AMERICAN BENEFITS COUNCIL

March 18, 2013

Submitted electronically via http://www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (REG-138006-12)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12)

Sir or Madam:

We write on behalf of the American Benefits Council ("Council") to provide comment in connection with the notice of proposed rulemaking issued by the Department of the Treasury and the Internal Revenue Service (collectively, the "Department") regarding Section 4980H of the Internal Revenue Code ("Code"), which addresses the shared responsibility for employers regarding employee health coverage, 78 Fed. Reg. 218 (January 2, 2013) ("NPRM"). Section 4980H was added to the Code by Section 1513 of the Patient Protection and Affordable Care Act ("ACA"), as amended by Section 1003 of the Health Care and Education Reconciliation Act of 2010.

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 guidance provided in the NPRM and that it generally tracks prior notices issued by the Department regarding determining of "full-time employee" and implementation of other key provisions of Code Section 4980H. In addition, we support the flexibility that the NPRM provides to employers in several important areas, including permitting employers to count employees' hours in a variety of ways for determining who is a "full-time employee" and allowing employers to choose between multiple affordability safe harbors. Furthermore, we appreciate that the NPRM provides employers with the ability to rely on the proposed guidance through 2014.

The continued opportunity to provide comment with respect to the implementation and application of Code Section 4980H is also very important to our member plan sponsors and service providers. Although the proposed regulations and prior notices provide helpful guidance regarding Code Section 4980H, there remain numerous areas of operational and compliance uncertainty that will need clarification. Our comments regarding these areas are set forth below.

GOOD-FAITH TRANSITION RULE FOR 2014

We very much appreciate the Department's development of a de minimis rule (as discussed in more detail below) in connection with determining whether an assessable payment is due under Code Section 4980H(a). However, the de minimis rule only applies with respect to Code Section 4980H(a), and not with respect to Code Section 4980H(b). Given the complexity of administering coverage to comply with Code Section 4980H and the errors that will inevitably result, we urge the Department to include in future guidance a good-faith transition rule that would allow an employer to avoid being subject to an assessable payment with respect to 2014 to the extent the employer can demonstrate that the failure to comply with Code Section 4980H was inadvertent and that it has undertaken steps to ensure such a failure will not recur.

MEASUREMENT AND STABILITY PERIOD SAFE HARBOR

We support the measurement and stability period safe harbor as provided in the NPRM as an alternative to a month-by-month method of determining full-time employee status. Additional guidance is requested with respect to certain aspects of the measurement and stability period safe harbor.

- **Clarification Requested Regarding Whether Measurement and Stability Periods Must Be Used for All Employees if Used for Any Employee:** The NPRM states that the measurement and stability period safe harbor is an optional method of determining an employee's full-time status. However, the NPRM is not clear regarding whether the safe harbor can be used for certain employees but not for others. For example, it is unclear whether an employer could choose to use the measurement and stability period safe harbor with respect to hourly but not salaried employees or whether an employer could determine that it will no longer use the safe harbor with respect to employees hired after a certain date. In addition, it is unclear whether an employer must actively track the hours of employees reasonably expected to work 30 hours per week if it elects to use the measurement and stability period safe harbor with respect to other employees. Accordingly, we request that the Department clarify whether an employer must use the measurement and stability period safe harbor for all of its employees if it chooses to use the safe harbor for any of its employees and, if this is not the case, the circumstances under which an employer can apply the safe harbor to some but not all employees.

- **Resolution of Potential "Gap" in Applying Measurement and Stability Periods:** With respect to a stability period associated with an initial measurement period for new variable hour or seasonal employees, we believe it is possible that there could be "gaps" between stability periods (i.e., there is a possibility for an employee's stability period associated with his initial measurement period to end prior to the start of the stability period associated with the employee's first standard measurement period). We encourage the Department to provide guidance addressing how employees should be treated in the event of such a gap. For illustration purposes, please see the example in the footnote below.[1]

