



AMERICAN BENEFITS
COUNCIL

November 4, 2014

Submitted via U.S. mail

Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington, DC 20224

**Re: Comments on Draft 2014 Forms and Instructions
Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and
Coverage Information Returns), Form 1095-B (Health Coverage), and Form
1095-C (Employer-Provided Health Insurance Offer and Coverage)**

Dear Sir/Madam:

I write on behalf of the American Benefits Council (“Council”) in connection with the release of draft Forms and Instructions for reporting under Internal Revenue Code (the “Code”) Sections 6055 and 6056.

As added by the Patient Protection and Affordable Care Act (“ACA”), Code Section 6055 requires issuers of insured health coverage and plan sponsors of self-insured group health plans (*e.g.*, employers) to file an annual report with the IRS and issue annual statements to covered individuals indicating the calendar months in a given year in which individuals were enrolled in “minimum essential coverage” (“MEC”) offered/sponsored by the issuer or plan sponsor, as applicable. Form 1094-B is the transmittal form to be used for MEC reporting and Form 1095-B is the reporting form for MEC reporting. Drafts of these Forms were originally released on July 24, 2014. Draft Instructions for these Forms (along with revised Form 1095-B) were released on August 28, 2014. Revised Forms were issued on October 3, 2014 and October 15, 2014.

The ACA also added new Code Section 6056, which requires each “applicable large employer member” (“ALE member”) to file a return with the IRS after the close of each calendar year (and issue annual statements to full-time employees) about the coverage,

if any, offered to the employee, by month. Form 1094-C is the transmittal form to be used for Code Section 6056 reporting and Form 1095-C is the reporting form for Code Section 6056 reporting. Drafts of these Forms (and draft Instructions) were released on the same days as the Forms 1094-B and 1095-B.

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.

The Council welcomed the Treasury Department's decision to delay mandatory reporting for 2014 with respect to Code Sections 6055 and 6056. The one-year delay was an important step toward providing employers and service providers with sufficient time to prepare for compliance with these new reporting requirements.

We remain concerned, however, that additional relief may be needed for 2015 given the significant time and resources that will be required to modify existing benefit and payroll technology systems, implement necessary changes to recordkeeping practices and procedures, train personnel and coordinate with third party record keepers and tax preparers. Compliance concerns related to Code Sections 6055 and 6056 are further heightened given that 2015 will also be the effective date for the new employer shared responsibility requirements under Code section 4980H.

Finalization of the Forms and Instructions provides an opportunity for the IRS to further understanding and provide clearer direction as to how the reporting is to work. Our specific recommendations are discussed below.

COMMENTS ON DRAFT FORMS 1095-B AND 1095-C

If a full-time employee (and any spouse and dependents) enrolls in self-insured coverage offered by an ALE member that is reported on Part III of Form 1095-C, the requirement to complete Part II for that employee should be eliminated.

Under the combined reporting that applies to ALE members, if the employer offers employer-sponsored self-insured health coverage in which the full-time employee enrolls, the employer reports under both Code sections 6055 and 6056 on the Form 1095-C. Part II of the Form 1095-C asks for information about the offer of coverage made to the employee and any spouse and dependents and therefore would be used in most instances by the IRS to determine if the employer has met its obligation under Code section 4980H and to confirm whether the employee and any spouse or dependents are eligible for a premium tax credit. Part III of the Form 1095-C is generally designed to determine if the employee and other "covered individuals," including a spouse and

dependents, maintained MEC through the self-insured plan during the calendar year, and therefore should not be liable for individual shared responsibility payments.

As a practical matter, if a full-time employee and his/her spouse and dependents are reported on Part III of the Form 1095-C as having coverage in particular months, the information reported on Part II of the Form 1095-C for that employee for those months would not be relevant to the IRS or the covered employee, spouse, or dependents. This is because for any months in which the employee and his/her spouse and dependents actually received coverage under the employer-sponsored self-insured plan, neither the employee nor his/her spouse or dependents are eligible for a premium tax credit, (since enrollment in an employer-sponsored plan disqualifies an individual from receiving such a credit). In that case, the full-time employee would also not trigger a Code Section 4980H penalty for the ALE member, since the full-time employee would not be eligible for a premium tax credit.

