



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,
SHARED RESPONSIBILITY OF EMPLOYERS
REGARDING HEALTH COVERAGE
(REG – 138006 – 12)

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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 need for additional and clarifying guidance with respect to certain aspects of Internal Revenue Code ("Code") section 4980H, which imposes a shared responsibility requirement on certain employers regarding health coverage. I have been working closely with the Council and its members to aid them in understanding employer obligations under Code section 4980H. In addition, I regularly work with Crowell & Moring's employer clients to assist them in implementing Code section 4980H. In advising the Council, its members, and my clients, I have spent hundreds of hours analyzing the statutory and regulatory obligations that the ACA imposes on employers and engaging with agency representatives, including representatives of the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS"), regarding various ACA issues including Code section 4980H.

We appreciate the IRS's continued efforts to work with employers to develop reasonable and useful rules for purposes of implementing Code section 4980H. In addition to the opportunities the IRS has provided to the employer community to comment via the formal regulatory process, Treasury and IRS officials have made themselves available to assist employers in understanding their obligations under Code section 4980H through a number of informal means. The Council very much appreciates this ongoing spirit of collaboration.

Although helpful information regarding the implementation of Code section 4980H is set forth in guidance issued to date, including the Notice of Proposed Rulemaking ("NPRM"), many unanswered questions remain. The Council believes it is imperative that guidance be provided soon with respect to a number of issues, including those that I will be discussing today.

I. GOOD-FAITH TRANSITION RULE FOR 2014

Employers play a critical role in the provision of health care coverage to American workers, retirees and their families. The ACA generally recognizes the importance of employer-sponsored health coverage, and the regulators have taken into account the unique issues employers face in implementing many of the ACA's requirements. It is important for the IRS to continue to keep in mind the challenges facing employers in connection with the implementation of Code section 4980H.

Although the NPRM includes a helpful de minimis rule to be used in determining whether an assessable payment is due under Code section 4980H(a), no similar de minimis rule is proposed with respect to Code section 4980H(b). As you know, Code section 4980H(a) generally requires that an applicable large employer make available minimum essential coverage to each full-time employee and his or her children up to age 26. Code section 4980H(b), in contrast, requires that such an employer make available qualifying, minimum value coverage to full-time employees that could otherwise obtain a premium tax credit for coverage purchased from a public exchange.

Given the complexity of administering coverage to comply with Code section 4980H(b) and the inadvertent errors that will inevitably result as Code section 4980H(b) first becomes effective, we urge the IRS to include as part of final rulemaking a good-faith transition rule that would allow an employer to avoid an assessable payment for failure to comply with the requirements of Code section 4980H(b) for 2014 if the employer can show that the failure was inadvertent and that it has undertaken steps to ensure that such a failure will not happen again. Such a good-faith transition rule for 2014 is needed by employers as they work to comply with Code section 4980H.

II. CLARIFICATION ON MEASUREMENT AND STABILITY PERIOD SAFE HARBOR

The Council and its members appreciate the proposed measurement and stability period safe harbor set forth in the NPRM. The Council believes the safe harbor will be useful to many employers in complying with Code section 4980H. However, clarification is needed regarding various aspects of the measurement and stability period safe harbor in order for the safe harbor to be of benefit to a greater class of employers and employees alike.

- *First*, clarification is needed regarding whether, under the safe harbor, the measurement and stability period method must be used for all employees if it is used for any employee. Guidance issued to date is unclear regarding whether an employer may utilize the measurement and stability period safe harbor for certain employees but utilize the month-by-month determination method for other employees. Employers need to know whether they are permitted to selectively apply the measurement and stability period safe harbor. For example, questions have arisen regarding whether an employer must use the safe harbor for all hourly employees if it chooses to use it with respect to variable hour employees.
- *Second*, the NPRM does not specify whether certain provisions must be applied on a calendar-month basis or whether there is flexibility to apply these provisions on a non-calendar month basis. For example, the NPRM first describes an “initial measurement period” by reference to “calendar months,” which indicates that full calendar months must be used. The NPRM later

describes it as a period of “between three and 12 months” beginning “on any date between the employee’s start date and the first day of the first calendar month following the employee’s start date,” which indicates that the initial measurement period may start on a day other than the first of the month. In addition, the NPRM includes examples in which initial measurement periods begin mid-month. Clarification is needed regarding whether certain periods, including initial measurement periods, may be applied on a non-calendar month basis.

