



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

March 14, 2013

Mr. Steven Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Comments Related to Notice of Proposed Rulemaking Issued on Employer Shared Responsibility for Health Insurance Coverage

Dear Messrs. Miller and Wilkins:

The American Institute of Certified Public Accountants (AICPA) offers the following comments in response to Notice of Proposed Rulemaking [REG 138006-12] issued on the employer shared responsibility for health insurance coverage under the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (the ACA). These comments were developed by the Health Care Tax Task Force of the AICPA's Employee Benefits Tax Technical Resource Panel, and approved by the Tax Executive Committee.

The AICPA is the world's largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of servicing the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

The AICPA commends the Treasury Department (Treasury) and the Internal Revenue Service (IRS) for developing proposed regulations which are comprehensive and remove much of the uncertainty around the implementation of the statutory provisions of section 4980H.¹ We also commend Treasury and the IRS for developing various rules to ease an employer's administrative burden, such as providing safe harbors to determine whether an employee's premiums for coverage are affordable.

¹ All Section references in this letter are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.

Identification of Related Employers

The AICPA suggests providing additional guidance around the determination as to whether an employer is an applicable large employer for a given year when the employer entities which comprise the employer change from one month to another during the preceding calendar year.

Prop. Reg. § 54.4980H-1(a)(4) defines an “applicable large employer” as “an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. Prop. Reg. § 54.4980H-1(a)(14) provides that “all employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m) or under section 414(o) are taken into account in determining whether the members of the controlled group or affiliated service group together are an applicable large employer.” Prop. Reg. § 54.4980H-1(a)(5) states that “if a person, together with one or more other persons, is treated as a single employer that is an applicable large employer on any day of a calendar month, that person is an applicable large employer member for that calendar month.”

While the regulations state that treatment as a single employer on any day of a calendar month applies for the entire month, there is no similar rule with respect to the entire calendar year. Since the determination of applicable large employer status is made on the basis of the entire preceding calendar year, a rule is needed as to the determination of applicable large employer status when the employer entities which comprise an employer (that is, related employers) change during the preceding calendar year, and when an given entity moves from one group of related employers to another group of related employers.

Definition of the Term Dependent

The AICPA recommends that the regulations be clarified to state that a child is treated as a dependent for the entire month in which the dependent attains age 26.

Prop. Reg. § 54.4980H-1(a)(11) defines the term “dependent” as a child² of an employee who has not yet attained age 26. The regulations further state that a child attains age 26 on the 26th anniversary of the date the child was born. The regulations do not specify whether a child is treated as a dependent for the entire month in which he or she attains age 26, or for only the part of the month prior to the date the child attains age 26.

Prop. Reg. § 54.4980H-4(a) provides that an employee may not be treated as having been offered coverage for a calendar month unless coverage is also offered to the employee’s dependents. To fulfill this requirement, employers must know if it is necessary to offer

² As defined in section 152(f)(1)

coverage to a dependent for the partial or full calendar month in which the dependent attains age 26.

The AICPA believes that coverage for a dependent for an entire calendar month better reflects the spirit of the ACA, and is consistent with other provisions in the proposed regulations.³

Definition of the Term “Full-Time Employee”

The AICPA believes it would promote more accurate compliance and provide greater flexibility if the language in the definition of the term “full-time employee” was modified to state that 130 hours of service in a calendar month *may* be treated as the monthly equivalent of at least 30 hours of service per week, with a requirement that if this equivalency rule is adopted by an employer, it must be applied on a reasonable and consistent basis.

In defining the term “full-time employee,” Prop. Reg. § 54.4980H-1(a)(18) provides “130 hours of service in a calendar month *is* treated as the monthly equivalent of at least 30 hours of service per week, provided the employer applies the equivalency rule on a reasonable and consistent basis.” The use of the word “is” infers that this equivalency rule is not elective, but because the rule is contingent on it being applied on a reasonable and consistent basis, it appears that an employer could elect out of it simply by not applying it on a reasonable or consistent basis. This will create confusion as to whether the equivalency rule is mandatory or elective.