- **Use of Calendar Months and Non-Calendar Months:** In general, the NPRM lacks clarity as to whether certain provisions must be applied on a calendar-month basis or whether they may be applied other than on a calendar-month basis. An example is the lack of clarity regarding whether full calendar months must be used to operate an initial measurement period or whether the initial measurement period may begin mid-month. The NPRM uses the term "calendar months" in defining "initial measurement period," but later notes that an initial measurement period can span "between three and 12 months" and can begin "on any date between the employee's start date and the first day of the first calendar month following the employee's start date." Moreover, examples in the NPRM utilize initial measurement periods that begin mid-month. Clarification is

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[1] Assume (i) an employer establishes a standard measurement period running from October 15th - October 14th, an administrative period running from October 15th - December 31st, and a stability period running from January 1st - December 31st; and (ii) the employer uses an 11-month initial measurement period, an administrative period running from the end of the initial measurement period to the end of the following calendar month, and a 12-month maximum initial stability period. Assume further that the employer hires a new variable hour employee on October 20, 2013. Such employee's initial measurement period is October 20, 2013 through September 19, 2014 and the administrative period is September 20, 2014-October 31, 2014. The new employee works only 25 hours per week during the initial measurement period. The initial stability period begins November 1, 2014, and ends December 31, 2014 (because it cannot extend beyond the end of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends). The new variable hour employee, however, will not have completed his first standard measurement period until October 14, 2015; the relevant stability period does not begin until January 1, 2016. Thus, the employee would not be subject to a stability period for all of 2015.

requested confirming that initial measurement periods may run on non-calendar months.

- **Ability to Have Variable Lengths of Initial Measurement Periods Based on an Employee's Date of Hire So Long as the Lengths Are Nondiscretionary and Apply Equally to All Like Employees:** The NPRM states that an "applicable large employer member may apply different measurement periods, stability periods, and administrative periods for the following categories of employees: (1) each group of collectively bargained employees covered by a separate collective bargaining agreement, (2) collectively bargained and non-collectively bargained employees, (3) salaried employees and hourly employees, and (4) employees whose primary places of employment are in different states." It also states that an employer may use both an initial measurement period of between three and 12 months and an administrative period of up to 90 days for variable hour and seasonal employees (not to extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling, at most, 13 months and a fraction of a month)).

  Additionally, the NPRM provides that the initial stability period must be the same length as the ongoing stability period. With respect to individuals determined to be full-time employees during the initial measurement period, the stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period. With respect to individuals determined to not be full-time employees during the initial measurement period, the stability period must not be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends.

  Given the significant complexities for an applicable large employer in administering dozens of initial measurement periods (depending on employer size and rate of worker turnover and new hires), the Council requests additional guidance that would allow an employer to utilize an initial measurement period for all new employees hired on or between certain dates (the "Window"), with such measurement period being determined from each employee's date of hire (or the first day of the next payroll period or the next calendar month) through a specified date that is the same for all employees hired during the Window (for example, November 1st). Under this approach, all employees within the same category (such as hourly employees) would be subject to the same initial measurement period rules, but their actual measurement period will vary based on their actual date of hire.

  Additionally, the Council requests that employers be permitted to couple this approach with a uniform stability period for all employees hired during the

Window that may be up to 12 months long, regardless of the duration of any given employee's measurement period, so long as the initial measurement period utilized is at least 6 months in duration.

Here is an example of how this rule would work: Employer establishes a system whereby newly hired variable hour employees will be subject to one of two initial measurement periods, depending on their hire date. Under the employer's system, if a variable hour or seasonal employee is hired on or after November 1st but before May 1st, his measurement period will begin on his date of hire and end the following November 1st. The employee – like all employees hired during this Window – will be subject to a two-month administrative period. If the employee is determined to have worked a full-time schedule during his measurement period, he will be enrolled in coverage on the next January 1st. If a variable hour or seasonal employee is hired on or after May 1st but before November 1st, his measurement period will begin on his date of hire and end on the following May 1st. He too will be subject to a two-month administrative period, and if he is determined to have worked a full-time schedule during his measurement period, he will be enrolled in coverage on the next July 1st. The initial stability period that would then apply to either employee in this example could be of or between 6 and 12 calendar months.

We believe the requested rule makes good policy sense as it will simplify the process of complying with Code Section 4980H by effectively allowing employers to utilize only two potential "end dates" for determining which initial employees worked a full-time schedule in any given calendar year. For many employers, this approach will be easier and less costly to administer and, as such, should help reduce employer costs, increase rates of compliance, and reduce the rate of inadvertent errors.

