

Employers for Flexibility in Health Care

August 5, 2013

The Honorable Jacob J. Lew
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Thomas E. Perez
Secretary
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretaries Lew, Sebelius and Perez:

We are writing on behalf of the Employers for Flexibility in Health Care (E-FLEX) Coalition to express our sincere appreciation for the Administration's decision to provide a year of transition relief to employers for information reporting requirements under IRC §§6055 and 6056 and excise taxes under IRC §4980H under the Affordable Care Act. This critical recognition by the Administration that employers need more time to implement complex new rules brings much-needed relief to employers across the nation and acknowledges the inextricable link among the employer coverage requirements, the information reporting requirements and other employer provisions of the law.

The E-FLEX Coalition is a group of leading trade associations and businesses in the retail, restaurant, supermarket, hospitality, health care, construction, temporary staffing and other service-related industries, that provide employer-sponsored plans insuring millions of American workers. Members of E-FLEX are strong supporters of employer-sponsored coverage and have appreciated the opportunity to work closely with the Administration to ensure that employer-sponsored coverage remains a competitive option for all employees, whether full-time, part-time, temporary or seasonal.

For the past two years, the E-FLEX Coalition has urged the Administration to provide transition relief to allow employers sufficient time to plan, budget and implement these new rules, especially those related to information reporting. The Administration's willingness to act upon the concerns of employers is the kind of flexibility we need in the implementation of a complex law to ensure that employers can continue to offer affordable coverage to their workers. Many members of the

E-FLEX Coalition will use the 2014 transition period as a “practice year” to build their tracking and compliance systems while working to voluntarily comply with the law’s employer requirements.

We will continue to work with the Administration to develop the rules on reporting requirements under IRC §§6055 and 6056. We welcome an opportunity to review the recommendations we have submitted on streamlining and improving information reporting processes, including our comments in response to Notices 2012-31, 2012-32 and 2012-33 and the HHS Bulletin on Verification of Access to Employer-Sponsored Coverage.

In addition, we would like to call attention to several issues that have arisen as a result of Notice 2013-45, which provided official notice of the transition period in 2014.

Application of Transition Rules in 2015. Notice 2013-45 raises additional questions about how transitional rules that were provided for 2014 as part of the Treasury Department’s proposed rule under IRC §4980H will operate in 2015. Given that 2015 will now be the first year in which employers could face excise taxes under IRC §4980H, employers need clarification regarding whether such transition relief will be extended into 2015. We urge the Administration to issue further guidance about the status of several transitional policies, including:

- Transition rules for non-calendar year plans that begin during the 2015 calendar year;
- Measurement periods for stability periods that start in 2015; and
- Minimum number of months an employer may use to determine applicable large employer status in 2015 and applicability of the coverage provisions under IRC §4980H.

Timely clarification around the application of these and other transition rules in 2015 will minimize confusion for employers working towards compliance with the law in 2014 and 2015.

Reliance on existing guidance and proposed rules in 2015. Notice 2012-58, which outlined guidance on determining full-time employees, provided much-needed flexibility for employers with variable hour workforces, including the look-back measurement/stability period and affordability safe harbors. The Notice provided employers certainty that they could rely on the guidance through at least the end of 2014. Similarly, proposed rules on IRC §4980H noted that employers may rely on the proposed regulations for guidance “pending the issuance of final regulations or other applicable guidance.” Given the voluntary compliance approach the Administration has decided to take for 2014 with respect to reporting requirements and employer penalties, we urge the Administration to consider extending through 2015 the certainty with which employers can rely on guidance in Notice 2012-58 and the proposed rules in IRC §4980H. As many of our members will use 2014 as a practice year to voluntarily comply with the law, we will continue to work with the Administration to make refinements to the proposed rules as we learn about their practical applicability in 2014.

Information reporting under IRC §§6055 and 6056. The E-FLEX Coalition looks forward to working with the Administration as it develops rules on reporting requirements under IRC §§6055 and 6056. In light of the time needed to implement the necessary reporting systems, we urge the Administration to issue proposed rules on IRC §§6055 and 6056 as soon as possible so that employers can build and implement the necessary systems.

Since 2011, members of the E-FLEX Coalition have taken a holistic view of the law, having recognized that the employer requirements under the law are inextricably linked. How the reporting process is structured among employers, insurance Exchanges, and the federal agencies - and the timing and frequency of these interactions - will have a major impact on our business decisions about how to implement the law and our administrative processes and costs.

Minimizing the number of inaccurate determinations of individual eligibility for premium assistance tax credits to purchase Exchange coverage is a major priority of the E-FLEX Coalition. It is in all of our interests to avoid our employees having to repay tax credits when employer-sponsored coverage that meets the law's affordability and minimum value standards is available to them. As such, we are exploring the options the Administration has provided for employers to communicate with employees about the coverage they offer via the Department of Labor's model notice to employees about Exchanges under the Fair Labor Standards Act and the Department of Health and Human Services' employer pre-enrollment template as part of the model application for Exchange coverage.

The E-FLEX Coalition hopes to work with the Administration to find ways that employers can certify to IRS prospectively certain data elements under IRC §6056 about coverage available to employees to improve the accuracy of Exchanges' determinations of eligibility for advance payment of premium tax credits. This stands as the best path forward given that -- as HHS recognized in its July 5 final rule that addressed Exchange eligibility processes and other issues -- there currently is no comprehensive data source of eligibility for employer-sponsored coverage. In addition, given that HHS has confirmed that data from IRS, the Social Security Administration and the Department of Homeland Security "should be available every day" via the data hub (See CMS-2234-F), the Administration would not need to develop a separate data source of eligibility for employer-sponsored coverage if it can collaborate with the employer community to develop flexible options for reporting under IRC §§6055 and 6056 throughout the year.

The E-FLEX Coalition is committed to working with the Administration to simplify and streamline the employer information reporting requirements under the law in part by continuing to offer employers of different sizes and structures flexibility and options to comply with the law's requirements. In order to assist with the upfront determination of individual eligibility for tax credits and the availability of employer-sponsored coverage, we continue to explore options under the employer reporting requirements that would allow employers to report prospectively to the IRS general information about the coverage offered to employees (e.g., availability of minimum value plans and affordability based on employee wage bands). By giving employers the flexibility to report required data elements to the IRS on timeframes that coordinate with the

Employers for Flexibility in Health Care

enrollment process, the Administration could use the federal data hub to provide Exchanges with access to more timely information about individuals' access to employer-sponsored coverage. In addition, we are exploring options to streamline end of year reporting for purposes of certifying compliance with the law and assessing tax penalties such as minimizing reporting fields, exceptions-based reporting based on limited number of employees receiving tax credits, and safe harbors for employers who are able to demonstrate compliance with the law.

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 the constructive way in which the Administration has engaged with the employer community in developing regulatory guidance. The E-FLEX Coalition looks forward to working with the Administration to address issues that preserve employer-sponsored coverage and smooth the implementation process for employers and 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.

Sincerely,

Employers for Flexibility in Health Care

Enclosure

cc: The Honorable Max Baucus
The Honorable Orrin Hatch
The Honorable Tom Harkin
The Honorable Lamar Alexander
The Honorable Dave Camp
The Honorable Sander Levin
The Honorable Fred Upton
The Honorable Henry Waxman
The Honorable John Kline
The Honorable George Miller