We believe that it would be better to provide flexibility to employers as to whether to adopt the equivalency rule. Nevertheless, if the final regulations provide that the equivalency rule is mandatory, we feel the language should be clarified to avoid the ambiguity of the proposed regulations.

Determination of Applicable Large Employer Status – Seasonal Worker Exception

The AICPA suggests the seasonal worker exception be expanded to apply to employers that have not been in existence throughout the prior calendar year.

Section 4980H(c)(2)(B)(i) provides that an employer shall not be considered to employ more than 50 full-time employees if the employer’s workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and the employees in excess of 50 who are employed during the 120-day period were seasonal workers. Prop. Reg. §

³ For example, Prop. Reg. §54.4980H-4(c) states that coverage must be offered to a full-time employee on every day of the calendar month in order to treat the employee as having been offered coverage for the calendar month.

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54.4980H-2(b)(2) provides a seasonal worker exception for an employer that has been in existence throughout the entire prior calendar year. The proposed regulations do not address the seasonal worker exception for employers that have not been in existence throughout the prior calendar year. In order to fairly apply the applicable large employer status rule, the seasonal worker exception should be extended to employers that have not been in existence throughout the prior calendar year.

Determination of Applicable Large Employer Status – Calculation of Number of FTEs

We recommend the regulations provide specificity as to rounding rules in calculating the number of full-time equivalent employees (FTE) for each calendar month. We suggest the interim calculation results be carried out to the nearest one-hundredth.

Prop. Reg. § 54.4980H-2(c)(2) provides that “[i]n determining the number of FTEs for each calendar month, fractions are taken into account.” However, the proposed regulations do not provide rounding rules. Although the degree of rounding should not change the ultimate results, it is our experience that taxpayers prefer clarity and specificity regarding required calculations, including rounding.

Determination of Full-Time Employees - Non-Hourly Employees Calculation Using A Days Worked Equivalency

The AICPA recommends greater clarity be provided in the regulations with respect to the calculation of non-hourly employees’ hours of service.

The proposed regulations provide rules to be used by employers when calculating hours of service for both hourly and non-hourly employees. With regard to employees paid on a non-hourly basis, Prop. Reg. § 54.4980H-3(b)(2)(i) provides that employers may calculate an employee’s hours of service by using one of three alternative methods. One method requires using actual hours of service. The other two methods are equivalency methods (i.e., a days-worked equivalency method and a weeks-worked equivalency method).

With respect to the days-worked equivalency method, Prop. Reg. § 54.4980H-3(b)(2)(i)(B) requires that eight hours of service be credited “for each day for which the employee would be required to be credited with at least one hour of service in accordance with paragraph (b)(1) of this section.” Paragraph (b)(1), which pertains to hourly employees, provides that “an employer must calculate actual hours of service from records of hours worked and hours for which payment is made or due.” It appears that the reference to paragraph (b)(1) means that if a non-hourly employee actually works at least one hour, or is paid for at least one hour, or is entitled to payment for at least one hour, then eight hours of service are credited to the employee. However, taxpayers may

become confused by the reference to the rules of hourly employees and would benefit from greater clarity as to how to apply the equivalency rule. The same comment applies to the week-worked equivalency method.

Section II. B. 1. of the preamble states that when choosing one of the three methods for counting hours of service for non-hourly employees, an employer may change the method from year to year. That is, consistency from year to year is not required. This rule does not appear in the proposed regulations. We recommend that this language be included as part of the various other consistency rules in Prop. Reg. § 54.4980H-3(b)(2)(ii).

Determination of Full-Time Employees - Look-Back Measurement Method

The AICPA suggests the regulations provide specific guidance on how to calculate an employee's average number of hours of service per week during the standard measurement period. It would be helpful if the guidance was similar to that provided in Prop. Reg. § 54.4980H-2(b) for determining the average number of full-time employees and full-time equivalent employees during the preceding calendar year for purposes of determining applicable large employer status. It would also be helpful for the guidance to address issues such as rounding rules and how to treat partial weeks during the measurement period. If specific guidance is not provided, we recommend that the regulations state that any reasonable method may be used.