- **Changing Standard Measurement and Stability Periods:** The NPRM provides that an employer "may change its standard measurement period and stability period for subsequent years, but generally may not change the standard measurement period or stability period once the standard measurement period has begun." Clarification is requested regarding how an employer can change its standard measurement period and/or stability period generally and especially where the employer's existing standard measurement or stability period spans two calendar years. Consider the following example: An employer uses a standard measurement period beginning May 1st and ending April 30th, an administrative period beginning May 1st and ending June 30th, and a stability period beginning July 1st and ending June 30th. If an employer decides on June 30th to change its standard measurement period, clarification is requested as to when such change could become effective.

- **Application of the Rules to New Full-Time Employees Who Experience a Change in Employment Status:** The NPRM provides useful guidance regarding how to treat a new variable hour or seasonal employee who, prior to the end of the initial measurement period applicable to such employee, experiences a change in employment status such that he or she becomes reasonably expected to be employed on average 30 hours of service per week. In addition, the NPRM provides that, with respect to ongoing employees, a change in employment status does not affect the employee's status as a full-time employee or non-full-time employee during the stability period.

  The NPRM does not, however, address situations in which an individual is hired as a full-time employee but who, whether voluntarily or otherwise, becomes a variable hour employee (or otherwise works a schedule that is less than full-time) prior to completing a standard measurement period. We urge the Department to provide rules permitting employers to treat employees who are hired as full-time employees but who end up working a variable hour or seasonal schedule as variable hour or seasonal employees beginning with the first of the month coincident with or next following the change in employment status. Otherwise, there will be situations in which certain part-time employees are offered coverage while other part-time employees in the same position are not.

- **Rehires and Break in Service Rules:** The NPRM provides guidance regarding how employers may treat employees who experience a break in service when applying a measurement period. Specifically, the NPRM provides that if the break in service for which an employee is credited with no hours of service is at least 26 consecutive weeks, then, if he performs an hour of service after such break in service, the employer may treat him as a new employee for purposes of determining whether he is a full-time employee. The NPRM also provides an alternative rule called the "rule of parity" for breaks in service of less than 26 weeks, whereby an employee is treated as having terminated employment and having been rehired as a new employee if the period with no credited hours of service is at least four weeks long and is longer than the employee's period of employment immediately preceding that period with no credited hours of service. In addition, the NPRM provides special rules for averaging hours when a measurement period includes a period of "special unpaid leave," which includes certain unpaid family medical leave, certain unpaid military leave, and unpaid leave on account of jury duty. We request additional guidance regarding the following issues.

  First, with respect to situations in which an employee goes on unpaid leave that does not constitute "special unpaid leave" (*e.g.*, a sabbatical or other voluntary unpaid leave) and also does not trigger the break in service rules mentioned in the preceding paragraph (including the rule of parity), we urge the

Department to confirm that the employer may include the weeks of unpaid leave (i.e., the zero hours worked during such weeks) in determining whether the employee worked a full-time schedule during the relevant measurement period. For example, where a new variable hour employee has worked six weeks, but then goes on unpaid leave for four weeks, we request confirmation that an employer can treat the employee as having worked zero (0) hours for each of her weeks of unpaid leave when determining whether she worked a full-time schedule during the entire course of the initial measurement period.

Second, with respect to an employee who is treated as a continuing employee (as opposed to an employee who is treated as terminated and rehired), the NPRM provides that, "if the continuing employee returns during a stability period in which the employee is treated as a full-time employee, . . . the full-time employee will be treated as offered coverage upon resumption of services if the employee is offered coverage as of the first day that employee is credited with an hour of service, or, if later, as soon as administratively practicable." Given that most coverage is priced and enrolled on a calendar-month basis, we strongly urge the Department to provide in final regulations that a continuing employee will be treated as offered coverage upon resumption of services if the employee is offered coverage as of the first day that employee is credited with an hour of service, or, if later, the first day of the first month next following the employee's resumption of services.

