan….". As the Service is aware, there has been, and remains, a question as to whether an employer must offer such coverage to dependents in order to comply with the excise tax provisions of Code section 4980H. This is due in large part to the fact that the statutory language included in both subsections (a) and (b) thereof refer to offering minimum essential coverage to each "full-time employee (and their dependents)."

We strongly believe that requiring employers to make coverage available to dependents of full-time employees is inconsistent with the language of Code section 4980H and contrary to the clarification in the recent Notice of Proposed Rulemaking regarding the health insurance premium tax credit that the affordability test under that provision will be based on the employee's premium cost for self-only or individual coverage under the employer-sponsored plan (as opposed to family coverage or other coverage applicable to multiple individuals). Moreover, a contrary rule would significantly increase the cost to employers of providing health coverage and would result in more employees losing access to valuable employer-sponsored coverage.

Congress' use of the parentheses in connection with the phrase "and their dependents," we believe, can and should be read to mean that the coverage obligation extends only to the full-time employee and that employers need not offer such dependent coverage to avoid penalties under either excise tax provision of Code section 4980H.

The Council commented extensively on these issues in prior comments[2] and urges the Service to make clear in proposed regulations that, in accordance with the statutory language, ***employers are not required to offer minimum essential coverage to a full-time employee's dependents in order to utilize the Affordability Safe Harbor or to otherwise avoid the penalty under Code section 4980H(a) or (b).***

PROSPECTIVE USE OF AFFORDABILITY SAFE HARBOR

The Notice provides that, although the determination of whether an employer actually satisfies the Affordability Safe Harbor would be made at the end of the calendar year, an employer could also use the Affordability Safe Harbor prospectively, at the beginning of the year, by structuring its plan and operations to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5 percent of that employee's W-2 wages for that year. It is contemplated that employers, on a consistent basis, would be permitted to make reasonable and necessary

[2] *Id.*

adjustments for pay periods so that the employee contribution does not exceed 9.5 percent of the employee's W-2 wages.

The Council appreciates that employers may utilize the Affordability Safe Harbor at the beginning of a year to structure its plan to set the employee contribution at a level that will be affordable and that employers may make reasonable and necessary adjustments during pay periods. However, the Council urges the Service to consider ways in which the Affordability Safe Harbor could be modified to provide employers with greater certainty at the start of each calendar year regarding their Code section 4980H(b) compliance, perhaps by providing for greater reliance on the prior year's wages and/or reliance on wages earned during a look-back period.

Specifically, the Council recommends that employers be given a better way to ensure that they will comply with Code section 4980H as of the beginning of a year. This would not be the case with the end-of-year determination contemplated by the Affordability Safe Harbor. For instance, salaried employees may experience mid-year variances in their salaries, which could cause employers to unexpectedly be subject to the Code section 4980H(b) excise tax upon reviewing end-of-year wages. An even greater issue arises with respect to hourly employees, who may not have predictable or consistent wages during a year, thus giving employers a significant degree of uncertainty with regard to whether coverage will be affordable at the end of a year. As a result, the Council urges the Service to consider additional safe harbors that permit use of the prior year's Form W-2.

In this regard, the Council supports the Affordability Safe Harbor but would encourage the Service to formulate a rule that incorporates either or both of the following concepts:

- A rule that more effectively integrates the Affordability Safe Harbor with an employer's use of a stability/look-back period, as introduced in Notice 2011-36. For example, the Council recommends that employers be permitted to utilize an employee's average Form W-2 wages during a look-back period for purposes of determining compliance with Code section 4980H(b) during the subsequent stability period.

- A rule that allows employers to determine affordability for a year based on an employee's prior year Form W-2 wages. This will enable an employer to set coverage costs in advance without the need to adjust costs during a calendar year. Furthermore, this approach is likely to be more favorable to employees, given that wages generally trend upwards over time (thus understating current year wages for purposes of the proposed Affordability Safe Harbor).

WORKER CLASSIFICATION

The Council notes that the distinction between status as an independent contractor or as an employee is not entirely clear with respect to imposition of the Code section 4980H(b) excise tax. Specifically, an employer that relies on section 530 of the Revenue Act of 1978 ("Section 530") in order to classify its workers as independent contractors rather than employees may not be entitled to relief from the Code section 4980H(b) excise tax. The Council urges the Service to issue an administrative rule excepting an employer from penalties under Code section 4980H with respect to a misclassified employee if such employer obtains relief under Section 530 with respect to such employee.

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We appreciate the opportunity to provide comments regarding Notice 2011-73. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

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