Prop. Reg. § 54.4980H-3(c)(1)(v) and (vi) state that standard measurement periods, administrative periods, and stability periods may differ either in length or in their starting and ending dates for various specified categories of employees. Section II.C.1. of the preamble indicates that even though employees of different entities are not specified as a separate category of employees in the regulations, employers may treat employees of separate entities as a separate category because section 4980H rules are generally applied on an applicable large employer member-by-member basis. We recommend that the language in the final regulations explicitly state that employers may treat employees of separate entities as a separate category so that employers will recognize that the category is available. Otherwise, we are concerned that employers will overlook that category.

The language in section II.C.1. of the preamble provides that with regard to the look-back measurement method for ongoing employees, an employer may change its standard measurement period and stability period from year-to-year, but generally may not change the standard measurement period or stability period once the standard measurement period has begun. This language is not part of the proposed regulations. Our recommendation is that the final regulations adopt the language in the preamble.

Determination of Full-Time Employees – New Variable Hour and New Seasonal Employees

We recommend the proposed regulations clarify that an employee's start date may be used as the first date of the initial measurement period for new variable hour and new seasonal employees.

Prop. Reg. § 54.4980H-3(c)(3)(i) provides that an applicable large employer member can determine whether a new variable hour or new seasonal employee is a full-time employee using an initial measurement period of between three and twelve months. The proposed regulations further provide that the initial measurement period may begin on any date between the employee's start date and the first day of the first calendar month following the employee's start date. Since the start date itself is not technically "between" the start date and the first day of the first calendar month following the start date, we are concerned this provision will lead taxpayers to believe that the start date cannot be used as the first date of the initial measurement period. This should be clarified as many employers will find it administratively convenient to use the start date as the first date of the initial measurement period. We do not believe it is the intention of the Treasury or the IRS to provide that the start date cannot be used as the first date of the initial measurement period, as evidenced by the example in Prop. Reg. § 54.4980H-3(c)(4)(i), which uses the start date as the first date of the initial measurement period.

Assessable Payments Under Section 4980H(a)

The AICPA recommends that clarification be provided with respect to how dependents are taken into account in determining whether an employer offers coverage to its full-time employees.

Prop. Reg. § 54.4980H-4(a), provides that an assessable payment is imposed on an applicable large employer member if, for any calendar month, the employer does not offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an employer-sponsored plan, and the member receives a Section 1411 Certification with respect to at least one full-time employee.

Prop. Reg. § 54.4980H-4(a)(1) provides "an applicable large employer member is treated as offering such coverage to its full-time employees (and their dependents) for any calendar month, if, for that month, it offers coverage to all but five percent (or, if greater, five) of its full-time employees, provided that an employee is treated as having been offered coverage only if the employer also offers coverage to that employee's dependents)." It seems clear from this language that only employees are taken into account in the five percent calculation, and an employee is not counted as having been offered coverage unless coverage is also offered to their dependents.

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The same coverage requirement is worded slightly different in Prop. Reg. § 54.4980H-5(a), which provides “an offer of coverage to all but five percent or less, (or, if greater, five or less), of its full-time employees (and their dependents)” is treated as satisfying the requirement. Since this wording refers to “five percent . . . of its full-time employees (and their dependents),” this provision can be interpreted to mean the actual number of both employees and dependents must be taken into account in the five percent calculation. Requiring employers to include an actual count of dependents in the calculation would add administrative complexity. To provide clarification and to avoid confusion among taxpayers, we recommend that the requirement be stated in the same manner in both portions of the regulations, and that the language in Prop. Reg. § 54.4980H-4(a)(1) be adopted for this purpose.

It would also be helpful to clarify the treatment when coverage is not offered to all categories of dependents. For example, a foster child is a dependent. If an employer does not offer coverage to employees’ foster children, the regulations should indicate whether only those employees who have foster children are treated as not having been offered coverage, or whether all employees are treated as not having been offered coverage. We believe the rule should be the former rather than the latter.

Limit on Assessable Payments Under Section 4980H(b)(2)

The AICPA recommends that the regulations be modified to allow that all related employers should be taken into account for both prongs of the comparison in determining the assessable payment, and should address how to allocate the assessable payment limit among all applicable large employer members.