Third, if an employee terminates employment with one member company and is later hired by another member company in the same controlled group, we urge the Department to make clear that such employee should be treated as a new employee for purposes of determining his or her status as a full-time employee. This is because many large controlled group companies have each member company or subsidiary establish and maintain its own payroll records and benefit programs. Accordingly, it would be difficult, if not administratively impossible, for such companies to track hours across subsidiaries with respect to a rehire.

Fourth, we urge the Department to provide an alternative means of measuring breaks in service for purposes of determining when an employee should be treated as a new hire versus a continuing employee. Both the 26-week break in service rule and the rule of parity will be administratively difficult for employers to administer, since they require detailed tracking of weeks worked versus weeks not worked. We encourage the Department to offer an additional alternative means of determining when an employee has experienced a break in service, whereby if an employee has a bona fide leave of absence or separation from service lasting for at least a certain period of time, *e.g.*, 30 or 60 days, the employer may treat him as a new employee for purposes of determining whether he is a full-time employee for purposes of Code Section 4980H. Such a rule would be much simpler for employers to administer, and it would be easier to communicate to employees. The Department would be more easily able to determine whether an employer has calculated the number of full-time employees appropriately, and exchanges would be more easily able to verify whether an individual is eligible for coverage. While it is true that in some cases an employer would be able to treat an employee as a "new employee" after a shorter break in service than under existing rules (*e.g.*, before an employee has experienced a 26-week break in service or satisfied the rule of parity), it is also true that in some cases an employer would not be able to treat an employee as a "new employee" as soon as it could under existing rules (*e.g.*, where an employee has satisfied the rule of parity).

- **Definition of Hour of Service:** The NPRM defines the term "hour of service" by reference to DOL Regulation Section 2530.200b-2(a). Confirmation is needed that the number of hours counted toward an employee's hours of service is limited as provided in DOL Regulation Section 2530.200b-2(a)(2)(i)-(iii). These provisions (i) limit the number of hours taken into account to 501 hours on account of any single continuous period during which the employee performs no duties, (ii) provide that no hours are required to be credited if an employee is directly or indirectly paid, or entitled to payment, on account of a period during which no duties are performed and payment is made or due under a plan maintained solely for purposes of complying with workmen's compensation, unemployment compensation, or disability insurance laws, and (iii) provide that no hours of service are required to be credited for a payment which solely reimburses an employee for medical or medically related expenses incurred by the employee. We urge the Department to adopt the limits specified above, given that the NPRM references DOL Regulation Section 2530.200b-2(a) without explicitly excluding clauses (i) through (iii) above, and that the preamble to the NPRM implies a need to be "consistent with the DOL regulations."

  In addition, we request clarification regarding the manner in which hours of service may be counted with respect to certain hard-to-count employees, such as commissioned salesmen, adjunct faculty, and transportation employees. The NPRM provides that, "until further guidance is issued," the employer must use a "reasonable method" for crediting hours for such employees that is consistent with the purposes of Code Section 4980H. Clarification is requested confirming that an employer may use a method other than one of the three hours-worked equivalencies specified with respect to non-hourly employees, so long as it is reasonable.

- **Changing Method for Calculating Non-Hourly Employees' Hours of Service:** The preamble states that "an employer may change the method of calculating non-hourly employees' hours of service for each calendar year." The preamble goes on to state that, "[f]or example, for all non-hourly employees, an employer may use the actual hours worked method for the calendar year 2014, but may use the days-worked equivalency method for counting hours of service for the calendar year 2015." It is not clear based on the preamble how an employer who uses a non-calendar year standard measurement period would change the method it uses to calculate hours of service. We request that the Department issue guidance clarifying that, where an employer utilizes a standard measurement period that spans two calendar years, an employer may change the method it uses to calculate hours of service upon the start of a standard measurement period.

MEASURING THE ADMINISTRATIVE/WAITING PERIODS FOR NEW FULL-TIME EMPLOYEES

With respect to new employees who are expected to work a full-time schedule as of their hire date, the NPRM provides that an employer is not subject to assessments under Code Section 4980H so long as the employer makes available qualifying coverage to the employee "at or before the conclusion of the employee's initial three full calendar months of employment." We have and continue to get many questions from Council members regarding this language in the NPRM.