Accordingly, the Council recommends that the Instructions for Form 1095-C be revised to provide that information on Part II of Form 1095-C is not required for a full-time employee for any month in which that employee and his/her spouse and/or dependents were enrolled in employer-sponsored self-insured health coverage, as reported in Part III of the Form 1095-C.

If an ALE member reports on Line 16 of Form 1095-C that a full-time employee with no spouse or dependents was enrolled in coverage offered, the requirement to complete Lines 14 and 15 should be eliminated.

Similar to the above point, if an ALE member enters code “2C” on Line 16 of Form 1095-C, the employer is indicating that the full-time employee was enrolled in employer-sponsored coverage for that month. This would render the information requested in Line 14 (regarding the offer of coverage) and Line 15 (the amount of the employee share of the lowest-cost monthly premium for self-only, minimum value MEC) for employees with no spouse or dependents irrelevant to the IRS for purposes of tax administration, because the employee’s enrollment in coverage would make the employee ineligible for a premium tax credit and therefore not trigger a Code Section 4980H penalty. Allowing the ALE member to bypass reporting on these two lines could also potentially reduce the reporting burden.

The logic behind the indicator codes for Line 16 of Form 1095-C, Part II should be more clearly explained in order to promote accurate reporting.

Line 16 of Form 1095-C, Part II provides for the reporting of an indicator code for use of a “[Code] Section 4980H Safe Harbor,” if applicable. One code is used if the employee enrolled in employer-sponsored coverage, and other codes can be used to

explain why an employee was not enrolled in employer-sponsored coverage (*e.g.*, the employee was not employed during the month or the employee was not a full-time employee in the month).

In addition, there are codes that can be used to indicate the Code Section 4980H affordability “safe harbor” being used by the ALE member to demonstrate that the coverage it offered meets one of the affordability standards as set forth in the Code Section 4980H final regulations. (The Instructions for Form 1095-C suggest that the information reported on Line 16 will be used to determine potential Code Section 4980H(b) liability for a particular full-time employee, in part because the coverage offered was not affordable or did not provide minimum value).

There is uncertainty regarding how to report on Line 16 because multiple indicator codes could apply in some instances. The draft Instructions to Form 1095-C provide ordering rules when multiple codes apply in certain instances, but do not address all instances where multiple codes could apply. For example, a new variable hour employee in an initial measurement period might be offered affordable, minimum value coverage that is effective at his/her hire date (even if there is no obligation to do so under the look-back measurement method), but the employee might decline that coverage. The draft Instructions suggest that code “2D” should be entered because the employee was in an initial measurement period (*i.e.*, in a limited non-assessment period); however, since affordable, minimum value coverage was actually offered to this employee, one of the affordability safe harbor codes (2F, 2G, or 2H) could apply as well.

The Instructions should further clarify the hierarchy of how the codes should be entered if multiple codes apply. In that vein, the draft Instructions are clear that code “2C” should be entered if the employee enrolls in coverage, regardless of whether any other code potentially applies; similar detail would be helpful with regard to the other codes. If, on the other hand, there is no hierarchy, and the entry of any code on Line 16 will establish that no Code section 4980H(b) liability exists, that would be helpful to know as well. This is because ALE members making an affordable, minimum value offer to all full-time employees could then just use two codes- 2C for full-time employees that enrolled in the coverage and either 2F, 2G, or 2H for all other full-time employees to establish that the offer is affordable.

A specific “98% Offer Method” indicator code should be created for Form 1095-C, Line 14 that could be used by ALE members who are using that simplified reporting method.

The 98% Offer Method can be used by ALE members if they certify that they offered, for all months of the calendar year, affordable health coverage providing minimum value to at least 98% of its employees and their dependents. To facilitate the simplified

reporting, any ALE member that is utilizing the 98% Offer Method should be able to enter a “98% Offer Method” indicator code in the “All 12 Months” box for each employee to which it offered affordable health coverage providing minimum value. This would eliminate the need to determine the different indicator codes for different employees.

