



AMERICAN BENEFITS

COUNCIL

TESTIMONY OF

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ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

BEFORE THE

**COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES**

HEARING ON

**THE INTERNAL REVENUE SERVICE'S IMPLEMENTATION
AND ADMINISTRATION OF THE
PATIENT PROTECTION AND AFFORDABLE CARE ACT**

SEPTEMBER 11, 2012

Chairman Boustany, Ranking Member Lewis, and Members of the Subcommittee, thank you for the opportunity to share our views with you today regarding the implementation and administration of the Patient Protection and Affordable Care Act (the "ACA") by the Internal Revenue Service (the "IRS"). My name is Seth T. Perretta, and I am here today representing the American Benefits Council (the "Council"). The Council is a public policy organization representing plan sponsors – 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 retirement and health plans that cover more than 100 million Americans.

In my role as outside health tax counsel to the Council, I have been assisting the organization and its members in understanding how to comply with the many provisions of the ACA that have or will soon become effective. Additionally, as a partner at Crowell & Moring LLP here in Washington, DC, I work regularly with both employer and health insurance company clients in helping them understand their obligations with respect to the ACA. Since March 2010, my practice has been focused in very large part on the ACA and I have spent thousands of hours assisting my clients in complying with the ACA and have worked closely with the federal agencies, including the IRS, as part of my work.

As this testimony describes in greater detail, it is the Council's view that the IRS has worked diligently to adopt a thoughtful and generally collaborative implementation process. In addition to the opportunities for the employer community to provide input via the formal regulatory process, through the submission of extensive comment letters and meetings with the agencies, Treasury and IRS officials have made themselves available to help the employer community understand its compliance responsibilities through a number of informal means. For example, since the enactment of the ACA, the Council has hosted fourteen compliance webinars to date reaching, collectively, thousands of corporate employee benefits professionals nationwide. Treasury and IRS officials have participated directly in four of them and have been an available technical resource for the rest. I would also note that I recently completed my tenure as Chairman of the Employee Benefits Committee of the Tax Section of the District of Columbia Bar Association. In that capacity, we hosted seven ACA compliance webinars for legal practitioners. Likewise, the agency officials either directly participated or provided valuable input to our education efforts. Notably, IRS and Treasury officials have not only been available to answer numerous questions, but have themselves used these webinars and other opportunities to learn more about employer and health plan compliance challenges as they have developed regulatory guidance.

IMPLEMENTATION CHALLENGES OF THE ACA

The ACA is a very significant piece of legislation for employer plan sponsors. The law includes dozens of provisions that affect employers, and employers, in turn, take their compliance obligations very seriously. These include new requirements on employer plans to provide specific substantive benefits such as first dollar coverage for preventive care services, expanded eligibility for coverage for children up to age 26, broader claims and appeals rights, new requirements to value and report the aggregate cost of certain employer-provided coverage on an employee's Form W-2, and new responsibilities for employers with an average of at least 50 employees to offer coverage to full-time employees and to meet new affordability and minimum value standards for the health coverage they offer. Additionally, the law imposes many new notice and disclosure requirements on employers, including a requirement that is effective just six months from now in March 2013 that requires employers to notify employees of the availability of health insurance through state insurance exchanges beginning in 2014. Additionally, unlike some statutes which contain a single effective date for their substantive provisions and which provide substantial lead time to allow the regulating agencies and the regulated public to prepare for those provisions, the ACA contains a range of effective dates, from as soon as six months after enactment of the ACA through 2018.

As a result, employers have had to work quickly and continuously since the ACA's enactment to comply with its provisions. In the same vein, the IRS has had to work diligently on a near-constant basis to provide timely guidance on a range of issues. The implementation challenges, for employers and the IRS alike, have been very substantial.

IRS IMPLEMENTATION AND ADMINISTRATION EFFORTS

From the beginning of this process and continuing to the present, the IRS has worked hard to establish a deliberative implementation process that allows for comment and participation by stakeholders, including the employer community. Naturally, employers and health plans have not always agreed with the guidance issued by the IRS. For example, employers were particularly disappointed that the regulatory agencies took an overly narrow interpretation of what constitutes a "grandfathered" plan that permits employers to avoid the need to comply with several ACA requirements. But, overall, the Council commends the agency's regulatory process and its efforts to provide flexibility to plan sponsors in implementing the law.