First, based on this language, it appears to be the case that, to the extent an employer only allows for entry into its health plan on a calendar-month basis (*e.g.*, the first day of each calendar month), an employer will generally be required to make coverage available to new hires under this rule following the close of their second full month of employment. This is because, if an employee is eligible to enroll in the employer's plan as of the first day of the fourth full calendar month of employment, it appears that the employer would not be making available coverage "at or before the conclusion of the employee's initial three full calendar months of employment." Clarification is needed as to whether this is indeed the case.

Second, Public Health Service Act ("PHSA") Section 2708, as added by the ACA, provides that, in plan years beginning on or after January 1, 2014, a group health plan or group health insurance issuer shall not apply any waiting period that exceeds 90 days. The term "waiting period" is defined for this purpose to be the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan. As mentioned by the Council in prior comments, given that a great many employers allow for enrollment on a calendar month basis, in order to give effect to congressional intent that employers be permitted to utilize a full 90-day waiting period, the waiting period rule should be drafted so as to allow employers to impose a waiting period for the first three full calendar months following an employee's date of hire. Otherwise, employers will be required to make available coverage prior to the close of 90 days and, in some instances, as soon as 60 days following hire (for example, where an employee is hired on December 31st, in which case he or she would need to be enrolled by March 1st in order to comply with the rule).

We reiterate our prior comments[2] in urging the Department to coordinate with the Department of Labor and the Department of Health and Human Services. We ask that the agencies adopt rules with respect to Code Section 4980H and PHSA Section 2708 that work in concert and, in doing so, give effect to congressional intent and long-standing employer practice by allowing employers to utilize an administrative period and/or a waiting period that extends until the first day of the first calendar month following an employee's three consecutive calendar months of employment.

APPLICATION OF MEMBER COMPANY PLAN ELIGIBILITY RULES TO TRANSFERRED EMPLOYEE WHERE CREDIT GIVEN FOR PAST SERVICE

With respect to many of our members, it is not infrequent that an employee transfers from one controlled group member company to another controlled group member company. Often, different member companies impose different eligibility requirements that employees must satisfy in order to obtain health coverage. For example, one member company may impose a 1,000 hours of service requirement, whereas another member company does not impose such a requirement. We encourage the Department to permit a member company to impose its health coverage eligibility requirements on an employee that transfers from another member company, so long as the employee's previous service with the former member company employer is taken into account in applying any eligibility criteria to participate in the new member company employer's plan.

EMPLOYERS AND SERVICE PROVIDERS SHOULD BE PERMITTED A REASONABLE DELAY WITH RESPECT TO ADMINISTRATIVE PERIODS

While we believe that a 90-day administrative period is generally sufficient, additional time is sometimes needed to enroll individuals in employer-sponsored health plans. This is because many, if not most, large employer plan sponsors desire to offer health coverage on a calendar year basis, which may create an administrative challenge for service providers to enroll all participants within a 90-day administrative period. We urge the Department to allow a reasonable delay in enrollment beyond the end of the 90-day administrative period, so long as any service performed by an employee during such delay is counted as part of a measurement period.

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[2] Council letter dated October 1, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_90day-notice2012-59_comments100112.pdf; Council letter dated April 6, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_shared-autoenroll_faq-cmnts040612.pdf.

DEFINITION OF SEASONAL EMPLOYEE

Under the proposed regulations and prior notices, applicable large employers are not required to make available coverage to "seasonal employees" regardless of whether they work 30 hours per week or 130 hours per month. We support the provision of the NPRM that provides that an employer may use a "reasonable, good faith" interpretation of the term "seasonal employee" for purposes of Code Section 4980H through 2014.

As it considers how to define the term for years beginning after 2014, we urge the Department to adopt the definition provided in the nondiscrimination rules applicable to self-insured plans as set forth in Treasury Regulation Section 1.105-11(c)(2)(iii)(C), specifically that a seasonal employee is an employee "whose customary annual employment is less than 9 months, if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more months." We further urge the Department to adopt the seasonal employee safe harbor definition applicable for purposes of the nondiscrimination rules, specifically that "any employee whose . . . customary annual employment is less than 7 months may be considered as a part-time or seasonal employee." This is a well-established and objective standard that employers may already be applying for other purposes, thus facilitating the determination of whether employees are seasonal employees for purposes of Code Section 4980H.