COMMENTS ON FORM 1094-C

The requirement to report the Total Employee Count for each ALE member on Part III, Column (c) of Form 1094-C should be eliminated.

The preamble to the Code Section 6056 final regulations advised, without explanation, that ALE members would have to report their total number of employees, by calendar month—but suggested that the information would be reported through indicator codes on the section 6056 return. As drafted, the 1094-C transmittal form now requires employers to report the total number of employees for each calendar month.

The purpose of Code Section 6056 reporting is to facilitate enforcement of Code Section 4980H and to assist the IRS and employees determine if particular individuals are eligible for premium tax credits. The total number of an ALE member’s employees bears no relevance to either determination. Nor does Code Section 6056 require such information to be reported. We therefore request that the IRS eliminate the requirement that ALE members report this information since it is not required by taxpayers for preparing their tax returns or by the IRS for tax administration nor required by statute.

COMMENTS ON INSTRUCTIONS FOR FORMS 1095-B AND 1095-C

The Instructions should provide additional guidance regarding the reporting requirements for non-employees, and also provide discretion for employers that sponsor self-insured health coverage to report for certain non-employees enrolled in such coverage on either the Form 1095-B or Form 1095-C.

It is currently unclear how ALE members should report under Code Section 6055 for certain *non*-employees enrolled in self-insured employer plans. For example, a divorced or surviving spouse may be covered by a self-insured employer plan through COBRA, a child may be receiving COBRA as either a surviving child or a former dependent who exceeds the plan’s age limit, or a former employee may be receiving COBRA coverage or retiree coverage in a year during which they were not an employee for any month.

The draft Instructions for the Form 1095-C state that if a retiree was a full-time “*employee*” (emphasis added) of the ALE member for any month during the calendar year, the ALE member must complete information regarding the retiree for every

month during the year (even for months in that year after the date of retirement) on the Form 1095-C. However, the draft Instructions do not address retirees in years after the year of retirement or certain COBRA qualified beneficiaries who were not employees at any time during the year or are covered separately from the employee (e.g., surviving spouse).

Similarly, we request clarification as to whether surviving spouses or children, “aged-out” children, and other similar qualified COBRA beneficiaries should be considered “non-employees” or if they should be treated as “covered individuals.” This is especially unclear for a year during which they are never covered in relation to the employee’s coverage (e.g., in a year after the year in which the divorce occurred).

In connection with this, the Council asks that the Instructions be revised to clarify that such “non-employees” who are provided self-insured coverage by a ALE member could be reported on either the Form 1095-B or the Form 1095-C. Page 8 of the draft Instructions to the Form 1095-C states that “employers that offer employer-sponsored self-insured health coverage to non-employees (for example, non-employee directors) who enroll in the coverage will complete Forms 1094-B and 1095-B, rather than Part III [of the Form 1095-C] for those individuals.” However, requiring ALE members to report non-employees on the Forms 1094-B and 1095-B would potentially create a significant burden for ALE members, as they would have to establish systems for two completely different tax forms just to report what is likely to be a relatively small population of individuals. We recommend that the Instructions be clarified to confirm that such non-employees who are enrolled in the ALE member’s self-insured health plan in a year during which they were never an employee for a month may be reported on either Form 1095-B or Form 1095-C.

The Instructions should provide a clearer explanation of how to provide Code Section 6056 reporting for a full-time employee that works for multiple ALE members that are part of the same Aggregated ALE Group in a month or a year.

Page 2 of the draft Instructions for the Form 1095-C confirms that a single Form 1095-C must be filed by each ALE member for each full-time employee. For example, if an ALE member has two business units and a full-time employee worked at both business units during the calendar year, the ALE member must combine the information on a single Form 1095-C for that employee for all twelve months of the year. If a full-time employee works for separate ALE members that are part of the same Aggregated ALE Group, he/she must receive a separate Form 1095-C from each ALE member.

