

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Internal Revenue Service
Room 5203
Department of the Treasury
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Submitted via www.regulations.gov

Re: **Comments on Notice of Proposed Rulemaking and Notice of Public Hearing --
Shared Responsibility for Employers Regarding Health Coverage**

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) appreciates this opportunity to comment on the proposed regulation regarding the Affordable Care Act's (ACA) provisions governing shared responsibility for employers under Code section 4980H as published in the Federal Register on January 2, 2013 (the "Proposed Regulation"), as modified by a correction released on March 14, 2013 and published in the Federal Register on March 15, 2013 (the "Correction") (collectively, the Proposed Regulation and the Correction are referred to as the "Corrected Proposed Regulation").

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 20 million active and retired American workers and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

Summary of Comments

The comments of the NCCMP on the Corrected Proposed Regulation are summarized as follows:

- 1. The NCCMP appreciates the effort made in the Corrected Proposed Regulation to address the specific issues for employers who contribute to multiemployer plans. The NCCMP supports the transition rule that was provided for 2014 with respect to such employers and recommends that the transition rule (including the method for determining affordability) be made permanent, with certain clarifications.**
 - Final regulations should clarify that, as under the Proposed Regulation, the rule for multiemployer plans applies with respect to individuals who are eligible to participate in the plan pursuant to a participation agreement. This provision was apparently removed in the Correction. This provision should be included for 2014 and as a permanent rule. Existing Department of Labor regulations defining collectively bargained plans provide a basis for providing the same rule for persons under a participation agreement. Should the Treasury Department decide not to include participation agreements in the final rule, the rule included in the Proposed Regulation should apply at least for 2014. Given that the Correction was released just a few days before the close of the comment period on the Proposed Regulation, it is possible that some employers and plans may have already submitted comments on the Proposed Regulation or have not had time to evaluate the Correction, particularly with respect to participation agreements. Thus, we request an additional time for comments on the issues addressed by the Correction.
 - Final regulations should confirm that the employer, not the plan, has the obligation to determine full-time status of employees. For example, regulations should clarify that a multiemployer plan that is offering affordable coverage and minimum value coverage to eligible employees (and their dependent children) does not need to establish a standard measurement period or stability period for purposes of determining full-time status under the employer responsibility provisions. We believe this is the result under the Corrected Proposed Regulation, but clarification would be helpful.
- 2. Final regulations should clarify whether foster children and step children are considered dependents for purposes of the employer responsibility requirements and provide appropriate transition if they are considered “dependents”.**

Each of these comments is discussed in further detail below.

Background Relating to Multiemployer Plans

One of the crowning achievements of collective bargaining over the past 50 years is the creation of thousands of labor-management, multiemployer health and welfare trust funds that provide to covered, workers and their dependents various benefit coverages, including medical,

hospitalization, preventive and wellness care, prescription drugs, dental care, and vision care. These trust funds are often referred to as “Taft-Hartley funds” because they are regulated by the Labor Management Relations (“Taft-Hartley”) Act of 1947, as well as by the Employee Retirement Income Security Act (“ERISA”) and the Internal Revenue Code (“Code”). We note, however, that some single-employer plans may operate as joint labor-management funds and therefore believe the more appropriate term is “multiemployer” plans with respect to comments contained herein.

Multiemployer plans provide health and welfare plan coverage to plan participants and their beneficiaries pursuant to the negotiated wages, hours, and other terms and conditions of employment (including requiring contributions to be made to a multiemployer benefit trust) of a collective bargaining agreement between one or more unions and more than one employer. Even for employees who are not union members but whose work is covered as part of a certified bargaining unit, existing labor law provides that discussions of employee benefits are a mandatory subject of bargaining and therefore subject to negotiation with the union under their status as the statutory bargaining agent. The ACA did not repeal the Labor Management Relations Act. Relationships are established between employers and employees under the Taft-Hartley Act, and these relationships should continue to be recognized in regulations implementing the ACA.

