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").

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 Proposed Regulation are summarized as follows:

1. **The NCCMP appreciates the effort made in the 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.**

    - The final rule should clarify that the employer responsibility requirement is satisfied if the employer is contributing toward coverage that is affordable and minimum value, and whether a particular employee attains eligibility is not relevant to the employer penalty determination.

    - Final regulations should confirm that the employer safe harbor rules, including the measurement period and stability period, do not apply to coverage offered by a multiemployer plan, i.e., there is no need for a plan to have a stability period.

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 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. 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 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 Proposed Regulations provides a transition rule for 2014 for employers that contribute to multiemployer plans. Under the transition rule, an applicable large employer 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 full-time employee pursuant to a collective bargaining agreement or an appropriate related participation agreement,

2. Coverage under the multiemployer plan is offered to the full-time employee (and the employee's dependents), and

3. The coverage offered to the full-time employee 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 Proposed Regulations are discussed below under "Recommendations".

Recommendations

1. **The NCCMP supports the transition rule 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 multiemployer plans consistent with the requirements of section 4980H. Thus, the NCCMP recommends that the transition rule be made permanent and included in final regulations.

   In addition, the NCCMP recommends that the following clarifying provisions be included in the final regulations. We believe that the recommend results are consistent with the Proposed Regulation; however, clarification would be helpful.

   - Clarify that, as long as an employer is required to make contributions with respect to an employee under a collective bargaining agreement and the services to which those contributions relate go toward eligibility under a multiemployer health plan, the employer will not be liable for a penalty, even if the employee is not immediately eligible for coverage. The preamble to the Proposed Regulation states that section 4980H is satisfied if an employer is required to make contributions to a multiemployer plan that offers to the employee and the employee's dependents coverage that is affordable and provides minimum value. Final regulations should clarify that the employer has satisfied the employer responsibility requirements in such cases, regardless of whether the plan participant has attained eligibility under the plan. As noted in the preamble, the plan needs to comply with the 90-day waiting period rules, which, in combination with the plan's eligibility requirements, will determine when coverage takes effect under the plan for any specific employee as well as the terms under which coverage will continue.
   - 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 believe future regulations should 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 employers 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 other 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 full-time employees (and their dependent children) does not need to establish a standard measurement period or stability period because these measurement periods do not apply to the plan. The measurement periods would only be of interest to the contributing employer, if the employer needs to determine full-time status.

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, two groups of children who may not be eligible for coverage under the terms of many plans that otherwise provide coverage of dependents, including other categories listed in section 152(f)(1) -- natural children, adopted children, and children placed for adoption with the participant. Further, state laws often provide that a child ceases to be a foster child at the age of majority. 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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Executive Director