Reporting for full-time employees who work for multiple ALE members in the same aggregated ALE group raises a number of questions. We note the following statement in the Code Section 4980H final regulations: “With respect to a full-time employee who

performs services for two or more [ALE] members during the same calendar month, the final regulations provide that the member for whom the employee has the greatest number of hours of service for that calendar month is the member that treats that employee as a full-time employee for purposes of assessable payment determinations under section 4980H(a) and (b).” This statement suggests that, to be consistent with the Code Section 4980H final regulations, when a full-time employee works for multiple ALE members in the same month, the ALE member for whom the employee has the greatest number of hours of service for that month should report the employee for that month on its Form 1095-C. If this is the case, it is unclear if the other ALE members also must, or even should, report the employee as a full-time employee or as a non-full-time employee for that month.

In addition, if the full-time employee worked for multiple ALE members in the same year, but the full-time employee worked the greatest number of hours in each month for one particular ALE member, it is unclear whether only that ALE member is required to report on Form 1095-C with respect to the full-time employee or whether all ALE members that employed the employee are required to report on Form 1095-C with respect to the full-time employee.

Lastly, the draft Instructions do not address the situation where an employee works the greatest number of hours for one ALE member in a month, but receives an offer of coverage from another ALE member in the same aggregated ALE group. Under the Code Section 4980H final regulations, an offer of coverage by one ALE member for a calendar month is treated as an offer of coverage by all other ALE members for the calendar month. It is unclear, however, whether this rule applies for Code Section 6056 reporting purposes. We request that the Instructions be clarified to address the scenarios described above.

The Instructions should clearly explain how third party reporting will occur.

The Code Section 6056 final regulations provide that “ALE members are permitted to contract with and use third parties to facilitate filing returns and furnishing employee statements to comply with section 6056, although ALE members remain responsible for reporting under section 6056...”.

As an example, the final regulations state that an ALE member that is part of an Aggregated ALE Group can facilitate the filing of returns and furnishing of employee statements on behalf of other members of the Aggregated ALE Group. The regulations also state that “[f]urther details will be provided in forms and instructions to accommodate third parties in facilitating section 6056 reporting for ALE members (including for third party service providers and multiemployer plan administrators).” Neither the draft Form 1095-C nor the draft Instructions for Form 1095-C appear to provide such further details. We anticipate that many employers will use third parties

to facilitate reporting, and request that the final Form 1095-C and/or Instructions provide additional guidance regarding this approach.

The Instructions should clearly explain how an insurer should report employer-sponsored coverage in situations where a third party sponsors an arrangement that provides health insurance to multiple employers.

Part II of the Form 1095-B requires that an insurer report information about insured employer-sponsored coverage, including the name, address, and EIN for each employer sponsoring the coverage. In certain circumstances, however, a third party may sponsor an arrangement that provides health insurance for multiple employers either as part of a collectively-bargained Taft-Hartley multiemployer plan or otherwise. For example, an insured multiemployer health plan is typically sponsored by a joint board of trustees and provides insurance to multiple employers that collectively bargain to participate in the plan.

The Code Section 6055 final regulations define “plan sponsor” for self-insured coverage, but not for insured employer-provided coverage. The preamble to the Code Section 6055 final regulations states that the final regulations “do not require sponsors of multiemployer plans to report the EINs of the participating employers. The regulations require only health insurance issuers to report the EIN of the employer sponsoring an insured group health plan.” However, it is not entirely clear who the insurer reports as the “employer sponsoring” an insured multiemployer plan. Additional clarifying guidance in this regard would be appreciated.

The Instructions should confirm that ALE members providing self-insured employer-sponsored coverage and using the alternative statement furnishing method under the Qualifying Offer Method or Qualifying Offer Method Transition Relief for 2015 will also satisfy the Code Section 6055 requirement to furnish a statement to individuals.