CLARIFICATION REGARDING APPLICATION OF CODE SECTION 4980H(a) DE MINIMIS RULE

We support the de minimis rule, as proposed, whereby an applicable large employer member will not be treated as failing to have offered coverage to its full-time employees (and their dependents) for a calendar month for purposes of Code Section 4980H(a) liability if, for that month, it offers coverage to all but five percent, or, if greater, five, of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offered coverage to that employee's dependents). The de minimis rule appears to apply on a per-member-company basis, which allows separate entities that would otherwise be considered one employer to not be affected by another entity's failure. We request express confirmation that this is indeed the case.

DEFINITION OF "DEPENDENT" FOR PURPOSES OF CODE SECTION 4980H(a)

The NPRM confirms that, for purposes of Code Section 4980H(a), an applicable large employer must offer minimum essential coverage to not only each full-time employee, but also to each full-time employee's child who is under 26 years of age. For this purpose, the NPRM defines "child" to have the meaning given to such term in Code

Section 152(f)(1), which means a son, daughter, stepson, or stepdaughter of the taxpayer, or an eligible foster child of the taxpayer.

In order to comply with the ACA's market reforms, an employer is required to offer coverage to its employees' children up to age 26 if the employer makes available child coverage generally ("Adult Child Requirement"). For purposes of this requirement, many employers have in good faith adopted a definition of "child" that does not include foster children or stepchildren. This is due in very large part to the absence of an express definition. Additional reasons that employers do not cover foster children include the fact that many foster children may be placed with a family for only a limited period of time and may cycle in and out of that family over a period of time. Moreover, foster children usually have access to needed medical coverage via a state-administered medical plan.

In light of the foregoing, we urge the Department to clarify that the definition of "child" for purposes of Code Section 4980H(a) liability does not include stepchildren or foster children.

WELLNESS INCENTIVES AND CAFETERIA PLAN FLEX CREDITS SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING AFFORDABILITY OF COVERAGE FOR PURPOSES OF CODE SECTION 4980H(b):

In accordance with our prior written comments,[3] we urge the Department to allow employers to take into account the full amount of any wellness incentive available to an employee in determining whether such employee's coverage is affordable for purposes of Code Section 4980H. Such a rule will encourage employers to continue to offer valuable and innovative wellness programs to employees and their families and allow individuals and employers to anticipate liability for assessable payments under Code Section 4980H(b). In addition to encouraging wellness program sponsorship and participation, we also believe it is important for employers to be able to determine, with certainty, prior to the end of the year whether they will be subject to assessable payments.

In addition, we encourage the Department to allow employers to take into account for purposes of determining affordability the full amount of any employer flex credits they may offer under a cafeteria plan that an employee may elect to use toward payment of health plan premiums. A contrary rule would misrepresent the affordability of coverage to an employee to the extent he elects to use the flex credits for purposes of some other qualified benefit under the cafeteria plan. Absent the requested guidance, it

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[3] Council letter dated August 21, 2012, *available at* http://americanbenefitscouncil.org/documents2012/hcr_premium-tax-credit_wellness-comments082112.pdf.

is conceivable that this traditional method of cafeteria plan administration would be discontinued by employers in favor of nonelective employer contributions toward the cost of an employee's coverage, at the expense of employee choice. We believe this would be an unfortunate result.

AN AFFORDABILITY "SNAPSHOT" SHOULD APPLY IN DETERMINING CODE SECTION 4980H LIABILITY REGARDING AN EMPLOYEE WHO CHANGES FROM FULL-TIME TO PART-TIME STATUS

For a variety of business reasons, employees may experience a decrease in hours worked during a stability period. A question has arisen with respect to the determination of affordability in the case of an employee who transitions from full-time status to part-time status during a stability period. Assuming there is a corresponding decrease in wages (which would presumably flow through to the individual's modified adjusted gross household income), it is possible that coverage that was affordable for the employee at the beginning of the stability period ceases to be affordable for the employee upon the change in employment status. Thus, despite prudently tracking hours and offering affordable coverage based on those hours worked, employers could potentially find themselves with Code Section 4980H liability with respect to employees for whom coverage becomes unaffordable during the stability period. We encourage the Department to allow employers to use a "snapshot" of the affordability of coverage to an employee as of the beginning of a stability period for the duration of that stability period without regard to a change in an employee's status, so long as the employer continues to provide the same dollar amount or percent of premium subsidy for the duration of the stability period.

