



AMERICAN BENEFITS

COUNCIL

TESTIMONY OF

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ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

BEFORE THE

INTERNAL REVENUE SERVICE

REGARDING

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF PUBLIC
HEARING: INFORMATION REPORTING BY APPLICABLE LARGE
EMPLOYERS ON HEALTH INSURANCE COVERAGE OFFERED
UNDER EMPLOYER-SPONSORED PLANS

NOVEMBER 18, 2013

My name is Seth Perretta, and I am a partner at Crowell & Moring LLP in Washington, D.C. I am testifying today on behalf of the American Benefits Council (the "Council"), for which I serve as outside health tax counsel. 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.

My testimony today will focus on the proposed regulations promulgated by the Department of the Treasury and the Internal Revenue Service with respect to Internal Revenue Code ("Code") Section 6056 ("Proposed Rule").

The Council very much appreciates the IRS's continued efforts to work with employers to develop simplified reporting methods for purposes of Code Section 6056. The reporting requirements that will be imposed upon employers are very significant. In many instances, they will require employers to modify existing benefit and payroll systems and to coordinate with third party record keepers and tax return preparers. The new requirements will also require significant training of human resources, benefits, and tax personnel and, in many instances, will require changes to existing recordkeeping practice and procedure (for example, in connection with classifications of "full-time" employees).

In light of these considerations, the Council and its members very much welcomed the Department's decision this past summer to delay mandatory reporting until 2015. The one-year delay was an important step in providing employers with sufficient time to come into full compliance with any final reporting requirements. We believe, however, that additional relief from the reporting requirements will likely be needed for 2015.

Given the significant time and energy that will be required of employers and third party service providers in order to operationalize the new reporting requirements, including the integration of numerous payroll, benefit, and tax IT systems, as well as the preparation and delivery of new tax returns and statements, it should be expected that a fair number of employers may not be able to ensure compliance in all material respects with Code Section 6056 reporting for 2015, notwithstanding their good faith efforts. Accordingly, we request that the Department consider issuing a specific non-enforcement safe harbor for 2015 for employers that in good faith take steps to comply with the reporting requirements.

We also encourage the Department to issue any future rulemaking in proposed form and subject to public comment. We further urge the Department to issue the related IRS forms in proposed format so that stakeholders may provide comment prior to the Department's finalization of the forms.

Many of the potential rules – including, for example, the simplified reporting methods – have yet to be proposed in formal regulatory text for review and public comment. It is important that these and other provisions be set forth in greater detail in proposed regulatory text for public comment and that, unless and until final rules are issued, employers and other reporting entities be permitted to rely on these re-proposed rules.

With respect to the rules themselves, we appreciate the Department’s continued efforts to simplify the reporting obligations under Code Section 6056. In addition to those items addressed in our written comments, we would like to address the following issues today.

COMBINED REPORTING

Of great interest to the Council’s members is the possibility of combined reporting. The ability for employers to use a single, combined return and statement for purposes of Code Sections 6055 and 6056 reporting should help reduce some of the burdens on employers. Moreover, combined reporting should reduce the possibility for the issuance of inconsistent returns and lessen potential participant confusion.

EXPANSION OF FORM W-2 SIMPLIFIED REPORTING METHOD

The Council’s members are also very supportive of future rulemaking that would allow for the meaningful use of the Form W-2 as an option for employers in satisfying their Code Section 6056 reporting obligations.

The preamble to the Proposed Rule sets forth several possible methods for simplifying the reporting requirements, including a method that would allow employers to use an existing box on the Form W-2 to fulfill the requirement under Code Section 6056. However, the proposed method would only be available if the full-time employee is employed for the entire calendar year, and if the individuals to whom the offer is made, as well as the extent of any employee contribution for the lowest-cost self-only coverage option, remain the same for the full calendar year.

The Council is concerned that the limitations imposed on the use of the Form W-2 method would make the method unavailable to many employers entirely or with respect to many groups of employees. This is because many full-time employees may not be employed or have the same number of covered dependents for the entire year.

Although we understand the Form W-2 is an annual statement and, as such, has not historically provided for the transmittal of information on a monthly basis, we believe the Department, in connection with other federal agencies, might find it worthwhile to

increase the utility of the Form W-2 for purposes of Code Section 6056 reporting. Accordingly, we urge the Department to expand the availability of the optional Form W-2 reporting method as discussed in our written comments.

