AMERICAN BENEFITS COUNCIL

June 11, 2012

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

Internal Revenue Service
CC:PA:LPD:PR (Notice 2012-31)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2012-31 – Minimum Value of an Employer-Sponsored Health Plan

Sir or Madam:

We write on behalf of the American Benefits Council ("Council") to provide comment on Notice 2012-31, Minimum Value of an Employer-Sponsored Health Plan ("Notice"). 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.

Under the Patient Protection and Affordable Care Act ("Affordable Care Act"), employers must provide coverage to their full-time employees that is affordable and that offers minimum value. Otherwise, they may be subject to penalties with respect to certain full-time employees that qualify for Internal Revenue Code ("Code") section 36B premium tax credits. The Notice provides that certain of the rules for whether an employer-sponsored plan provides minimum value are to be based on forthcoming regulations to be issued by the Department of Health and Human Services ("HHS") for purposes of determining the actuarial value of qualified health plans, which will be required to adhere to certain essential health benefit requirements.

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The Notice describes proposed modifications to the actuarial value methodology proposed by HHS for purposes of determining minimum value with respect to employer-sponsored self-insured plans and insured large group plans, since these plans are not subject to the essential health benefit requirements. It also describes and requests comments on three potential approaches that could be used to determine whether an employer-sponsored self-insured plan or insured large group plan provides minimum value to its full-time employees such that the employer is not subject to penalties under Code section 4980H (the employer shared responsibility requirement). Specifically, the Notice discusses a proposed minimum value calculator, certain design-based safe harbor checklists, and a certification by a certified actuary.

The Council supports the three possible approaches set out in the Notice for determining minimum value and recommends that they be included in future guidance. We believe that providing several options for determining minimum value will allow plan sponsors to choose the method best suited to their unique plan characteristics. The Council further urges that any tools for determining minimum value – particularly the calculator and safe harbor checklists – that are included in final regulations be clear, simple, and provide maximum flexibility for plan sponsors to design health benefit plans that meet the needs of their workforce. As discussed below, we anticipate that the safe harbor checklist approach could be particularly able to satisfy these requirements for clarity, simplicity and flexibility, providing it is not further restricted by proscriptive limits or other restraints on the ability of plan sponsors to apply it to their benefit plan design.

We also appreciate the express acknowledgment in the Notice that appropriate modifications must be made when applying to self-insured and insured large group plans the actuarial value framework established by HHS. As discussed below, any proposed guidance needs to take into account the full array of self-insured and large group insured plans (including variations in industry, sector and employer size), and also ensure that employers are able to fully account for the unique benefits that may be provided under their plans, such as wellness benefits, disease management programs, on-site health centers and occupational health benefits.

We also appreciate the Service's acknowledgment in the Notice that employers of self-insured and large group plans will not be required to provide any specific essential health benefit. As recognized by Congress in its enactment of the Affordable Care Act, employer sponsors of self-insured and large group insured plans need broad flexibility to design their plans in a manner that best accounts for the unique realities of their industry and employee population and thus should not be subject to any specific benefit mandates or requirements.

Formal Guidance and Transition Relief Needed

The Council appreciates that the Service has informally solicited public comment prior to issuing a notice of public rulemaking in connection with the determination of minimum value. Given the rapidly approaching effective date for the minimum value requirement, the Council believes it is important for the Service to provide formal guidance as soon as possible to allow plan sponsors sufficient time to implement new rules. Given the short implementation timeframes employers are likely to face once final regulations are issued, we recommend that the Service provide transition relief, including but not limited to, a good faith non-enforcement safe harbor, to allow sufficient time for employers to bring their operations into compliance with the minimum value rules without the fear of penalty in the absence of strict technical compliance.

Interaction with Anticipated HHS Actuarial Value Guidance/Assumptions to Be Used in Minimum Value Determination

The Notice contemplates that minimum value for employer-sponsored self-insured plans and insured large group plans "would be determined in the same manner as actuarial value" applied to qualified health plans, but with appropriate modifications.

Since actuarial value is determined with respect to plans that are required to offer 10 categories of essential health benefits (and is based upon a dataset regarding the same types of plans), the actuarial value mechanism would not be appropriate for employer-sponsored self-insured plans and insured large group plans, absent significant modifications. This is because such plans are not required to provide coverage for essential health benefits as defined under the Affordable Care Act and implementing guidance.

