AMERICAN BENEFITS COUNCIL

July 2, 2013

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

Internal Revenue Service
CC:PA:LPD:PR (REG-125398-12)
Room 5203
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit

Sir or Madam:

I write on behalf of the American Benefits Council ("Council") to provide comment in connection with the notice of proposed rulemaking ("Proposed Rule") published in the Federal Register on May 3, 2013, by the Department of the Treasury and the Internal Revenue Service (collectively, the "Department"). The Proposed Rule provides guidance relating to the health insurance premium tax credit available under section 36B of the Internal Revenue Code of 1986, as amended ("Code"), as added by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively, the "ACA"). The Proposed Rule also provides guidance relating to the determination of whether health coverage under an eligible employer-sponsored plan provides minimum value and is affordable.

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.

We appreciate the opportunity to provide comments to the Department with regard to the determination of minimum value and affordability in connection with an eligible employer-sponsored plan. We originally provided comments in response to Notice 2012-31, which requested comments on methods for determining whether health coverage under an eligible employer-sponsored plan provides minimum value.[1]

AVAILABILITY OF MINIMUM VALUE CALCULATOR, DESIGN SAFE HARBORS AND ACTUARIAL CERTIFICATION

We appreciate that the Proposed Rule sets forth multiple methods for determining minimum value. Specifically, the Proposed Rule provides that a plan may use the minimum value calculator made available by the Department of Health and Human Services and the Internal Revenue Service, or safe harbors to be described in additional published guidance (which are expected to consist of plan designs meeting certain specifications and appear to be similar to the design-based safe harbor checklist described in Notice 2012-31). The Proposed Rule provides that actuarial certification may be used if an eligible employer-sponsored plan has nonstandard features that are not compatible with the minimum value calculator and may materially affect the minimum value percentage (or, for plans in the small group market, conformance with the requirements for a level of metal coverage).

The Council supports allowing plans the alternative of satisfying the minimum value requirements by virtue of either using the minimum value calculator or fitting within a safe harbor. In addition, as stated in prior comments, we encourage the Department to consider making the actuarial certification tool available to all plans regardless of whether a plan could also use the calculator or one of the safe harbors.[2] As we discussed in our comment letter regarding Notice 2012-31, the Council believes that providing multiple mechanisms for determining minimum value will allow plans to choose the method best suited to their unique characteristics.[3]

In addition, we continue to urge the Department to ensure that the tools for determining minimum value be clear, simple, and provide maximum flexibility for plan

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[1] *See* Council Letter dated June 11, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_irs-n2012-31_council-comments061112.pdf.

[2] *See* Council Letter dated December 26, 2012, *available at* http://www.americanbenefitscouncil.org/documents2012/hcr_ehb-propreg_council-hhs-letter122612.pdf.

[3] *See* Council Letter dated June 11, 2012.

sponsors to design health benefit plans that meet the needs of their workforce. We also recommend that the Department periodically update guidance for determining minimum value to reflect and accommodate plan design innovation.

TREATMENT OF CONTRIBUTIONS TO HEALTH SAVINGS ACCOUNTS AND HEALTH REIMBURSEMENT ARRANGEMENTS FOR PURPOSES OF MINIMUM VALUE DETERMINATION

The Proposed Rule provides that, for purposes of determining minimum value, all amounts contributed by an employer for the current plan year to a health savings account ("HSA") are taken into account in determining the plan's share of costs for purposes of minimum value and are treated as amounts available for first dollar coverage. Amounts newly made available under an integrated health reimbursement arrangement ("HRA") for the current plan year count for purposes of minimum value in the same manner if the amounts may be used only for cost-sharing and may not be used to pay insurance premiums.

We appreciate the provision in the Proposed Rule that provides that all amounts contributed by an employer for the current plan year to an HSA are taken into account in determining minimum value and are treated as amounts available for first dollar coverage. We urge the Department to allow plans to decide how to utilize amounts newly made available under an integrated HRA for a plan year.[4] Many integrated HRAs permit funds deposited therein to be used to reduce cost-sharing or to pay insurance premiums. Plans should be able to apply the funds available under an HRA in the way they see fit, whether it is to count them in a minimum value determination or to count them toward affordability. Taking into account any lesser portion of amounts made available under an HRA could discourage employers from offering such benefits, ultimately making health coverage more expensive for employees. With respect to our proposed approach, although a plan may choose how to allocate funds available under an HRA for purposes of determining minimum value and affordability, plans would not be permitted to count the same dollar toward both minimum value and affordability.

TREATMENT OF WELLNESS REWARDS FOR PURPOSES OF MINIMUM VALUE DETERMINATION AND APPLICATION OF TRANSITION RULE

The Proposed Rule provides that minimum value and affordability are both

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[4] *See* Council Letter dated June 11, 2012.

determined by assuming that each employee fails to satisfy the requirements of a wellness program (and thus does not receive the benefit of reduced cost-sharing or premiums), except with respect to the requirements of a nondiscriminatory wellness program related to tobacco use. Thus, the minimum value and affordability of a plan that charges a higher level of cost-sharing or higher premiums for tobacco users will be determined based on the premium that is charged to non-tobacco users or tobacco users who complete the related wellness program.