Health and welfare trust funds cover workers in industries as diverse as building and construction, transportation, retail, food, clothing, textiles, service, mining, entertainment, hotel and restaurant, maritime, longshore, and manufacturing. But for these trust funds, millions more working families would be uninsured and at risk for financial ruin in the event of a serious illness. Indeed many millions of workers in these funds would not be eligible for coverage even under the enhanced eligibility requirements mandated for employers by ACA.

The transient, project-based, mobile and seasonal employment patterns that characterize many of these industries would prevent workers from obtaining health coverage absent a central, pooled fund through which portable coverage is provided to workers as they move from employer to employer.

The Corrected Proposed Regulation as Relates to Multiemployer Plans

The preamble to the Proposed Regulation discusses the unique structure of multiemployer plans and recognizes that, as a result of this structure, specific rules are needed to determine how section 4980H applies in the context of such plans. Thus, for example, the preamble recognizes that eligibility for benefits under a multiemployer plan is typically based on work performed for several employers and that, as a result, any single employer who contributes to a multiemployer plan may not be aware of whether a particular employee has qualified for benefits under the plan. The preamble recognizes the practical difficulties of applying rules designed for single employer plans in the multiemployer plan context and that administrable rules are need for contributing employers to multiemployer plans.

The preamble to the Corrected Proposed Regulation provides a transition rule for 2014 for employers that are required to contribute to multiemployer plans. Under the transition rule, an applicable large employer member will not be treated as failing to offer the opportunity to enroll in minimum essential coverage to a full-time employee (and his or her dependents) under section

4980H(a) and will not be subject to a penalty under section 4980H(b) with respect to a full-time employee if:

1. The employer is required to make a contribution to a multiemployer plan with respect to the employee pursuant to a collective bargaining agreement, and
2. The multiemployer plan offers to individuals who satisfy the plan's eligibility conditions (and their dependents), coverage that is affordable and provides minimum value. .

For purposes of determining affordability of multiemployer plan coverage, employers may use any means otherwise available. In addition, the transition rule also provides that coverage under a multiemployer plan will be considered affordable if an employee's required contribution, if any, toward self-only coverage under the plan does not exceed 9.5 percent of the wages reported to the multiemployer plan. Reported wages may be determined based on actual wages, or on an hourly wage rate under the applicable collective bargaining agreement.

The preamble to the Proposed Regulations also provides that, if any assessable payment were due under section 4980H, it would be payable by a participating applicable large employer member and that member would be responsible for identifying its full-time employees for this purpose (which would be based on hours of service for that employer). If the applicable large employer contributes to one or more multiemployer plans and also maintains a single employer plan, the rule applies to each multiemployer plan but not to the single employer plan. Comments on the transition rule for multiemployer plans are specifically requested.

Certain other aspects of the Corrected Proposed Regulations are discussed below under "Recommendations".

Recommendations

- 1. The NCCMP supports the transition rule in the Corrected Proposed Regulation with respect to contributing employers to multiemployer plans (including the method for determining affordability) and recommends that the rule be made permanent, with certain clarifications.**

The NCCMP believes that the transition rule provides an administrable rule for employers who contribute to such plans consistent with the requirements of section 4980H. In particular, the transition rule, as clarified by the Correction, appropriately looks to the contributions to a multiemployer plan and defers to the eligibility requirements under the plan. The NCCMP recommends the transition rule should be made permanent.

Moreover, employers and unions typically negotiate multi-year collective bargaining agreements impacting contribution obligations to multiemployer plans, and it is difficult for the negotiators to enter into these long-term agreements in the absence of a stable and reliable regulatory environment. This is why it is so important that the transition rule with respect to employers contributing to multiemployer plans should be made *permanent* in the final regulation. If for some reason the rule cannot be made permanent, a provision should be added stating that the transition rule as it existed at the time that any collective bargaining agreement requiring

contributions to a multiemployer health benefit plan was entered shall continue to control the shared responsibility for employers under Code section 4989H with respect to any employees covered by such collective bargaining agreement until such time as the employer's multiemployer plan contribution obligations under that agreement have expired or terminated.

In addition, the NCCMP recommends that the following clarifying provisions be included in the final regulations.

