NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

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VIA: e-ohpsca-er.ebsa@dol.gov

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

VIA: Notice.comments@irscounsel.treas.gov

J. Mark Iwry
Senior Adviser to the Secretary and
Deputy Assistant Secretary for
Retirement and Health Policy
U.S. Department of Treasury
Departmental Offices
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Waiting Period Proposed Rule
26 CFR Part 54; [REG–122706–12]; RIN 1545–BL50 and 29 CFR Part 2590; RIN 1210–AB56

Dear Assistant Secretary Borzi and Deputy Assistant Secretary Iwry:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to submit these comments to the proposed regulation implementing the Affordable Care Act's 90-day waiting period.

Background:

The NCCMP is the only national organization devoted exclusively to protecting the interests of over 20 million workers, retirees, and their families who rely on multiemployer plans for health, retirement 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 plan sponsors 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.
The NCCMP has previously provided comments on a variety of ACA issues. In particular, we provided extensive comments regarding Notice 2012-17, "Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods," and Notice 2012-59 and DOL Technical Release 2012-2, which raised many of the same questions as the instant guidance.

We appreciate the Departments' attentiveness to the impact of the 90-day waiting period rule on multiemployer plans. In particular, we support the Departments' approach as stated in the preamble, that the rules need to provide flexibility to plan sponsors:

> *It is the Departments' view that the proposed rules provide flexibility to both multiemployer and single-employer health plans to meet their needs in defining eligibility criteria, while also ensuring that employees are protected from excessive waiting periods.*

We also commend several statements included in the preamble and request that these provisions be codified in final rules. Specifically, we request that final rules reflect the preamble statement that eligibility requirements based on earnings and residuals are permissible. In addition, we request that final regulations reiterate that hour banks that allow workers to bank excess hours from one measurement period and then draw down on them to compensate for any shortage in a succeeding measurement period to prevent lapses of coverage are permissible. Similarly, the regulations should codify statements in the preamble that other arrangements that permit workers who lack sufficient hours to make a self-payment (or buy-in) equal to the amount that would allow them to have a sufficient number of hours for the measurement period are permissible.

Although we believe that the proposed rule provides substantial assistance to plan sponsors to continue existing eligibility rules which have been developed over time to fit the needs of the individual plan participants, there are several items that continue to be confusing under the current regulation. We request that final regulations clarify the following issues.

1. Plans that have a lag period may have a lag period of up to 90 days or three (3) months.

As an example, a multiemployer plan provides that coverage will begin on the first day of the second benefit quarter following completion of 300 hours of covered employment in a quarter. For example, work performed in January – February – March of at least 300 hours will earn coverage in July – August – September. The first quarter is the measurement period, the second quarter is the lag period and the third quarter is the coverage period. This would be permissible under the 90-day rule as long as 90 days equals three (3) months.

Equating 90 days to three (3) months would add significant administrative flexibility for plan sponsors, without compromising the purposes behind the waiting period limitation.

2. The 90-day rule applies only to initial eligibility to enroll in the plan. If the participant loses eligibility for coverage after having gained initial eligibility, due to failure to meet the continuing eligibility requirements, the 90-day rule would not apply.

As an example, the same plan has a rule that once the participant satisfies the initial eligibility requirement to maintain eligibility he or she must continue to work a minimum number of hours in covered employment during subsequent quarters. If the participant is credited with at least 300 hours in the work quarter, e.g., January through March, he or she will continue to be eligible in the benefit quarter, e.g., July through September. The plan satisfies the 90-day rule due to its initial eligibility requirement, and the continuing eligibility rule would not be affected by the 90-day rule.

3. Plans that have a measurement period of up to 12 months for variable hour employees may have a waiting period that begins after the measurement period, as long as the waiting period is no longer than 90 days or three (3) months. Consequently, the 13-month rule should be revised to a 15-month rule.

As an example, a multiemployer plan provides coverage to participants for a calendar year if he/she works at least 1,000 hours in the previous plan year, and files an application to receive benefit coverage. The plan year is October 1 – September 30. For example, 1,000 hours of work performed in the October 1 – September 30 plan year earns coverage in the subsequent calendar year. The plan should be able to satisfy the 90-day rule because it has a waiting period of 90 days or three months (October – December).

4. Plans that provide benefits to part-time employees may use a measurement period that is longer than 12 months.

For example, a multiemployer plan provides coverage to part-time employees who work 800 hours per year in each of four years. These participants would be eligible for coverage in the fifth year. This provision should be permissible as long as the coverage begins on the 91st day after the end of the fourth year.

Providing such additional flexibility will provide greater incentives to cover part-time employees and will help overcome the disincentives the Affordable Care Act contains with respect to covering part-time employees. In particular, because the pay or play penalty is based solely on full-time employees, the penalties do not provide an incentive for coverage of part-time workers.

5. Provide an administrative rule that permits multiemployer plans to use a measurement period that begins with the beginning of the period for which contributions are received

For multiemployer plans, the “start date” of an employee is often not known, because the multiemployer plan has no employer/employee relationship with the individual, and does not hire the individual. Multiemployer plans find out an individual has been hired in covered employment when the contributing employer informs the plan of the employee’s work and sends in the contributions for that work required by the collective bargaining agreement. The relevant period for purposes of the plan is the period for which contributions are made. Consequently, for multiemployer plans, an administrative rule is necessary which allows the multiemployer plan to use the beginning of the period for which contributions are received as the “start date” for purposes of administering the 90-day rule.

6. Clarify that the previous HIPAA definitions related to multiemployer plans and waiting periods do not apply for purposes of the 90-day rule

Existing regulations under HIPAA (54 CFR §54.9801-3(a)(3)(iv); 29 CFR §2590.701- 3(a)(3)(iv); and 45 CFR §146.111(a)(3)(iv), example 5), define the time period during which work is measured as a "waiting period" for multiemployer plans. The proposed rules does not appear consistent with the existing regulations. We understand that the Departments will be reviewing pre-existing guidance in light of the Affordable Care Act and related guidance in order to determine the extent to which preexisting guidance is no longer applicable. As part of this review, we suggest that the Departments clarify that the existing regulations are not applicable for purposes of determining compliance with Section 2708.

We are available to expand upon and clarify any of the points described above at your convenience by phone or e-mail at the address captioned in our letterhead.

Respectfully submitted,

Randy G. DeFrehn
Executive Director