A transition rule is provided for certain plans for plan years beginning before January 1, 2015 with respect to coverage that is unaffordable or does not provide minimum value. The transition rule is available solely for purposes of applying Code section 4980H (relating to the employer shared responsibility requirement). The transition rule provides that an employer will not be subject to an assessable payment under Code section 4980H(b) for plan years beginning before January 1, 2015, if the offer of coverage would have been affordable or would have satisfied minimum value, as applicable, based on the total required employee premium and cost-sharing that would have applied if the employee had satisfied the requirements of any wellness program described below, including wellness programs with requirements unrelated to tobacco use. This transition rule applies only:

1. To the extent of the reward as of May 3, 2013, expressed as either a dollar amount or a fraction of the total required employee contribution to the premium (or the employee cost-sharing, as applicable);

2. Under the terms of a wellness program as in effect on May 3, 2013; and

3. With respect to an employee who is in a category of employees eligible under the terms of the wellness program as in effect on May 3, 2013, (regardless of whether the employee was hired before or after that date).

Although we appreciate that the Department has provided a transition rule with respect to wellness programs, we believe that final rulemaking should allow plans to take into account potential wellness program rewards in determining minimum value and affordability, regardless of whether the rewards are related to cessation of tobacco use.

In addition, with respect to the transition rule, we request the following clarifications. First, it is unclear whether a plan may increase rewards for plan years beginning before January 1, 2015, and continue to be able to utilize the transition rule. As noted above, the transition rule provides that it is only available under the terms of the wellness program in place as of May 3, 2013, and only "to the extent of" the reward as of such date. Given the permitted increase in rewards levels implemented by the ACA, we urge the Department to confirm that plans may increase rewards as permitted by the ACA and also utilize the transition rule for the amount of the wellness program reward available as of May 3, 2013. For example, with respect to a calendar year program that offers a 20% reward as of May 3, 2013, the program should be permitted to increase its reward to 30% (assuming there are no rewards specific to cessation of tobacco use) for the plan year beginning January 1, 2014, as permitted by the ACA, without losing the ability to utilize the transition rule for purposes of determining affordability and minimum value for the plan year beginning January 1, 2014. Such program should be permitted to count the 20% reward in effect as of May 3, 2013, toward minimum value and affordability for the 2014 plan year.

Second, the treatment of wellness rewards offered by a plan with a wellness program that provides a reward for the cessation of tobacco use and another separate wellness program that provides a reward for undertaking activities or satisfying standards that are not related to tobacco use is unclear. Specifically, the Proposed Rule does not address whether a plan may apply the tobacco-related reward toward minimum value and affordability determinations (with respect to which the transition rule is not needed) and then apply the reward that is not related to the cessation of tobacco use to further adjust minimum value and affordability determinations by way of the transition rule.

We urge the Department to provide in final rulemaking that a plan may apply the tobacco-related reward outside of the transition rule and also apply the reward that is not related to tobacco via the transition rule. An argument for such a rule is supported by other guidance issued by the Department. Specifically, the recently finalized wellness program regulations[5] indicate that multiple, separate wellness programs may be maintained with respect to a single plan. The preamble to those final regulations states that "the total reward offered to an individual under *all health-contingent wellness programs with respect to a plan* cannot exceed the applicable percentage" (emphasis added). The takeaway from the preceding quote is that multiple wellness programs may be maintained by an employer with respect to a single plan. Thus, application of the transition rule should be permitted to be made on a program-by-program basis.

TREATMENT OF RETIREE HEALTH REIMBURSEMENT ARRANGEMENTS FOR PURPOSES OF THE PREMIUM TAX CREDIT

The Proposed Rule provides useful guidance clarifying that an individual who "may enroll" in retiree coverage is "eligible" for minimum essential coverage only for the

[5] Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,157 (June 3, 2013).

months the individual is "enrolled" in the coverage. To the extent a retiree is "eligible" for minimum essential coverage, he or she is not eligible to obtain a premium tax credit under Code section 36B.

The application of this rule to retiree HRAs is not clear. As we noted in prior comments with respect to Code section 5000A (regarding the individual shared responsibility requirement), many employers make available to their retirees HRAs for use by such retirees in helping to defray the out-of-pocket medical costs they may incur post-employment.[6] These retirees typically do not affirmatively "enroll" in the stand-alone HRAs; rather, the employer contributes, without the retiree's election, a sum of money to an HRA for use by the retiree to pay medical costs. In essence, the retiree is automatically "enrolled" in the HRA. Questions have arisen regarding whether a retiree's eligibility to reimburse medical expenses from an HRA could render the retiree ineligible for a premium tax credit under Code section 36B. To the extent there is a possibility that offering these HRAs to retirees could disqualify retirees from obtaining premium tax credits, there is concern that employers will cease to offer these valuable benefits to retirees. It seems unlikely that the rules under Code sections 36B and 5000A were intended to result in *decreased* benefits being offered to retirees.

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Thank you for considering these comments submitted in response to the Proposed Rule issued with regard to the premium tax credit and the determination of minimum value and affordability. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

Kathryn Wilber

Kathryn Wilber
Senior Counsel, Health Policy

[6] *See* Council Letter dated May 2, 2013, *available at* http://www.americanbenefitscouncil.org/documents2013/hcr_shared-mec_irs-letter050213.pdf.