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Internal Revenue Service
Room 5203, POB 7604
Ben Franklin Station
Washington, DC 20044

Submitted Electronically:  http://www.regulations.gov

Re: Shared Responsibility for Employers Regarding Health Coverage, Proposed Rule

These comments are submitted to the Department of Treasury (Treasury) and the Internal Revenue Service (IRS), pursuant to Section 4980H ($4980H) Shared Responsibility for Employers Regarding Health Coverage, Proposed Rule (Proposed Rule); published in the Federal Register on January 2, 2013, on behalf of the Small Business Coalition for Affordable Healthcare (the Coalition).

Representing more than 150 of the country’s largest, oldest, and most respected small business associations, the Coalition has spent more than a decade working to increase access to and affordability of private health insurance. The Coalition’s membership is diverse and includes small business organizations in the agricultural, automotive, construction, food services, floral, lodging, manufacturing, wholesale, retail, rental, entertainment, and housewares communities. As part of the nation’s leading small business coalition, our members actively participated in the healthcare debate and advocated for solutions that would promote choice, enhance competition for private insurance, and increase the overall affordability of health insurance for our country’s job creators: America’s small businesses. The Coalition continues to engage in the regulatory process on provisions within the Patient Protection and Affordable Care Act (PPACA) that impact small businesses.

General Comment

The Coalition appreciates the opportunity to comment on the Proposed Rule. The importance of Internal Revenue Code §4980H to the small and independent business community cannot be overstated. Section 4980H is the driver of the highest cost compliance obligation and will be the highest cost assessment exposure most businesses have ever faced or are ever likely to face in the future. It is far from clear that every employer can pass 100% of these increased costs on to
customers, or can absorb any portion that cannot be passed on. To put the matter in plain terms, §4980H likely will result in the closure of an as yet unknown percentage of businesses in the United States. The Coalition sincerely hopes that Treasury and the IRS share the Coalition’s goal of reducing that percentage to zero, or at least as close to zero as possible. Alternatively, §4980H may also lead to an acceleration of the erosion of employer-sponsored health insurance coverage. Employer-sponsored health insurance is fundamental to achieving the PPACA’s goals of expanding coverage. Any interpretation of §4980H that results in any employer’s closing its doors for the last time or dropping employer-sponsored health insurance coverage is a loss for employers, employees, and Federal taxpayers.

The Coalition believes the primary Executive Branch Departments (Departments) with regulatory jurisdiction over PPACA must clarify and align regulatory interpretations so employers do not face increased exposure to penalties that may result in further compliance costs, penalties, or loss of health insurance coverage. After the Supreme Court’s decision to make Medicaid expansion optional for States, the Treasury and the IRS interpreted that new populations will have access to cost-sharing subsidies and tax credits through the Exchanges. In the Preamble of the Proposed Rule regarding Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage issued on January 30, 2013, Treasury and IRS wrote, “an applicable taxpayer is a taxpayer whose household income for the taxable year is between 100 percent and 400 percent of the Federal poverty line for the taxpayer's family size.”¹ The population between 100 percent and 133 percent of the Federal poverty line may now have access to health insurance subsidies.

Additionally, this newly subsidy-eligible population may not be subject to individual mandate penalties. Shortly thereafter, on February 1, 2013, the Department of Health and Human Services (HHS) issued a Proposed Rule on Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions. The Preamble of that Proposed Rule relating to Exchange functions said,

We propose to add paragraph (g)(4) to specify that the Exchange provide an exemption for hardship for a calendar year for an individual who has been determined ineligible for Medicaid for one or more months during the benefit year solely as a result of a State not implementing section 2001(a) of the Affordable Care Act. We provide an exemption for hardship in this circumstance to address situations in which a state’s decision regarding the Medicaid expansion included in the Affordable Care Act results in an individual being ineligible for Medicaid. We believe that this determination is an appropriate use of the hardship exemption given that the Affordable Care Act anticipates that Medicaid will be available to such individuals. With this situation noted, we believe that many such individuals could also receive exemptions based on the standards specified in paragraph (g)(2) of this section (the inability to afford coverage), or section 5000A(e)(2) of the Code (income below filing threshold), and so propose this paragraph to ensure that any such individuals remaining are not liable for a shared responsibility payment regardless of a state's decision with respect to the Medicaid expansion under the Affordable Care Act. We seek comment on whether this exemption

should be limited to such individuals who are also not eligible for advance payments of the premium tax credit (that is, with projected annual household income below the poverty threshold).\(^2\)

A decision to make an advance payment of a premium tax credit can trigger the demand on an employee for immediate payment of an assessable amount under §4980H(a) or (b), even if that decision is incorrect. Judging from the foregoing quotation, however, it appears that the Departments have not given sufficient thought to be able to propose a parallel rule for the protection of employers from potentially ruinous exactions made because of decisions to make advance payments on behalf of individuals who are extremely likely to be exempt from the requirements of §5000A of the Code. Employers should be afforded the same protection from shared responsibility penalties in States where Medicaid eligibility is not expanded.

