Employers for Flexibility in Health Care Coalition

November 6, 2013

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

Attn: CC:PA:LPD:PR (REG-136630-12)
Room 5205, Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Attn: CC:PA:LPD:PR (REG-132455-11)
Room 5203, Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Request for Comments re:

I) Information reporting by applicable large employers on health insurance coverage offered under employer-sponsored plans (REG-136630-12)
II) Information reporting of minimum essential coverage (REG-132455-11)

We are writing in response to the above proposed rules on behalf of the Employers for Flexibility in Health Care ("E-FLEX"), a coalition of leading trade associations and businesses in the retail, restaurant, hospitality, supermarket, construction, temporary staffing and other service-related industries, as well as employer-sponsored health plans insuring millions of American workers. Members of the E-FLEX Coalition are strong supporters of employer-sponsored coverage and have been working with the Administration as you implement the Affordable Care Act ("ACA") to help ensure that employer-sponsored coverage – the backbone of the US health care system – remains a competitive option for all full-time, part-time, temporary and seasonal employees.

The E-FLEX Coalition has engaged in a constructive dialogue with the Department of Treasury since 2011 about the employer requirements under the ACA, including the information reporting requirements. As evidenced by our previous comment letters and meetings with the Administration, the Coalition has sought to work with the Administration to develop regulations that provide workable options for employers to administer and offer health coverage to their employees. We hope to continue our productive working relationship with the Administration as you finalize regulations on the law's information reporting requirements under Code sections 6056 and 6055.

The Coalition has taken a holistic view of the law's requirements and how they interact with one another, particularly with regard to the flow and timing of required notices and reporting, and the interaction between employers, health insurance Exchanges, and the federal agencies in conjunction with the coverage requirements and imposition of penalties under the law. The E-FLEX Coalition strongly supports development of a streamlined reporting process that:

1) Helps individuals by minimizing the prospects of employees being subjected to repayment of advanced premium assistance tax credits for which eligibility was inaccurately determined; and

2) Reduces unnecessary administrative burden while facilitating the simplified administration of the employer responsibility provisions under section 4980H, premium assistance tax credits under section 36B, and the individual shared responsibility requirements under section 5000A.

I. Balancing the Benefit and the Burden of Reporting

As the Administration finalizes information reporting regulations, the E-FLEX Coalition continues to strongly endorse giving employers the option of prospectively filing information with the IRS about coverage available to employees through an annual certification process. We recognize that determinations of eligibility for premium tax credits are under the purview of the Department of Health and Human Services, but we believe that it is in the collective best interests of individual Americans, employers and the Administration to ensure the accuracy of such up-front determinations to avoid subjecting individuals to unexpected repayments of any tax credits for which Exchanges incorrectly deemed them to be eligible. To accomplish this, the IRS could modify its data sharing agreement with CMS to facilitate access to such information via the federal data hub.

The E-FLEX Coalition also urges the Administration to take a measured approach to information reporting that strikes a balance between the data that will be needed to administer the employer and individual shared responsibility provisions and premium assistance tax credits and the administrative burden of new employer reporting requirements. The E-FLEX Coalition remains concerned that the proposed rules on reporting would require employers to report to the IRS information that will prove not only superfluous to administering these provisions of the law, but also ineffective in identifying those individuals who are eligible for a premium tax credit.

In the Congressional Budget Office's (CBO) May 2013 "Estimate of the Affordable Care Act's Effect on Insurance Coverage," the CBO estimated that more than 155 million Americans will continue to receive their coverage through employer-sponsored health plans through 2023 (the last year included in the CBO's projection). The CBO also projected that no more than 500,000 individuals in 2014, 2015 and 2016 will enroll in Exchanges as a result of an unaffordable offer of employer-sponsored coverage, growing to 1 million individuals from 2017 to 2023.

In light of the CBO's estimates, the E-FLEX Coalition urges the Administration to work with the employer community to develop reasonable options for administering the shared responsibility provisions and premium tax credits for *500,000 to 1 million* individuals without requiring employers to report to the IRS detailed information for the more than *155 million* Americans that the CBO projects will be covered by employer-sponsored plans

each year through 2023. The E-FLEX Coalition believes a less expansive approach to information reporting can achieve the same ends with fewer burdens to the IRS and employers who voluntarily provide health coverage without giving rise to any adverse effects for individuals.