REDUCED REPORTING FOR AFFORDABLE COVERAGE

The Council also supports reporting rules that would allow for reduced reporting where it can be reasonably expected that the coverage offered by the employer will be affordable to the employee within the meaning of Code Section 36B.

Specifically, we support the proposal in the preamble to the Code Section 6056 Proposed Rule that would permit an employer to report the employee cost as \$0 where the annual employee cost of self-only coverage is an amount less than 9.5% of the federal poverty line for a single individual.

The Council also encourages the Department to implement a similar rule for those instances where an employee's wages are sufficiently high such that the coverage offered can be expected, in nearly all instances, to be affordable. The Council believes such a rule would help reduce the reporting burden for employers without adversely affecting the recipient employee. As set forth in our written comments, we think an appropriate threshold for this purpose would be \$150,000 of taxable wages per employee, which is four times the 2013 federal poverty line *for a family of seven* — well in excess of the size of the average American household (2.58 people per household, according to 2010 Census documents).¹

NO NEED TO DETERMINE FULL-TIME EMPLOYEES IF MINIMUM VALUE COVERAGE IS OFFERED TO ALL POTENTIALLY FULL-TIME EMPLOYEES

The preamble to the Proposed Rule states that the Department is also considering providing a simplified reporting method for employers that are able to accurately represent that the only employees not offered coverage are not full-time employees. These employers may not have determined whether every employee to whom coverage is offered is or is not a full-time employee. The reporting method under consideration would except such employers from having to identify the number of full-time employees per month as well as from having to specify whether a particular employee offered coverage is a full-time employee – so long as the employer provides a certification that all of its employees to whom it did not offer coverage during the calendar year were not full-time employees (or were otherwise ineligible for coverage).

¹ See U.S. Census Bureau, C2010BR-14, Households and Families: 2010 (Apr. 2012), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

The employer would be required to confirm at a later date whether an employee is a full-time employee if such an employee claims a premium tax credit.

The Council and its members support the contemplated simplified reporting method. Many employers may utilize their own full-time employee definition that differs from the definition provided in Code Section 4980H, but at the same time provide minimum value, affordable coverage broadly to their employee populations – including with respect to employees who work less than 30 hours per week on average. The contemplated method would save these employers from having to engage in costly and time-consuming reporting on the front-end, while at the same time ensuring the IRS has the ability to properly administer Code Section 36B premium tax credits and the excise tax provisions of Code Section 4980H.

EXPANDED REASONABLE CAUSE EXCEPTION

The Council appreciates that the rules under Code Section 6724, including the abatement of information return penalties for reasonable cause, apply for purposes of Code Section 6056 reporting. However, we are concerned that these existing rules may not provide sufficient relief for employers in connection with Code Section 6056 reporting. Specifically, the Council is concerned that an employer could still be required to file and issue new amended returns and statements if it learns of new information after the fact – for example, in the case of a permitted rescission of coverage. Accordingly, the Council encourages the Department to issue guidance providing that employers will not be required to file or issue amended returns or statements solely to reflect new information learned following filing and issuance of the returns and statements.

EXPANDED ELECTRONIC DELIVERY RULE

Lastly, the Council appreciates that the Proposed Rule would permit the use of the Department’s electronic delivery rules to furnish the required statements to covered individuals. An ever-growing majority of companies are relying on electronic delivery to furnish workplace-related materials and notices. The Council recommends that any final rulemaking include an express rule permitting the use of electronic delivery.

The Council would like to encourage the Department as part of its rulemaking on Code Section 6056 reporting, or more generally, to consider allowing for the use of an expanded electronic delivery rule. We note that many of our members have found helpful (and successful) the expanded electronic delivery rule that is permitted for use in distributing the Summary of Benefits and Coverage (“SBC”). We believe this rule appropriately balances the interests of ensuring actual notice of important information to intended recipients (*e.g.*, the SBC) with the need for more efficient delivery methods and reduced employer costs (*e.g.*, by permitting electronic posting of the information

and providing paper copies upon request). Accordingly, we encourage the Department to use its regulatory authority to consider a broader electronic delivery rule.

CONCLUSION

Thank you for providing the opportunity for me to testify on behalf of the Council today. I welcome any questions you may have.