If the facts known during 2014 are sufficient to predict with reasonable certainty that an individual will qualify for an exemption under §5000A(e), it is irrational not to issue a determination to that effect on which an employer can rely. This is especially so in the case of the assessable amount described in §4980H(a), where the amount bears no relationship at all to the number of full-time employees adversely affected by a failure to offer coverage. The assessable payment under §4980H(a) can be so large that as a practical matter the employer will not survive to sue for a refund after paying the assessment.

**Counting hours of service for employees who work on a commission basis.**

One topic on which the Proposed Rule specifically requested comment involves rules for counting hours of service and applying equivalencies in the case of employees who are compensated on the basis of commissions. The Preamble noted in particular that:

\[\text{[a]}\] number of commenters requested special rules for employees whose compensation is not based primarily on hours and employees whose active work hours may be subject to safety-related regulatory limits (for example, salespeople compensated on a commission basis or airline pilots whose flying hours are subject to limits). Generally, the commenters suggest determining whether such employees are full-time employees for purposes of section 4980H by using hourly standards that, for the relevant industries or occupations, would be equivalent to the 30-hour and 130-hour standards applicable to other employees. . .

The Treasury Department and the IRS are continuing to consider, and invite further comment on, how best to determine the full-time status of employees in the circumstances described in the preceding paragraph and in other circumstances that may present similar difficulties in determining hours of service. Further guidance to address potentially common challenges arising in determining hours of service for certain categories of employees may be provided

in the final regulations, or through Revenue Procedures, or other forms of subregulatory guidance (emphasis added).³

The Coalition’s concerns on this topic stem from the potential breadth of the phrase “employees whose compensation is not based primarily on hours.” This phrase could be interpreted broadly to include sales persons who are paid by the hour but also receive commission income, or even wait staff in a restaurant whose compensation is hourly based but includes tip income.

The Coalition urges Treasury and the IRS not to devise special rules for determining whether an individual has worked a given number of hours of service if the individual’s compensation is based on hours, even if the individual’s hours-based compensation is supplemented by commissions or other forms of non-hourly-based remuneration. There are several reasons not to venture into any special rules for such employees.

First, Code § 4980H(c)(4)(B) provides, “The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.” This delegation is broad enough to permit promulgating rules for determining the hours of service of employees whose compensation is 100% independent of hours worked. However, according to its literal language, Code § 4980H(c)(4)(B) is not broad enough to permit regulations that vary or depart from “regulations, rules, and guidance as may be necessary to determine the hours of service of an employee” who is compensated on an hourly basis.⁴

Second, it is easy for everyone to whom the Proposed Regulations might apply to reach an agreement based on objective, unambiguous facts as to which employees are not compensated on an hourly basis to any degree and which are compensated at least to some degree on an hourly basis. There is no test or objective method for determining whether “[an employee’s] compensation is not based primarily on hours” (emphasis added).⁵ For this reason, a special rule for employees whose hours are known will create a basis for disputes that could have been avoided easily and that do not advance any statutory goal.

Even using a “greater than 50% standard” to decide whether an individual’s compensation “is not based primarily on hours” would not be an objective test. To the contrary, a “greater than 50% standard” would beg the questions, “Over what period of time?” and “Calculated on a cash or an accrued basis?”