MULTIPLE AFFORDABILITY SAFE HARBORS WILL AID EMPLOYERS IN COMPLYING WITH CODE SECTION 4980H(b)

The NPRM provides for three safe harbors for purposes of determining whether coverage is affordable for employees. The offering of these safe harbors will make it much easier for employers to gauge whether the coverage they offer will put them at risk for a Code Section 4980H(b) assessable payment.

The new rate of pay safe harbor would allow employers to take into account elective deferrals to 401(k) plans and salary reductions to cafeteria plans in determining affordability of coverage. However, it is possible that the safe harbor may not be available to a number of employers (for example, with respect to employers that adjust their employees' salaries and wages during the course of a year, which is, of course, very common). Accordingly, although we support the proposed rate of pay safe harbor, we expect that it will be unavailable to many employers. As a result, it is likely that these employers will utilize the Form W-2 safe harbor, which, as noted in the preamble to the NPRM, relies on the amount of wages reported in Box 1 of the Form W-2, which is reduced to the extent of an employee's elective deferrals to a 401(k) plan or salary reductions to a cafeteria plan ("Pre-Tax Contributions"). As discussed in prior comments,[4] we remain concerned that employers will be discouraged from offering valuable opportunities for employees to make Pre-Tax Contributions unless employers are permitted to take account of such Pre-Tax Contributions when determining whether an employee's coverage is affordable for purposes of Code Section 4980H.

In addition to the above, the NPRM provides that, in order to use the Form W-2 safe harbor, "the employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or, for plans with fiscal year plan years, within the portion of each plan year during the calendar year) so that an applicable large employer is not permitted to make discretionary adjustments to the required employee contribution for a pay period." We request confirmation that an employer that utilizes a fiscal year plan year may make changes to the required employee contribution on a fiscal-year basis and still utilize the Form W-2 safe harbor.

NONPAYMENT OF PREMIUMS BY EMPLOYEES

The NPRM provides that an employer is not required to offer coverage to an employee "whose coverage under the plan is terminated during the coverage period solely due to the employee failing to make a timely payment of the employee portion of the premium." The NPRM goes on to provide that the provisions that apply for purposes of determining whether premiums have been paid for COBRA continuation coverage apply for purposes of determining whether an employer is required to provide coverage for purposes of Code Section 4980H where an employee fails to make premium payments. In practice, when coverage ceases as a result of nonpayment of premiums is determined as a matter of contract or state law. Requiring modification of policies and plans to reflect the COBRA nonpayment provisions would be challenging for employers. We encourage the Department to allow employers to rely on provisions in current policy or plan documents for purposes of determining when an employer is no longer required to provide coverage to an employee for purposes of Code Section 4980H where that employee has failed to make premium payments.

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[4] Council letter dated April 6, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_shared-autoenroll_faq-cmnts040612.pdf; Council letter dated Dec. 13, 2011, *available at* http://americanbenefitscouncil.org/documents/hcr_4980h_irs-comments121311.pdf; Council letter dated Oct. 31, 2011, *available at* http://americanbenefitscouncil.org/documents/hcr_premium-tax-credit_comments103111.pdf.

TRANSITION RULES

The Department's issuance of proposed transition rules is very important, given the fast-approaching deadline and the complexities associated with complying with Code Section 4980H. Clear and well-fashioned transition rules are vital in order to provide employers with the time necessary to comply with the new rules and to avoid any unnecessary disruptions to coverage that would likely otherwise result. To this end, with respect to the transition rules as proposed in the NPRM, we request the following clarifications and/or additional guidance.