- *Third*, many large employers will face significant difficulties in administering dozens of different initial measurement periods and initial stability periods. This is because the safe harbor, as proposed, would require employers to track a separate initial measurement and stability period for each new hire. To assist employers in implementing the measurement and stability period safe harbor, the Council proposed in its written comments to the NPRM that employers be permitted to utilize an initial measurement period for all new employees hired on or between certain dates, which we referred to in our comments as the “Window.” The initial measurement period applicable to a new employee would start on the employee’s date of hire (or the first day of the next payroll period or the next calendar month) and would end on a specified date that is the same for all employees hired during the Window. Under this approach, all employees within the same category (such as hourly employees) would be subject to the same initial measurement period rules, but the length of an employee’s actual initial measurement period will vary based on his actual date of hire.

Additionally, the Council proposed 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 initial measurement period, so long as the initial measurement period utilized is at least 6 months in duration. This would simplify implementation of Code section 4980H for employers who have a large number of new hires or have high worker turnover rates. This method would also reduce employer costs, increase rates of compliance and reduce the rate of inadvertent errors.

- *Fourth*, rules are needed regarding how to treat an individual who is hired as a full-time employee but becomes a variable hour employee or otherwise accepts a schedule that is less than full-time before he completes a standard measurement period. We urge the IRS to allow employers to treat such an individual as a variable hour or seasonal employee beginning with the first of the month coincident with or next following the change in employment status. This will ensure equity in the treatment of all part-time employees, regardless of whether they were first hired as full-time employees or as part-time employees.

- *Fifth*, clarification is needed regarding when an employee who is treated as a continuing full-time employee after a break in service is to be offered coverage. The NPRM provides that such an employee is to be offered coverage upon resuming services (and being credited with an hour of service) or, if later, as soon as administratively practicable. Because most employers offer coverage that is priced and enrolled in on a calendar-month basis, we strongly urge the IRS to clarify that the employer of a continuing employee who returns to employment during a stability period may offer coverage to such employee on the date such employee resumes services (and is credited with an hour of service) or, if later, the first day of the first month following the employee’s resumption of services.
- *Sixth*, clarification is needed regarding how to apply the safe harbor and break in service rules across a controlled group. As noted in the NPRM, Code section 4980H applies on a member-company basis. In determining if an employee works a full-time schedule for purposes of Code section 4980H, clarification is needed regarding whether a member company should only take into account the hours worked by the employee as its common law employee or, alternatively, whether the member company must also take into account the hours worked by the employee as a common law employee of a brother or sister member company within the controlled group. Thus, for example, if an employee works 20 hours a week for member company “A” and 20 hours a week for member company “B” – where A and B are in the same controlled group – has the employee worked a full-time schedule for purposes of Code section 4980H? If so, which member company is liable for any assessable payment under Code section 4980H? Presumably, the answer is not both member companies. Similarly, clarification is needed regarding whether an individual that is a common law employee of one member company within a controlled group is subject to the break in service rules of the NPRM if he or she has a bona fide termination of employment with the one member company and is subsequently hired by a brother or sister member company, or whether the brother or sister member company can treat the individual as a new hire.

III. EXPANDED RULEMAKING ON 90-DAY WAITING PERIOD MAXIMUM

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. Many, if not most, large employer plan sponsors offer health coverage on a calendar month basis. While a 90-day administrative period is generally sufficient, requiring employers to enroll all participants within a 90-day administrative period may cause significant administrative burdens.

We reiterate our prior written comments in urging the agencies to 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. A contrary rule would result in many employers being permitted to administer a waiting period of as little as 59 days, which is clearly not what Congress intended.