⁴ The Coalition acknowledges that the Secretary is authorized to issue regulations delineating what part of an employee’s hours of service is taken into account for purposes of determining whether an employee “is employed on average 30 or more hours of service per week.” See Code § 4980H(c)(4)(A). However, this grant of authority is best interpreted to authorize regulations that scale down raw hours of service data into actual hours of service “employed,” i.e., to identifying the portion of the unadjusted hours of service actually spent rendering personal services at the employer’s direction. Moreover, as noted, this authority to scale raw hours of service data to fit within the statutory definition derives from the Secretary’s power to issue regulations interpreting the term “employed . . . 30 hours of service,” as that phrase is used in Code § 4980H(c)(4)(A), not from the requirement to issue specified guidance found in Code § 4980H(c)(4)(B).
⁵ 78 Fed. Reg. at 225
To begin with the first question, it is obvious that a variety of measuring periods might be selected for determining whether an employee’s compensation is based at least 50% on hours worked. However, some of the measuring periods that are possible in theory would require too great an administrative burden for small and independent business. For example, using a week or even a month as the measuring period for determining whether 50% or more of an employee’s compensation was attributable to hourly wages would place a devastating administrative burden on employers. Perhaps of the greatest importance here, there is absolutely no intelligible standard by which to choose from among various alternatives for defining the period of time over which the “greater than 50% standard” might be applied. None of the possibilities has a statutory basis.

Even if there were a lawful way to choose the measuring period for the “50% or more” determination, Treasury then would be required to make another regulatory choice without any statutory standard to invoke in favor of one option over another. As of what date would the sales person be credited with a commission for purposes of determining whether “50% or more” of his or her compensation was based on hourly wages? In the real world, this question allows for a multitude of answers. For example, an employee engaged in the sale of a service or the provision of a periodically delivered commodity may have completed in one payroll period every step required of the employee to become entitled to a stream of commission payments for as long as the subscription or service is renewed. By contrast, employees who become entitled to a commission based on the sale of individual goods typically receive their commission in a single payment. However, even in the case of the sale of an individual item of goods, the employee may be paid a commission on one of a variety of dates: after the customer payment has cleared; after the return period expires; or following some other landmark. As a practical matter, the Coalition believes that the type of guidance evidently contemplated would require the arbitrary application of generalized rules to various circumstances that should not be treated identically from the viewpoint of their economic substance.

The use of prior employees’ hours of service to determine the hours of service of current employees and other bases for determining an individual’s status as a full-time employee taking into account factors other than those relating to the individual employee whose status is to be determined.

One good feature of the Proposed Regulations, from the perspective of the small business community, is that they “do not contain special rules for high-turnover positions,” which had been the subject of one request for comments in Notice 2012-58. The Preamble to the Proposed Regulations explained one of the bases for not including any such rules. Comments submitted in response to Notice 2012-58 noted that “‘high-turnover’ is a category that would require a complex definition (for example, how to define classes of employees and how much turnover of employment would be required over what period) and that could be subject to manipulation.”

The Coalition was one source of comments to this effect. In comments submitted in response to Notice 2012-58, the Coalition noted that there were serious objections to creating special rules for employees “hired into high turnover positions.”

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Creating such rules presupposes an ability to determine what constitutes a “high turnover position[,]” . . . which . . . presupposes that a position’s status as “high turnover” can and will be determined either with respect to the experience of a particular employer or with respect to the aggregate experience of an industry or line of business. Either approach is problematic. The former could expose employers to liability or enhanced duties based on the vagaries of spats with a co-worker, wanderlust, a disabling accident while off the job, “greener pastures” syndrome, a family member’s desire to move to a new locale, simple ennui, or other random causes of employee migration over which an employer has no control. . . . At some indefinable point, it would become irrational to expose some employers to liability or enhanced duties under Section 4980H based on a run of bad luck in employee retention.7

Using the aggregate experience of an industry or line of business to define a “high turnover” position is at least equally unappealing. In order to use this approach, it would be necessary to adopt a fairly elaborate set of uniform criteria for job titles. In some businesses, particularly start-ups and high tech companies, there are no job titles (or the job titles are more whimsical than descriptive). Moreover, no uniform set of criteria based on job titles that is small enough to be useful can avoid creating the circumstances in which apples will be compared with oranges.

This is problem is particularly troublesome for small and independent businesses, because job titles do not always translate well between the world of small and independent business and the world of very large employers. . . . [T]he realities of a small and independent business environment frequently require a great degree of multi-tasking and shifting responsibilities over time. . . . [A high] degree of overlapping responsibilities is not remotely unusual in smaller firms, and it is incapable of being captured by any approach to systematizing job titles. . . .