The IRS has not followed one specific method for promulgating ACA-related guidance. Instead, the IRS has adopted different approaches to providing guidance and conducting rulemaking over the past two-and-a-half years based, in part, on the effective dates prescribed by the law.

In the first six months following enactment of the ACA, the IRS, along with the U.S. Department of Labor (“DOL”) and U.S. Department of Health and Human Services (“HHS”), relied to a great extent on the use of interim final rules in providing guidance. This is in contrast to issuing proposed rules, which typically allow for more meaningful notice and comment by stakeholders. The IRS’s use of interim final rules, however, was due in large part to the fact that many of the ACA’s market reforms had an initial effective date of just six months following enactment. The Council and its members found this process frustrating at times as the resulting guidance was sometimes unclear or resulted in unnecessary administrative burdens. Nonetheless, the IRS was regularly available to the Council and its members to address employer concerns and worked diligently with the Council to address many pressing implementation issues facing employers. On several occasions, the IRS provided additional clarifying guidance following the issuance of an interim final rule in response to concerns expressed by the Council and its members.

As we have moved further from the initial effective date of the ACA, the IRS has generally adopted a more measured approach to rulemaking that relies more heavily on proposed rulemaking rather than interim final rules. Additionally, before proceeding with the issuance of proposed or final rules, the IRS often issues a notice as the initial step of its rulemaking process to first ask stakeholders for input on discrete issues or concerns related to a specific guidance project or to set forth in writing for public comment a concept or framework under consideration by the agency. The IRS then follows up this notice by issuing proposed regulations that again provide for notice and public comment. The IRS has also generally been willing to address concerns of broad applicability quickly through the issuance of various forms of sub-regulatory guidance, such as answers to Frequently Asked Questions (“FAQs”), Notices and the like.

The use of sub-regulatory guidance can in some respects be a mixed blessing. It facilitates the issuance of important guidance in a timely fashion, but may not allow for meaningful public comment. Significantly, unlike in the months that initially followed enactment of the ACA, where the use of sub-regulatory guidance by the agencies was fairly common, the IRS appears to be using sub-regulatory guidance at this time more to frame issues for future rulemaking or to clarify more formal guidance that has already been the subject of significant public comment.

SPECIFIC EXAMPLES OF IRS IMPLEMENTATION EFFORTS

1. *New Form W-2 Reporting Requirements for Employer-Sponsored Group Health Coverage:* Under the ACA, employers are required to report the cost of certain employer-provided health coverage on the Form W-2. This requires employers to make complex determinations of whether particular coverage is subject to reporting and how to value the coverage if it is. This new reporting requirement was scheduled to become effective for the 2011 tax year, meaning that many employers would have been required

to make substantial changes to their payroll and accounting processes with very little lead time. Fortunately, after receiving feedback from the Council and the employer community generally about the near-impossible task this would entail, the IRS, in Notice 2010-69 (issued on October 12, 2010), provided employers with a one-year reprieve by making the new requirement optional for 2011.

Subsequently, on March 29, 2011, the IRS issued Notice 2011-28, which provided interim guidance to employers on this new reporting requirement. The Notice provided that, unless and until the IRS issues further guidance, employers filing fewer than 250 Forms W-2 for the preceding calendar year are not subject to the reporting requirement. The Notice also invited additional comments, and, in response to the comments it received, the IRS, on January 3, 2012, issued Notice 2012-9, which amended and restated the interim guidance provided in the earlier Notice. In addition, the IRS stated in Notice 2012-9 that it would continue to consider additional comments as it works toward issuing additional guidance, including regulations. Employer plan sponsors are currently working to implement this requirement in time for issuing Forms W-2 for tax year 2012, which generally are issued to employees in January 2013.