II. Simplifying Reporting Through Certification

The E-FLEX Coalition strongly supports the Administration's proposal permitting simplified reporting for employers who can certify that they offer minimum value coverage to all or substantially all full-time employees and their dependents. Utilizing a certification method is a reasonable approach that could be used as the basis for a simplified reporting process that could benefit employers of all sizes and structures.

We ask the Administration to consider including a certification process paired with more targeted information reporting under section 6056 to administer the employer shared responsibility provisions under section 4980H and the premium tax credits under section 36B. Under this option, employers could file a transmittal form with the IRS to certify that they offer coverage that meets the standards under the ACA. Employers could provide information regarding coverage offered (e.g., minimum essential coverage, minimum value, premium contributions) that could be used to administer any excise tax on employers under section 4980H. Such a certification process could be paired with a more targeted approach that would eliminate the need to distribute information returns under section 6056 to all full-time employees and instead provide information returns only to those employees who have been deemed eligible for an advanced premium tax credit. The process would be built upon the notices that Exchanges are required to send to employers when employees are determined eligible for an advanced premium tax credit for Exchange coverage. Employers could use such notices from Exchanges to:

1. Identify employees to whom employers should provide individual information returns to help employees comply with section 36B; and
2. Identify employees for whom more detailed information should be reported to the IRS to help administer any potential excise tax under section 4980H.

For employees who enroll in employer-sponsored coverage, information returns provided under section 6055 can be used to demonstrate compliance with section 5000A. In addition, employees would continue to receive health plan information from employers describing coverage options.

> Example of E-FLEX Coalition Proposal for Simplified Certification Method: Employer A has 1,000 full-time employees, and certifies that each full-time employee has access to an employer-sponsored plan that meets the law's minimum value standard and satisfies an affordability safe harbor under section 4980H. By the March 31 deadline for reporting to the IRS, Employer A electronically files a certification with the IRS indicating that such coverage is available to each full-time employee and the employee's dependents. Employer A uses the model notice of Exchange coverage options under the Fair Labor Standards Act and other enrollment material to

communicate to employees that such coverage is available to full-time employees and their dependents. Employer A receives a notice from an Exchange that Employees Y and Z have been deemed eligible for a premium tax credit based on household income. As part of its end-of-year tax filings, Employer A provides an individual information return under section 6056 to Employees Y and Z and submits to the IRS a transmittal form with information on Employees Y and Z. This information can be used to facilitate administration of the premium tax credits under section 36B and the employer shared responsibility requirement under section 4980H. Information on Employer A's remaining 998 full-time employees is not included in the transmittal form submitted to the IRS, and individual information returns are not furnished to those full-time employees. However, individual information returns under section 6055 would be furnished to the employees who enrolled in coverage, facilitating administration of the individual shared responsibility provisions under section 5000A.

III. Using Prospective Reporting To Improve Accuracy of Eligibility Determinations

The E-FLEX Coalition also urges the Administration to give employers the option of prospectively reporting to the IRS information about coverage they offer to employees. Under a prospective reporting system, employers could provide to the IRS information about coverage offered to employees electronically at the employer's open enrollment period or by the January 31 statutory deadline at the employer's election. In light of the absence of a single data source on the availability of employer-sponsored coverage, Treasury could modify its data sharing agreement with CMS (RIN 1545-BK87) and make this information available to Exchanges via the data hub to improve the accuracy of initial eligibility determinations for advanced premium assistance tax credits and reduce the risk of employees having to repay tax credits that are granted improperly. Exchanges could use a data matching process to verify whether individuals have access to employer-sponsored coverage that meets the law's minimum value standard and an affordability safe harbor.

Information that employers could report prospectively to the IRS and provide to employees as part of an employer's annual open-enrollment process includes:

- Name of the employer, date and employer ID number
- Certification as to whether the employer offers full-time employees, their dependents and their spouses the opportunity to enroll in minimum essential coverage offered under an eligible employer-sponsored plan
- Months during the year for which coverage is available
- Whether the employer offers employees a plan for which the employee share of self-only coverage meets the ACA's affordability standard based on one of the safe harbors granted under regulations implementing section 4980H
- Whether the employer offers a plan that meets the minimum value standard, i.e. the plan's share of the total allowed benefit costs covered by the plan is no less than 60% of such costs

Although the E-FLEX Coalition believes that more expansive reporting under section 6056 is unnecessary, the potential benefits of having information about coverage available to employees on file with the IRS could make it a worthwhile option to offer employers even if the Administration pursues the default reporting method as outlined in the proposed rules. The lack of a uniform prospective reporting system requires employers to interact separately with each Exchange every time an employee seeks Exchange coverage. Some employers would voluntarily report information to the IRS about the coverage they offer employees to help minimize the potential for an employee to be improperly determined eligible for a premium tax credit and subjected to repayment of the tax credit. Such a repayment could be a significant burden for individuals that could be mitigated by creating a system that utilizes prospective plan information.