Standard Population and Utilization. The Notice states that the Affordable Care Act specifies that actuarial value is computed based on the health expenses that are expected to be incurred by a "standard" population, rather than the population that a plan actually covers. According to the Notice, HHS intends to publish two types of continuance tables, including one based on claims and population data for "typical self-insured employer-sponsored plans." This set of continuance tables would be incorporated into a minimum value calculator, which would be provided and could be used to calculate the actuarial value of an employer-sponsored self-insured plan or an insured large group plan. This set of continuance tables would not include claims or population data for plans required to provide essential health benefits or state mandated benefits. The Council agrees that plans required to provide essential health benefits or state mandated benefits should not be included in the dataset for the continuance tables for plans not subject to those requirements.

While the Council appreciates that the Service recognizes that a different set of continuance tables would need to be utilized with respect to self-insured plans, it is important to consider the wide variation that exists with respect to the size and characteristics of employers that sponsor such plans and the coverage offered. As a result, we recommend that the Service take care to include plans from all ranges of the self-insured market in the dataset underlying the continuance tables. Specifically, the continuance tables should utilize data from employers of all sizes that are considered large employers for purposes of the employer shared responsibility requirements, as well as data from employers in various industries and sectors (*e.g.*, manufacturing, service, agriculture) and with various worker and wage demographics and attrition rates.

We are also concerned that many of the costs of complying with the Affordable Care Act are yet to arise or will not be fully reflected in any existing data set. As a result, any currently existing dataset will need to be updated using 2014 data as soon as possible.

In addition, we urge that any tool for minimum value calculation not result in employer sponsors of self-insured plans and insured large group health plans having to provide coverage that effectively exceeds the bronze-level threshold (i.e., a plan providing a level of coverage that is designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan) that applies to qualified health plans. If the population used for the dataset provides benefits in excess of the 60% threshold, then the practical effect would be that the dataset would not represent a "standard" plan, and it could result in the imposition of coverage requirements on self-insured plans and insured large group health plans that exceeds those that apply with respect to insured arrangements that are required by statute to comply with benefit mandates.

Finally, we urge the Service to make the continuance tables (and the mechanisms described in the Notice) publicly available as soon as they are completed, as employers need lead time to interpret and understand the tables and to apply them to their plans to ensure compliance with the minimum value requirements.

POSSIBLE APPROACHES FOR DETERMINING MINIMUM VALUE

The Council appreciates that the Service has proposed three mechanisms for employers to use in determining the minimum value offered by employer-sponsored self-insured plans and insured large group plans – the minimum value calculator, the design-based safe harbor checklists, and the actuarial certification. The Notice states that, under anticipated future guidance, an employer-sponsored plan would be able to use one of several alternative approaches to ascertain that the plan provides minimum value. We believe it is very important that employers to have maximum flexibility in determining whether their plans satisfy the minimum value requirements, including

the discretion to choose which mechanism to apply for making that determination for their plan.

As discussed below, we strongly urge the Service to develop and implement each mechanism in a manner that will maximize employers' ability to utilize the approach that best suits their plans and businesses.

Safe Harbor Checklists. The Council strongly supports the design-based safe harbor checklist approach and recommends that it be included among options for determining minimum value and in any future implementation guidance. According to the Notice, this approach would provide an array of safe harbor checklists that would be used to make minimum value determinations for plans that cover all of the four categories of benefits and services and have specified cost-sharing amounts. We believe the safe harbor checklist offers significant potential as a mechanism that will be accessible to most large employers, workable and requiring a minimum of time and resources to apply.

The Notice also states that the safe harbor options would include coverage equivalent to an HDHP combined with an employer-funded plan. We recommend that future guidance also affirm that the safe harbor options include any HDHP that satisfies Code section 223 that is offered without an employer HSA contribution.

We believe the utility of safe harbor checklist approach would be diminished, however, to the extent the checklists were cumbersome to apply or effectively required the provision of a specific set of benefits and/or cost-sharing structures in order to use them. As a result, we urge the Service to keep this approach as simple to use as possible and permit as much flexibility as possible for employers to apply different cost-sharing structures to each of the four core benefit categories identified in the Notice for use with the checklist approach.

ACTUARIAL VALUE CALCULATOR AND ACTUARIAL CERTIFICATION

The Council also supports the minimum value calculator and actuarial certification approaches set out in the Notice and recommends that they be included in any future guidance.

To ensure that employers have sufficient flexibility in designing their plans, the calculator should be designed to take account of plans that utilize different benefit sets and/or cost-sharing structures. For example, rather than requiring that an employer utilize a certain deductible or copayment, the calculator could require a plan not to exceed some upper limit on overall cost-sharing with the employee, and permit a plan to identify how the cost-sharing will be allocated over benefits and types of cost-sharing.