ALE members that use the Qualifying Offer Method are not required to provide full-time employees who received a Qualifying Offer with the Form 1095-C (they can instead provide an alternative statement with limited information that includes a statement that the employee and any dependents are not eligible for a premium tax credit because they received a Qualifying Offer). Similarly, ALE members that use the Qualifying Offer Method Transition Relief for 2015 may, in lieu of providing a Form 1095-C to its full-time employees, satisfy its reporting requirement under Code section 6056 by furnishing a similar alternative statement to each of its full-time employees.

Although ALE members might assume that the alternative statement will suffice for meeting the Code Section 6055 furnishing obligation, the Instructions are silent on this

point. We request that the Instructions to Form 1095-C clarify that the alternative statement will also suffice for meeting the ALE member's Code section 6055 furnishing obligation.

The Instructions should clarify how the calculation of 95% of full-time employees is made for purposes of the Qualifying Offer Method Transition Relief for 2015.

One of the requirements for utilizing the Qualifying Offer Method Transition Relief for 2015 is the ALE member must certify that it has made a "qualifying offer" to at least 95% of its full-time employees and to their dependents in a month. Neither the Code Section 6056 final regulations nor the draft Instructions for Form 1095-C explain whether the calculation of full-time employees must take into account employees in a limited non-assessment period. Additional guidance on this issue would be helpful.

The Instructions for the Form 1095-C should clarify with regard to the 98% Offer Method whether health coverage that provides minimum value to employees, but not necessarily their dependents, satisfies the eligibility requirement.

The regulations under Code section 6056 state that an ALE member "that otherwise meets its reporting obligation under section 6056 is not required to identify on its section 6056 return whether a particular employee is a full-time employee for one or more calendar months of the reporting year or report the total number of its full-time employees for the reporting year, if it certifies that it offered minimum essential coverage providing minimum value that was affordable under section 4980H to at least 98 percent of the employees (and their dependents) with respect to whom it reports for purposes of section 6056..." Some employers may offer affordable, minimum value minimum essential coverage to their employees, but the minimum essential coverage offered to dependents may not meet the minimum value standard. Under these circumstances, it is not clear from the language of the regulations (or the Instructions to the Form 1095-C) whether such an employer would be eligible to use the 98% Offer Method. We request that the Instructions be revised to address this particular issue.

The Instructions should permit employers to furnish the Forms 1095-B and 1095-C to employees by hand delivery or intra-office mail.

Pursuant to the Code Section 6055 and 6056 final regulations, as well as the draft Instructions to Forms 1095-B and 1095-C, employers that file the Form 1095-B or Form 1095-C must furnish a copy of any Form filed to the person identified as the "responsible individual" or "employee" on the Form. However, the Instructions to both Forms provide that the copy "must be furnished on paper by mail, unless the recipient affirmatively consents to receive the statement in an electronic format." Many

employers may prefer to provide the forms by hand delivery or intra-office mail to their employees (as is permitted and often used for the Form W-2). It would benefit employers as well as employees if the Instructions to both Forms were revised to clarify that hand delivery of the forms is acceptable. Accordingly, the Council requests confirmation that the Forms may be furnished by hand delivery or intra-office mail.

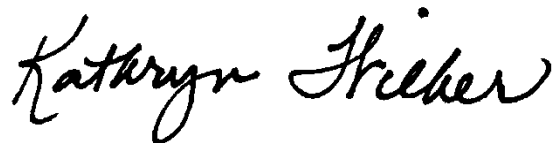
The definition of “Employee” in the Instructions for the Forms 1094-C and 1095-C should be revised to conform with the final regulations under Code section 4980H.

The draft Instructions provide a definition of “Employee,” but do not mention that leased employees are excluded for the purpose of reporting, in accordance with the final regulation under Code section 4980H. The Instructions could be revised to clarify that the definition of employee for purposes of reporting is the same as the definition used in the 4980H final regulations, and also excludes Code section 414(n)(2) leased employees.

* * *

Thank you for your consideration of the above comments. If you have any questions or would like to discuss these comments further, please contact me at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Kathryn Wilber
Senior Counsel, Health Policy