Section 4980H(b)(1) provides that if an applicable large employer offers coverage to its full-time employees for a month, and has one or more full-time employees who have been certified under section 1411 of the Patient Protection and Affordable Care act as having enrolled for the month in a qualified health plan and who qualify for a premium tax credit or cost-sharing reduction, an assessable payment is imposed on the employer for the month. Section 4980H(b)(2) provides that the aggregate amount of the assessable payment is not to exceed an assessable payment imposed if the employer had not offered coverage to its full-time employees and their dependents for the month. In describing this rule, Prop. Reg. § 54.4980H-5(a) limits the total assessable payments under section 4980H(b)(2) for the “applicable large employer” (that is, taking into account all related employers) to the assessable payment under section 4980H(a) for the “applicable large employer member” (that is, taking into account only the employer and not related employers). If Treasury and the IRS do not agree, it would be helpful for the preamble to provide an explanation of why the limit is being applied in the manner set forth in the proposed regulations.

Assessable Payments – Allocated Reduction of 30 Full-Time Employees

The AICPA requests that the regulations provide additional rounding rules related to the allocation of the 30-employee reduction for the assessable payment under section 4980H(b) among applicable large employer members.

Prop. Reg. § 54.4980H-4(d) provides that when an applicable large employer member calculates its liability under section 4980H(a), the number of employees is reduced by its allocable share of 30 employees among all applicable large member employers. Further, if the member's total allocation is a fractional number that is less than one, it is rounded up to one. No further rounding rules are provided.

The AICPA believes guidance is needed as to rounding if the allocation results in a fractional number that is greater than one. To illustrate, Prop. Reg. § 54.4980H-4(e) provides an example where the allocation to an applicable large employer member is exactly 16. If instead, the allocation had been 16.5 employees, there is no guidance under the regulations as to whether the allocation should be reduced to 16 or increased to 17, or retained as a fractional number. Although this issue will not have a significant impact on the amount of the assessable payment, taxpayers and their advisers are likely to spend a considerable amount of time deciding on a reasonable approach to rounding if no guidance is provided.

Assessable Payments – Affordability Safe Harbors – Federal Poverty Line

The AICPA recommends that the Federal poverty line affordability safe harbor for purposes of satisfying section 4980H(b) be modified to provide that the Federal poverty line is determined as of the first day of the plan year rather than the first day of the calendar year. We also feel the regulations should allow use of the Federal poverty line as going into effect six months prior to the beginning of the plan year.

Prop. Reg. § 54.4980H-5(e)(2)(iv) provides that the Federal poverty line for the calendar year is used for purposes of the Federal poverty line safe harbor. Section V.B.1.c. of the preamble states that the most recently published poverty guidelines as of the first day of the plan year may be used. Thus, the regulations refer to the calendar year, while the preamble refers to the plan year. Since premiums are typically established for a given plan year, we believe that it is appropriate to use the Federal poverty line as of the first day of the plan year.

We also recommend that the regulations provide clearer guidance as to the timing of determining the Federal poverty line. The preamble states that in the interest of administrative convenience, the most recently published guidelines as of the first day of the plan year may be used. While this rule is helpful, it could be problematic as an employer must determine premium amounts in advance of the beginning of the plan year

in order to communicate the premium amounts to employees and to enroll them in the plan. If new guidelines are published between the date the employer sets the premiums and the beginning of the plan year, under the rule stated in the preamble, the premium amount may no longer satisfy the safe harbor. To provide adequate time for administrative purposes, we recommend that the Federal poverty line be in use as in effect six months prior to the beginning of the plan year. We also believe this rule should be stated in the body of the regulations.

Eligibility Waiting Period

The proposed regulations provide that an assessable payment does not apply for a new employee within the first three months of the employee's date of hire. The regulations should be clarified to eliminate potential confusion as to how the end date of the three-month period is determined. In addition, we believe that the regulations should clarify how the determination of an assessable payment under section 4980H is coordinated with the 90-day waiting period under the Public Health Service Act.