As should be apparent by this point, employers as well as various other stakeholders voiced their concerns regarding the implementation of this new reporting requirement, and the IRS listened. The series of Notices on this topic not only incorporated many employer suggestions and responded to numerous employer concerns, but also provided employers with additional time to better understand how the new rule works and to update their administrative systems and practices to facilitate eventual compliance with the rule. Although certain questions remain to be answered, as a result of the IRS outreach to the employer community on this issue, employers are in a much better position to comply with this reporting requirement.

2. *The ACA's Pay-or-Play Provision:* Under the ACA, beginning in 2014, large employers are required to offer their employees the opportunity to enroll in group health plan coverage that provides "minimum essential coverage," that is both affordable and provides "minimum value." If a large employer does not offer "minimum essential coverage," or if such coverage is either unaffordable or does not provide minimum value, the employer will be subject to a significant excise tax. This has come to be known as the ACA's "Pay-or-Play" provision, with large employers choosing between the "Pay" option (i.e., do not provide such coverage and pay the excise tax) or the "Play" option (i.e., provide the requisite coverage and avoid the excise tax).

As noted, employers subject to the ACA's Pay-or-Play provision are only required to provide qualifying and affordable coverage to full-time employees. Hence, employers have been keenly interested and invested in a rational, coherent administrative scheme for determining which employees will be considered to be "full-time employees" for this purpose. The IRS responded by issuing a series of Notices that are intended to

provide employers with helpful rules for purposes of determining who is a full-time employee.

First, the IRS issued Notice 2011-36 on May 3, 2011. This Notice described and requested comments on a potential optional safe harbor (the “look-back/stability period safe harbor”) to determine whether existing (versus new) employees are full-time employees for purposes of Pay-or-Play. Under this safe harbor approach, an employer will be permitted to determine each employee’s full-time status by first choosing a “look-back” period of three to twelve months. The employer can then determine during this “look-back” period whether the employee averaged at least 30 hours of service per week or 130 hours per month. If the employee averages the necessary hours during this “look-back” period, the employee will be treated as a full-time employee during the subsequent “stability” period, regardless of the employee’s actual number of hours worked.

This guidance generally was well-received by employers because the safe harbor would help eliminate administrative burdens associated with complying with Pay-or-Play on a monthly basis with respect to a variable hour employee who could work full-time hours one month but perhaps not the next month. Additionally, employers appreciate the flexibility that would be provided in determining the length of any look-back and stability periods. Such flexibility will ensure that employers can adopt look-back and stability periods that best reflect the unique realities of their employee population and business.

On September 13, 2011, the IRS issued Notice 2011-73, which provided additional relief for employers with regard to the Pay-or-Play provision. Specifically, this Notice described a safe harbor under which employers could rely on the employee’s Form W-2 wages, instead of household income, to determine whether the coverage they offer is “affordable.” Under this safe harbor, no excise tax would apply if the required group health plan contribution by the employee was no more than 9.5% of the employee’s Form W-2 wages. This guidance was also generally well-received by our members. The statute provides that “affordability” is based on an individual’s modified adjusted gross *household* income. However, since employers generally do not have knowledge of an employee’s sources of income beyond the Form W-2 wages paid by the employer to the employee (in part because of privacy concerns), employers need a way to measure whether the coverage provided to an employee is affordable in order to determine whether they could be subject to an excise tax under the Pay-or-Play provision for failing to provide affordable coverage. The contemplated rule is helpful because it will allow employers to determine affordability based solely on an employee’s Form W-2 wages.

The IRS has since issued several additional notices that have been intended to both clarify prior guidance set forth in the earlier notices as well as make certain modifications based on comments received by the IRS to date. The consistent theme in

this series of Notices is the IRS' willingness to solicit feedback from employers and other stakeholders, and to continue to move toward a more flexible and predictable regulatory scheme for employers.

3. Fees for the Patient-Centered Outcomes Research Trust Fund: The ACA created several new sections of the Internal Revenue Code to impose a fee (the "PCORI Fee") on health insurance plans with respect to "specified health insurance policies" and on employers with respect to "applicable self-insured health plans" to partially fund new comparative clinical effectiveness research relating to patient-centered outcomes through the Patient-Centered Outcomes Research Trust Fund. The PCORI Fee is a per capita fee based on the average number of lives covered under a policy (for insured coverage) or plan (for self-funded plans).