Even if all the practical and other barriers to the type of regulations contemplated by Section V(1) could be overcome, there is no need for any special rule for individuals “hired into high turnover positions.” The purpose of Section 4980H is to promote the ability of certain working individual to obtain minimum essential coverage, which by its very nature has value to a covered person as an individual. Attaching special rules to job categories is not related to this purpose. Moreover, all newly hired employees have something in common with each other that cuts across all job titles or categories, and that far outweighs any differences in the relative staying power of their predecessors: each of them is capable of remaining employed through and beyond the initial measuring period used to determine his or her full-time status. To regulate in defiance of this fact by attaching special

7 While the Preamble to the proposed Section 4980H regulations characterizes observations of this kind as pointing out that a definition of “high turn-over employee” could be “subject to manipulation,” the Coalition believes it is better to be specific about the nature of the manipulation. Certain definitions of the phrase “high turn-over employee” would result in irrational outcomes, calling into question whether their application satisfies the requirements of due process.
rules to job titles rather than applying a set of uniform rules to individuals amounts to treating working people as mere interchangeable parts.

The Coalition adheres to those comments. Thus, the Coalition was somewhat alarmed to see that the Preamble to the Proposed Regulations invites further comment directed at the reasons for rejecting the adoption of special rules for high-turnover positions. This sense of alarm was heightened by the following statement in the Preamble:

In determining whether a new employee is reasonably expected to work 30+ hours of service per week, Treasury and the Service are still considering whether it is appropriate or useful to take into account the following factors: (1) whether the employee is replacing an employee who is a full-time employee; and (2) whether the hours of service of ongoing employees in the same or comparable positions actually vary.

The Proposed Regulations already provide a workable method for determining the full-time employee status of variable hour employees and seasonal employees. Primarily, the proposed rules allow for an optional look-back measurement period for each new employee who satisfies the definition of a variable hour employee or is a seasonal employee on his or her start date as defined in the Proposed Regulations. Once that period is established, the full-time employee status of the individual involves an evaluation of known facts regarding the individual’s prospects determined for each such employee at precisely the same point in the employment cycle and based on factors most relevant to that employee’s prospects. Thus, adding factors into the mix such as those mentioned in the quoted portion of the Preamble would detract from the immediacy, simplicity, and uniformity of the method used to apply an initial determination period to these categories of newly hired employees.

To illustrate the complexity of applying these factors, consider the circumstances in which Employee A is hired to perform the duties currently performed by Employee B. On Employee B’s date of termination, he or she is employed fewer than 30 hours per week on average per calendar month. However, Employee B is treated as a “full-time employee” during a stability period that includes his or her date of termination. On Employee A’s start date, it cannot be determined that Employee A will be employed 30 or more hours of service per week on average over any calendar month in the future. Under the Proposed Rule, it is clear beyond any possibility of ambiguity that Employee A is a variable hour employee. No statutory purpose is served by abandoning a workable rule that yields an objectively verifiable conclusion in order to consider whether Employee A is “replacing an employee who is a full-time employee.”

It would be even less practical to decide the status of a new hire by taking into account whether “the hours of service of ongoing employees in the same or comparable positions actually vary.” When a business is small, it is far less likely to have any ongoing employees “in the same . . . positions,” regardless of commonly-used job titles. Thus, deciding whether an ongoing employee is in a “comparable position” to the position into which a new employee has been hired will necessarily be arbitrary. Moreover, given the way many small and independent businesses grow, it would not be uncommon for 45 person hours per week to be devoted to a given function (for example), which easily can mean that the work of an actual full-time
employee is supplemented with “as needed” help from an employee who clearly meets the
definition of a variable hour employee under the Proposed Regulations. In these circumstances,
concluding that a new hire for what might be called the “junior position” is a variable hour
employee is not shown to be a subterfuge simply by showing that the person in the senior
position is employed 30 or more hours of service per week on average.

Accordingly, the Coalition encourages Treasury and the IRS to stay with the approach reflected
in the Proposed Regulations for determining the full-time status of newly-hired variable hour
employees and seasonal employees.

**Definition of “Seasonal Employee.”**

The Proposed Regulations reserve the definition of “Seasonal Employee.” The Preamble to the
Proposed Regulations reiterate that, as provided in IRS Notice 2012-58, until further guidance is
issued, employers will be permitted to use a reasonable, good faith interpretation of the term
“seasonal employee.” The Preamble goes on to say that it is not a reasonable, good faith
interpretation of the rules to treat an employee of an educational organization as a seasonal
employee if they work during the active portions of the academic year. The Proposed
Regulations also note that the final regulations might include a specific time limit (in the form of
a defined period) in the definition of seasonal employee. Treasury and the IRS have requested
further comments regarding the definition of seasonal employee, including whether other legal
definitions of seasonal employee should be considered in defining the term under the final
regulations.