This method would provide a simplified approach that increases the accuracy of determinations of eligibility for premium assistance tax credits, improves financial predictability for individuals, and reduces employer reporting.

IV. Evaluating Opportunities To Simplify Reporting Under Proposed Alternative Methods

The proposed rule requested comments on whether alternative reporting methods would be useful to employers. The E-FLEX Coalition strongly supports the development and inclusion of reporting methods that streamline and simplify reporting under sections 6051, 6055 and 6056. As described above, the E-FLEX Coalition is particularly supportive of alternative methods that simplify reporting by permitting employers to certify their compliance with core employer requirements and methods that improve the accuracy of the determination of individuals' eligibility for advanced premium tax credits.

The E-FLEX Coalition encourages the Administration to adopt a modified version of method "b" in the preamble to the proposed rules that would permit employers that offer minimum value affordable coverage to all or substantially all of their full-time employees to avoid reporting on each employee's full- or part-time status on a monthly basis.

The Coalition remains concerned that some alternative reporting methods under consideration may not be viable for employers with large numbers of variable hour employees and transitional workforces. For example, one proposed alternative method would permit employers to use the Form W-2 to meet section 6056 reporting obligations for employees that are eligible and enrolled in employer sponsored coverage for an entire 12 month calendar reporting period. Options for information reporting that depend on a static workforce or a calendar year plan will do little to help many members of the E-FLEX Coalition given the nature of our workforces.

The E-FLEX Coalition encourages the Administration to consider expanding the Form W-2 method to accommodate non-calendar year plans and partial year enrollments. Even with partial year information, an individual should receive sufficient information through the

section 6055 reporting combined with their Form W-2s to accurately complete their Form 1040. Making the Form W-2 method broadly available may also reduce the cost for employers if payroll vendors adapt their systems to accommodate the change.

An additional proposed alternative reporting method that allows employers to avoid section 6056 reporting by requiring employees to enroll in no-cost or low-cost coverage also raises some concerns. Encouraging employers to avoid reporting by requiring employees to be mandatorily enrolled in coverage rather than giving them the option of enrolling in coverage of their choice creates incentives that could be harmful to employees. Mandatory enrollment could disqualify an individual from making otherwise qualified HSA contributions, result in unnecessary duplicative coverage, or trap employees in undesired coverage, among other concerns.

V. Streamlining Delivery of Notices

As the Administration considers additional ways to reduce the reporting burden, the E-FLEX Coalition encourages the Administration to ease the requirements for electronic delivery of employee notifications. For example, utilizing existing Department of Labor rules for the delivery of benefit materials would protect employees, while allowing employers to use established methods of delivering benefits materials. The Coalition also supports giving employers the option to include the employee reports in the same mailing as the Form W-2.

The privacy of employee information is very important to the members of the E-FLEX Coalition. Employers in the E-FLEX Coalition do not uniformly collect Social Security numbers of dependents. The Coalition urges the Administration to reconsider requiring employers to collect and provide dependent Social Security numbers. Collecting dependent Social Security numbers should be unnecessary as spouses that receive tax credits are required to file joint returns and individuals are required to include tax dependent Social Security numbers on their personal Form 1040. The IRS should be able to verify dependents using alternative data such as name and date of birth. If the Administration continues to require the collection of dependent Social Security numbers, the Coalition also recommends eliminating or reducing the requirement that employers make and document at least two requests for the personal information if an employee does not provide it after the initial request.

The proposed rule also raised concerns that combining the section 6055 and 6056 notices to employees may be confusing for employees who might expect multiple notices. To the contrary, the E-FLEX Coalition thinks that providing multiple notices with similar information is more confusing for employees, and the Coalition supports combining both the section 6055 and 6056 notices to the IRS and the employees to the greatest extent possible.