Additionally, the calculator should permit employers to take account of aspects of their plans that provide meaningful benefits, but that may not be reflected in a standard or "typical" plan, such as with respect to wellness plans, disease management programs, onsite health centers and occupational health benefits. Otherwise employers will be disadvantaged and/or discouraged from offering benefits that are otherwise meaningful and important to a given workforce or employee population.

The Notice provides that plans with "nonstandard" features will not be able to utilize the calculator or the safe harbor checklists, but rather will have to obtain an actuarial certification that such plans comply with minimum value requirements. As discussed above, the Council believes it is important to make the calculator and the safe harbor checklists broadly available to plans with both "standard" and "non-standard" features, as those tools will be more affordable and efficient to use. We also request affirmation that the actuarial certification option may be used at the discretion of the employer, even if the safe harbor checklist or calculator approaches could also be used to determine minimum value of the plan.

Where an employer obtains an actuarial certification to ensure it satisfies the minimum value requirements, we urge the Service to provide that an actuarial determination by itself provides assurance that a plan satisfies the minimum value requirements. In other words, whether an actuarial certification adequately ensures that minimum value requirements have been satisfied should not be determined on a facts-and-circumstances basis. An employer should be able to proceed with confidence that it has satisfied the minimum value requirements where it has obtained a certification from an actuary that it has done so.

Finally, the Council notes that even the actuarial certification mechanism would, to some extent, require use of the same dataset that underlies the calculator and the safe harbor checklists. We reiterate the concerns we expressed above, and we again urge the Service to revisit the components it intends to include in the dataset to ensure that the dataset is representative of all employer-sponsored self-insured plans and insured large group plans that will be required to use one of the three mechanisms described in the Notice in determining whether they satisfy the minimum value requirements.

Treatment of HSAs and HRAs in Calculating Minimum Value. The Notice states that the Service intends to follow HHS's rules for including employer contributions to a health savings account ("HSA") and amounts made available under a health reimbursement account ("HRA") in determining the value of an employer-sponsored high-deductible health plan ("HDHP") combined with an HSA or an employer-sponsored plan combined with an HRA when determining minimum value.

The Council requests that the Service make clear in guidance that, if an employer sponsors an HDHP, it will not be required to make employer contributions to an HSA

in order to satisfy the minimum value requirements. If an employer makes contributions to an HSA, we strongly recommend that a plan be permitted to take into account any contributions an employer makes to an HSA in a given year. Taking into account any lesser amount of employer contributions to an HSA or amounts made available under an HRA could discourage employers from offering such benefits, ultimately making health coverage more expensive for employees.

Minimum Value Determinations Should Be Based on Lowest Cost-Sharing Tier. The Council urges the Service to confirm that minimum value determinations will be based on the lowest cost-sharing tier available under an employer-sponsored group health plan. Many employer-sponsored plans offer employees the opportunity to elect among different cost-sharing levels within the plans. These cost-sharing tiers are designed to permit employees to tailor their health coverage as it best suits their unique situations. Any rule that would determine minimum value based on other than the lowest cost-sharing tier would discourage flexibility and innovation in employer-sponsored health plans.

De Minimis Variations. The Council urges HHS to allow employer-sponsored self-insured plans and insured large group health plans to satisfy the minimum value requirements where there is a *de minimis* variation between the minimum value required threshold (i.e., 60%) and the plan's minimum value determination. A similar *de minimis* rule is included in the minimum value determination recommended by HHS for small employer group health plans. Such a rule will allow employers to minimize changes in plan coverage and any related confusion for employees.

Employers Should Be Permitted to Offer Multiple Plans. An employer should be permitted to offer plans that do not necessarily satisfy the minimum value requirements (i.e., a lower cost plan), as long as it offers at least one plan that does satisfy the minimum value requirements. The ability to offer such plans is important because it enables employers to implement benefit designs that may be of interest to their employees despite the fact that they do not satisfy the minimum value requirements. For example, an employee may voluntarily elect to pay for a lower-premium plan with higher cost-sharing if it suits his or her individual circumstances. The Council requests clarifying guidance in this regard.

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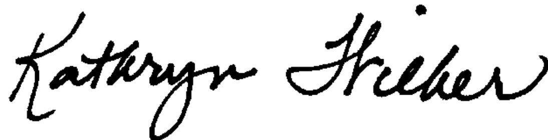
Thank you for the opportunity to comment on Notice 2012-31, Minimum Value of an Employer-Sponsored Health Plan. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



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