IV. CLARIFICATION OF "SEASONAL EMPLOYEE" DEFINITION

The NPRM provides that applicable large employers are not required to make coverage available to "seasonal employees." The NPRM reserves on the definition of "seasonal employee." While we appreciate that the NPRM allows employers to use a "reasonable, good faith" interpretation of the term in 2014, for years after 2014, we urge the IRS to adopt the definition of "seasonal employee" set forth in Treasury Regulation section 1.105-11(c)(2)(iii)(C) in the context of nondiscrimination rules for self-insured plans and the nondiscrimination safe harbor. Adopting this well-established, objective standard already used by employers for other purposes would facilitate the determination of whether an employee is a seasonal employee for Code section 4980H purposes.

In addition, many employers hire employees with the expectation that those employees will be employed initially on average at least 30 hours per week. Transition relief in the NPRM provides that, in 2014, such an employee may be treated as a variable hour employee if, based on the facts and circumstances at the start date, the period of full-time employment is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over the initial measurement period. Starting January 1, 2015, except in the case of seasonal employees, an employer cannot take into account the likelihood that such an employee's employment will terminate before the end of the initial measurement period in determining whether an employee is a variable hour employee. We urge the IRS to make the transition relief permanent and to allow employers that hire employees on a short-term full-time basis to treat such employees as variable hour employees.

V. ADDITIONAL RULEMAKING ON "DEPENDENT" DEFINITION

The NPRM currently provides that applicable large employers must offer coverage to each full-time employee's child who is under age 26, and it defines "child" to include stepchildren and eligible foster children. As you know, the ACA's market reforms require employers to offer coverage to employees' children up to age 26 if the employer

makes available child coverage generally. The ACA's market reform provisions do not define "child," and, consequently, many employers have, in good faith, adopted a definition of "child" that does not include foster children or stepchildren. We urge the IRS to clarify the definition of "child" for purposes of Code section 4980H to be consistent with that used by many employers for compliance with the ACA's market reform provisions and thus to exclude foster children and stepchildren.

VI. CLARIFICATION REGARDING CONSIDERATION OF HIPAA-COMPLIANT WELLNESS REWARDS IN AFFORDABILITY DETERMINATIONS UNDER CODE SECTION 4980H(B)

One very important issue for the Council and its members pertains to how wellness incentives may be taken into account by employers in determining the affordability of an employee's coverage for purposes of complying with Code section 4980H – specifically, whether employers may take into account the full amount of any wellness incentive available to an employee to determine whether that employee's coverage is affordable for purposes of Code section 4980H.

Employers are utilizing wellness programs to an increasing extent in an effort to incent their employees to adopt healthy behaviors for themselves and their families. This has the important and valuable effect of potentially improving employee health and well-being, as well as decreasing worker turnover and increasing productivity. To encourage employers to continue to offer valuable and innovative wellness programs to employees and their families, we urge the IRS to allow employers to take into account the full amount of any wellness incentive available to an employee to determine whether that employee's coverage is affordable for purposes of Code section 4980H.

VII. CLARIFICATION REGARDING APPLICATION OF TRANSITION RULES TO NON-CALENDAR YEAR PLANS, UNION-SPONSORED PLANS AND MULTIEMPLOYER PLANS

As you know, employers who contribute to single-employer and multi-employer Taft-Hartley plans make contributions to such plans in accordance with their collective bargaining agreements. In such plans, decisions regarding benefits are made by a joint board of trustees, and eligibility may be determined based on service with more than one employer. The employer or employers often do not have a role greater than making contributions. Consequently, we recommend that the temporary transition relief for multiemployer plans be made permanent. Additionally, we ask that similar transition relief be provided to single-employer union-sponsored plans, which pose many of the very same issues for contributing employers, but which generally do not qualify as multiemployer plans for purposes of the transition relief set forth in the existing NPRM.

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 generally and Code section 4980H, in particular. We also recognize that much more work remains to be done by the IRS and all affected stakeholders, including employers. Therefore, we urge the IRS to continue to reach out to the employer community and provide timely guidance on issues regarding the implementation of Code section 4980H and its safe harbor.

Thank you for providing the opportunity for me to testify. I welcome any questions you may have.