- Clarify that, as under the Proposed Regulation, the rule for multiemployer plans applies with respect to individuals who are eligible to participate in the plan pursuant to a related participation agreement. The Proposed Regulation applied the transition rule to employees who participate in a multiemployer plan pursuant to a participation agreement, but this reference was not included in the Correction. Participation agreements allow for participation in a multiemployer plan by a certain non-bargaining unit employees, such as employees of the union, the fund, and non-bargaining employees of the employer. Similar administrative issues arise with respect to such individuals, i.e., the employer's connection to the plan with respect to such individuals is to make the required contributions pursuant to the participation agreement. Department of Labor regulations defining a collectively bargained plan provide that 85% of the employees participating in the plan must be "nexus" employees. Included in "nexus" employees are certain classes of individuals who participate through a participation agreement, including employees of the union, employees of the fund, and employees of the employer. DOL Reg. Sec. 2510.3-40. The section 4980H rules should similarly recognize participation agreements. We request that the Treasury Department clarify that the transition rule includes employees who participate pursuant to a participation agreement, and that the final regulations apply to such employees. In the event that the final regulations do not provide a permanent rule for persons who participate in the plan pursuant to a participation agreement, the rule should be applied at least for 2014. Applying the rule at least for 2014 is mandated by the statement in the Proposed Regulation that "[i]f and to the extent future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect and employers will be provided with sufficient time to come into compliance with the final regulations." 78 Fed Reg 239 (Jan. 2, 2013). Given that the Correction was issued just a few days before the comment deadline on the Proposed Regulation, it is possible that some plans may have already provided comments or may not have had sufficient time to reflect the provisions of the Correction. Thus, additional time to comment on the Correction should be permitted.

- Clarify the relationship of the multiemployer plan rule to the measurement of full-time employment status. In some cases, we have been advised of confusion about whether the plan or the employer must measure whether an employee is a full-time employee. We request that future regulations confirm that the employer, not the multiemployer plan, has the obligation to determine whether an employee is a full-time employee. This is consistent with the preamble to the Proposed Regulations, which states that if a penalty is payable, the obligation is on the employer, not the plan, to pay that penalty with respect to that employer's full-time employees. With respect to the determination of full-time status, it should also be made clear that once the multiemployer exception is satisfied, the multiemployer plan has no

obligations with respect to section 4980H. For example, regulations should clarify that a multiemployer plan that is offering affordable coverage and minimum value coverage to eligible employees (and their dependent children) does not need to establish a standard measurement period or stability period for purposes of determining full-time employee status under the employer responsibility provisions. Rather, the employer is responsible for determining full-time status. We believe this is the result under the Corrected Proposed Regulation, but clarification would be helpful.

2. Final regulations should clarify whether foster children and step children are considered dependents for purposes of the employer responsibility requirements and provide appropriate transition if they are considered “dependents”.

The Proposed Regulation defines “dependent” as a child as defined under Code section 152(f)(1) who has not attained age 26. That section of the Code defines the term “child” to encompass eligible foster children and stepchildren, as well as natural children, adopted children, and children placed for adoption with the participant. It is not unusual for plans to not cover foster children or stepchildren. One of the reasons that foster children and step children may be excluded is that, while other types of children defined in Code section 152(f)(1) (e.g., natural children and adopted children) could have two parents, foster children and step children may have two natural parents and two step parents, or two natural parents and two foster parents, and therefore there may be a lot of duplication and need for coordination of benefits for which the rules are not clear or well-established (as they are for two parents – e.g., the birthday rule). Further, state laws often provide that a child ceases to be a foster child at the age of majority, thus potentially creating a conflict between state law and ACA requirements. We suggest that “dependents” for this purpose should not include stepchildren and foster children. Should the Treasury Department conclude otherwise, we ask that the Department clarify that the one-year transition period to put dependent coverage in place would apply not only to plans that lack such coverage entirely, but also to plans that need to extend coverage to these additional groups of children. We believe this is the case under the transition rule in the preamble to the Proposed Regulation, but clarification would be helpful.

Conclusion

We appreciate your consideration of these comments and the effort made by the Treasury Department and Internal Revenue Service to address these issues. We would welcome the opportunity to participate in the upcoming hearing, to provide any additional information or to answer any questions you may have.

Respectfully submitted,



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