Prop. Reg. § 54.4980H-3(c)(2) provides that “[i]f an employee is reasonably expected at his or her start date to be a full-time employee (and is not a seasonal employee), an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three full calendar months of employment will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for up to the initial full three calendar months of employment.” In referring to the same employees for purposes of determining assessable payments under section 4980H(b), Prop. Reg. § 54.4980H-5(a) refers to “employees who are new full-time employees during their first three months of employment.” Thus, one provision refers to “initial full three calendar months of employment,” while another provision refers to “first three months of employment.” This difference in language may create confusion for employers, since the two provisions which address the same issue result in two different end dates for the three-month period. The “initial full three calendar months of employment” excludes the first month from the three-month period for an employee with a start date that is after the first day of the calendar month. In contrast, the “first three months of employment” does not exclude the month in which the employee is hired, since Prop. Reg. § 54.4980H-1(a)(25) defines “month” as “the period that begins on any date following the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from February 2 to March 1 or from December 15 to January 14) or that is a calendar month.” We believe the regulations should be clarified to eliminate potential confusion as to how the end date of the three-month period is determined.

Section 2708 of the Public Health Service Act provides that a plan shall not provide a waiting period that exceeds 90 days. The proposed regulations under section 4980H provide relief from assessable payments as long as coverage is offered within a three-

month period. Regardless of whether the three-month period is stated as the “initial full three calendar months of employment” or the “first three months of employment,” the three-month period will generally exceed 90 days. We believe the regulations should be clarified to either indicate that use of the three-month period will satisfy the 90-day requirement, or that while the three-month period may be used for purposes of section 4980H, a strict 90-day period is required for purposes of section 2708 of the Public Health Service Act. We prefer the former, because consistency in the rules will foster simpler administration on the part of employers.

Educational Organizations

The AICPA believes that clarification is needed with respect to certain rules related to “employment break periods” for educational organizations, and that adding examples with respect to the rules would be helpful.

Prop. Reg. § 54.4980H-3(e)(2) defines an “employment break period” as “a period of at least four consecutive weeks . . . during which an employee of an educational organization is not credited with hours of service for an applicable large employer.”

Prop. Reg. § 54.4980H-3(e)(4) provides that for purposes of determining whether an employee of an educational organization has an average of 30 or more hours of service per week during a look-back measurement period, the employer determines the employee’s average hours of service for the measurement period by computing the average after excluding any employment break period during that measurement period and by using that average as the average for the entire measurement period.

The average number of hours of service during a measurement period is computed by dividing the number of hours in the measurement period (the numerator) by the number of weeks in the measurement period (the denominator). Thus, the number of weeks in the employment break period is excluded from the denominator. The regulations provide a special rule whereby “no more than 501 hours of service during employment break periods in a calendar year are required to be excluded” from the calculation. It is unclear as to how this rule that limits the number of hours of service excluded in the calculation to 501 hours would be applied to the calculation, since the hours of service are part of the numerator, and the calculation involves no adjustment to the numerator. An example would be especially helpful in providing this clarification.

The proposed regulations provide an alternative calculation to the one described above for purposes of determining the average hours of service for an employee of an educational organization. Under the alternative, the employer may choose to treat the employee as credited with hours of service for any employment break period during the measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not

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part of the employment break period. It would be helpful for the regulations to provide examples that illustrate whether the two alternative methods would produce different results, since intuitively, it does not seem that the two methods would produce different results, and therefore, it is unclear why an educational organization would choose one method over the other method.

* * * * *

We appreciate the opportunity to comment on these proposed regulations, and welcome a further discussion of the comments. If you have any questions, please contact Eddie Adkins, Member, AICPA Health Care Tax Task Force and Member, AICPA Tax Executive Committee at (202) 521-1565 or eddie.adkins@us.gt.com; Kristin Esposito, AICPA Technical Manager at (202) 434-9241 or kesposito@aicpa.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Porter". The signature is fluid and cursive, with the first name "Jeffrey" being the most prominent.

Jeffrey A. Porter, CPA
Chair, Tax Executive Committee