The PCORI Fee, which applies for plan or policy years ending after September 30, 2012 but on or before September 30, 2019, raises the cost to employers of providing group health coverage and, as such, is an issue of great importance to employers. Hence, the Council believes the IRS took the correct step when it began the implementation process for the PCORI Fee by releasing, on June 8, 2011, Notice 2011-35, which requested comments on how the fees imposed by these new provisions of the Internal Revenue Code should be calculated and paid, including possible rules and safe harbors. The IRS followed this up, on April 17, 2012, by issuing proposed regulations pertaining to the PCORI Fee under which, among other things, employers may treat multiple self-insured arrangements as a single applicable "plan," so long as these arrangements are established and maintained by the same plan sponsor and have the same plan year. Because many employers already treat multiple arrangements as a single "plan" for business or accounting purposes, this approach would allow employers to continue with current business practices without fear of incurring additional liability under the PCORI Fee. In this case, again, the IRS addressed an employer concern in providing additional guidance.

ADDITIONAL GUIDANCE NEEDED

The ACA is, of course, a large and complex law, and much of the implementation and administration responsibilities are still on the horizon. Thus, just as the IRS has generally been very receptive to employer input so far, the agency must continue to understand that ensuring employer flexibility is essential to successful implementation of the law.

Among the areas the Council sees an urgent need for additional guidance are:

- ***Reporting and Disclosure Obligations:*** The ACA will impose additional reporting and disclosure obligations on employers, including disclosures to employees, as well as various agencies including the IRS. Of special concern to employers is a requirement, effective for March 2013, that employers provide a notice to employees regarding the availability of insurance coverage through the state exchanges. Employers urgently need guidance regarding their new reporting and disclosure obligations, including this March 2013 notice requirement.
- ***Minimum Value:*** As noted above, an employer must pay certain excise taxes under the Pay-or-Play provision if it fails to provide coverage that provides “minimum value.” Although the IRS has issued some recent guidance setting forth a conceptual framework for determining “minimum value” (and requesting comments with respect to such guidance), many questions remain regarding how “minimum value” will be determined. Many employers are unable to plan for the future – specifically plan years beginning in 2014 – without further clarifying guidance regarding minimum value.
- ***Wellness Programs:*** Employers continue to utilize wellness programs to improve the health of their employees and to control the rising cost of providing employer-sponsored health coverage. Under rules put in place in the mid-to-late 1990s, employers have been able to offer incentives of up to 20% of the total premium cost to encourage employees to participate in wellness programs. The ACA effectively codified this guidance by allowing for an increase to 30%. Employers are concerned that any guidance issued to implement the increase not impose new burdens on employers. Additionally, employers need clarification that such incentives will be taken into account in determining whether an individual’s employer-provided coverage is “affordable” for purposes of Pay-or-Play. If a wellness incentive is not considered for purposes of Pay-or-Play, this would most assuredly have the result of making wellness programs less attractive to employers and discouraging their use overall. The Council urges the IRS to issue guidance making clear that wellness programs will be taken into account for purposes of Pay-or-Play, and to ensure that employers continue to have the necessary flexibility to create wellness programs that improve the health of their employees while strengthening employers’ ability to continue to provide quality group health coverage to their employees.

CONCLUSION

The Council appreciates the ongoing efforts of the IRS to take into consideration as part of its rulemaking the issues and concerns of the employer community during the

lengthy and complex implementation process of the ACA. We also recognize that much more work remains to be done by the agency and all affected stakeholders, including employers. Therefore, we urge that the agency continue to reach out to the employer community and provide timely guidance on the many issues that remain on the implementation agenda.

Thank you for the opportunity to share the Council's perspectives on these important issues. We look forward to continuing to work with the IRS and Treasury on employer concerns with respect to implementation of the ACA, and would be happy to share our views regarding the progress of this implementation with the Subcommittee at any point in the future.