VI. Making the Proposed General Reporting Method More Workable

The default reporting method outlined by the Administration in the proposed rules would result in an unprecedented collection of data from employers and a particularly onerous compliance process. The E-FLEX Coalition does not see the collection of data on every employee and their dependents covered in an employer-sponsored plan as intrinsically improving the administration of the ACA's premium tax credits and employer tax penalties.

An area of particular concern for employers is the burden of tabulating data on a monthly basis. Employers' payroll and HR systems generally do not break out employee information on a monthly basis, but instead focus on effective dates or specific dates in time. For example, employers in our Coalition have indicated that requests such as the total number of employees by calendar month are more difficult to collect than for example the number of employees on the 1st of the month because many of their payroll systems are built on a two week payroll timeframe that does not match with calendar months. Consequently, for some employers it is also more difficult to list the months of coverage rather than the start date and end date of coverage.

Several E-FLEX Coalition members commented that it is more difficult to report an employee's level of coverage on a monthly basis and the cost of that coverage than to provide a report that uses coverage effective dates. Some employers do not "own" this data and are required to rely on third-party vendors or in some cases multiemployer plans to report accurate information. Other employers noted that substantial time will be dedicated to matching up pay periods to the monthly reporting time frame in order to report who was full-time on a monthly basis. Overall, Coalition members prefer certifying to the IRS that they offer coverage to their full-time employees, rather than tabulating their employees' full-time status and coverage options on a monthly basis.

The Coalition notes that the proposed indicator codes may be insufficient to describe the reasons why an individual may not be enrolled in employer-sponsored coverage. Examples of additional indicator codes that would be needed under the general reporting method include:

- Coverage canceled due to nonpayment of premiums
- Employee declines offer of employer-sponsored coverage meeting the minimum value standard
- Employee missed enrollment window for employer coverage
- Employee is currently in a safe harbor measurement period under proposed rules to implement section 4980H.

The Coalition also requests that the final rules confirm that, within a controlled group, an applicable large employer member with no employees is not required to file under section

6056 and that an applicable large employer may provide a consolidated report for its members.

VII. Weighing the Cost of Compliance to Employers

In addition to our reservations about the volume of data that the Administration is considering requiring employers to report, the E-FLEX Coalition harbors significant concerns about the cost of such an expansive undertaking. Because employers do not track all of the data elements under consideration for reporting under section 6056 in a single system, substantial systems build outs will be needed in many cases. This project could be further complicated for larger companies that use different payroll, human resources and other systems across different divisions and locations. In addition, tabulating information on a monthly basis will require further modifications to employers' systems, which generally organize information by pay period or by year.

Beyond the systems build, employers will face ongoing costs as a result of the information reporting requirements. For example, some employers expect to have to add administrative personnel to track the necessary information and process notices from Exchanges about employees being deemed eligible for premium tax credits. Employers also will face ongoing costs for data storage as employers will be required to maintain data about employees' eligibility and enrollment – tabulated on a monthly basis – to support appeals of potential tax penalties.

Employers' costs will vary widely depending on their size, availability of data required to be reported, current configuration of reporting systems, and whether a simplified reporting method will be a viable option for them. Reflecting such variables, some smaller members of the E-FLEX Coalition with less complicated systems estimate that compliance with the information reporting requirements will cost approximately $50,000 annually while some larger coalition members project that information reporting could cost up to $1 million annually. Such costs are significant for employers and could affect their contributions to employee total compensation.

VIII. Conclusion

In closing, the E-FLEX Coalition urges the Administration to offer options for streamlined reporting processes that are viable for employers with differing workforces. In particular, the Coalition supports a certification method that could help minimize the number of employees subject to repayment of advanced premium assistance tax credits for which eligibility was inaccurately determined, as well as reduce unnecessary administrative burden while facilitating the simplified administration of the employer responsibility provisions under section 4980H, premium assistance tax credits under section 36B, and the individual shared responsibility requirements under section 5000A.

We would like to thank you again for the opportunity to share our comments with the Administration on provisions of the ACA that affect employers, and we appreciate that the Administration has been receptive to the comments from the employer community in developing regulatory guidance. The E-FLEX Coalition looks forward to working with the Administration and with Congress to address issues that preserve employer-sponsored coverage and smooth the implementation process for employers and their employees.

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416, on behalf of the Employers for Flexibility in Health Care Coalition.