- **Clarification of Fiscal Year Plan Transition Relief:** We appreciate the transition rules that were provided in the NPRM for fiscal year plans. With respect to the transition rule providing further relief for employers that have a significant percentage of their employees eligible for or covered under one or more fiscal year plans that have the same plan year as of December 27, 2012 and want to offer certain other employees coverage under their plans, we request clarification with respect to three issues:

    - whether an employer is eligible for relief if the plan under which a significant percentage of its employees are eligible for or covered by provides only limited medical or excepted benefits;

    - whether all employees, including part-time employees, must be taken into account for purposes of determining whether a "significant percentage" of employees are eligible for or covered by a plan; and

    - if an employer makes contributions to a multiemployer plan on behalf of certain bargaining unit employees, whether the employer may consider these employees to have been "offered" coverage for purposes of the transition rule.

  In addition, it is not clear based on the NPRM whether, for purposes of the transition rules for fiscal year plans, "plan year" means the Form 5500 plan year, the insurance contract/policy year, or some other 12-month period that the employer may designate. Clarification is requested regarding how "plan year" should be determined.

  Given the complexity of the fiscal year transition relief, we also encourage the Department to provide examples in the final rule showing how the fiscal year transition relief may be applied.

- **Make Multiemployer Plan Transition Relief Permanent and Extend Relief to Certain Single-Employer Union-Sponsored Plans:** We appreciate the transition relief that employers participating in multiemployer plans may use through

2014. The relief appropriately recognizes the need for administrable rules to accommodate the structures of such plans. The only connection employers have to such plans is the requirement to make contributions in accordance with the applicable collective bargaining agreement. Benefits and eligibility rules are generally determined by the joint board of trustees, and eligibility is typically based on services performed by an employee for more than one unrelated employer, often in the same industry. These complexities are ongoing issues for such plans. Accordingly, we recommend that the Department make the multiemployer plan transition relief permanent.

We also encourage the Department to extend availability of the multiemployer plan transition rule to certain employers that, although they do not *per se* participate in multiemployer plans, in practice face the same difficulties as multiemployer plans in determining employees' hours worked. Specifically, we urge the Department to extend the multiemployer plan transition rule to employers that make a similar contribution to a single union-sponsored plan for those employees who did or will opt out of the employer's major medical plan. As with multiemployer plans, these employers make non-elective employer contributions toward an employee's cost of coverage via the union-sponsored plan – in a very similar fashion to those contributions made by employers to "Taft-Hartley" or other multiemployer plans. Given this similarity as well as the existence of similar policy concerns for multiemployer and single union-sponsored plans, we ask that the transition relief be extended to apply to situations in which an employer makes contributions to a single union-sponsored plan.

In addition, we encourage the Department to not find an employer in violation of Code Section 4980H or the limitation on the 90-day waiting period (as set forth in new PHSA Section 2708) to the extent an existing collective bargaining agreement provides for a waiting or probationary period that is otherwise longer than that which would be permitted under the rules. A contrary rule would unjustly penalize employers for decisions made in concert with the employee's collective bargaining representative. To the extent that the Department disagrees with the exception as requested, we urge the Department to provide transition relief that would give employers sufficient time to work with their employees' labor representatives to seek to negotiate the needed changes to the collective bargaining agreements.

- **Support of Transition Rule Permitting Shorter Measurement Periods for Stability Periods Starting in 2014:** In the absence of transition relief, it would be difficult for employers to adopt a 12-month stability period for 2014, given the short period over which employers may prepare for Code Section 4980H. Thus, we strongly support the transition rule in the NPRM that would permit employers to use a 12-month stability period in 2014 so long as the associated measurement period is at least 6 months in length.

- **Support of Transition Rule for Coverage for Dependents:** We also appreciate the transition rule in the NPRM that provides that any employer that takes steps during the plan year that begins in 2014 toward satisfying the Code Section 4980H provisions relating to the offering of coverage to full-time employees' dependents will not be liable for any assessable payment under Code Section 4980H solely on account of a failure to offer coverage to the dependents for that year. This transition relief is welcomed, given that many employers do not currently offer coverage to their employees' dependents, and expanding coverage as required by Code Section 4980H will require sufficient time to implement this new requirement.

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Thank you for considering these comments submitted in response to the notice of proposed rulemaking issued in connection with Code Section 4980H. 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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