The term “seasonal employee” should be defined broadly and neutrally so that it applies to any
employee whose period of employment is less than one full year and is related to any cycle that
in the ordinary course recurs annually for the employer during roughly the same period of the
calendar year. Defining “seasonal employee” by linking its application to time periods
determined by identified holidays is not neutral, for the obvious reason that within a diverse
country like the United States, there are a multitude of holidays affecting various sectors of the
economy (retail, travel and lodging, manufacturing, etc.). There also are secularly-determined
seasons (for example, “primary season”) that increase the need for employees in some sectors of
the economy (for example, public opinion research). There are seasons that are loosely associated
with various times of the year, such as golf season, when labor demands increase for employers
that serve their customers’ outdoor recreational interests. Finally, there also are seasons in what
might be called the meteorological or climatic sense, and there are more than four of these (for
example, separate horticultural and agricultural “planting seasons” in addition to spring, summer,
fall and winter). Thus, the term “seasonal employee” should be treated as a term of art that is
decoupled from the various meanings of the word “season” in everyday language.

Although it may be less obvious, placing an artificial limit on the duration of seasonal
employment also can compromise the goal of neutrality. For example, the period over which
additional labor is needed at a resort featuring outdoor recreational activities is longer in South
Carolina than it is in Idaho. Any rule that artificially limits the period to a number of days or
months less than the maximum some employers in the same industry require effectively creates a
differential burden on employers based on a consideration completely unrelated to the Act, namely their geographic location.

The definition recommended here avoids these shortcomings. For this reason, the Coalition urges Treasury and the IRS to define “seasonal employee” for purposes of Code Section 4980H to refer to any employee whose period of employment is reasonably expected on his or her start date to be less than one full year in duration and whose anticipated period of employment is related to any cycle that in the ordinary course recurs annually for the employer during roughly the same period of each calendar year.

**Whether the special averaging rules during all unpaid leave that apply to educational institutions under the Proposed Regulations should apply to all employers.**

The Proposed Regulations provide significant guidance regarding crediting of hours when a continuing employee resumes service after an absence. In such cases, the same measurement and stability periods will continue to apply that would have applied had the employee not experienced a break in service. The Proposed Regulations further provide for a method of averaging an employee’s hours when calculating hours for the purpose of a measurement period that includes special unpaid leave (such as FMLA or USERRA leave). In such cases, the employer determines the average hours of service per week for the employee during the measurement period (excluding the special unpaid leave period), and uses that average as the average for the entire measurement period. In the alternative, an employer may treat employees as credited with hours of service for a special unpaid leave period at a rate that equals the employee’s average weekly rate of hours of service during the portion of the measurement period that was not special unpaid leave.

The Proposed Regulations further provide that educational organizations must apply one of the methods described above to any employment break periods that are related to or arise out of non-working weeks or months under the academic calendar. The educational organization is required to determine an employee’s average hours of service per week during the measurement period (but excluding the employment break period). This average is then used as the average for the entire measurement period. In the alternative, the educational organization can treat an employee as credited with hours of service for the employment break period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the week in the measurement period that are not part of an employment break period.

However, notably, and unlike the rules described in the above paragraph, an educational organization is not required to credit an employee with more than 501 hours of service for any employment break period. This rule does not, however, apply to the crediting of hours of service for special unpaid leave. The Treasury Department and IRS are considering applying this rule to all employers, rather than only educational organizations, to be effective no earlier than 2015.

The Coalition believes the issues that can arise in the context of academic employment are neither universal nor analogous to other fields of endeavor. Most academic employment involves the performance of duties throughout the calendar year (creating grant proposals; teaching course for alumni or other visitors; scholarship; and discharging departmental duties
such as recruitment are a few examples that come to mind). The special rules for academic employees in the Proposed Regulations address the limited situation typical of adjunct faculty. The Coalition has no reason to doubt that it can be difficult in a particular case to determine whether an adjunct faculty member has spent a number of hours of preparation time that can be expressed as a multiple of classroom time and/or credit hours for the course involved. If the adjunct is hired to teach a basic course (for example, Introductory Calculus) that is a staple of every university curriculum, there is a reasonable chance that the adjunct has taught the course before, and the need to recognize “prep time” as working time is reduced accordingly.

Be this as it may, there is no analogue outside academia to the notion of granting hours of service for time spent acquiring and/or honing the skills necessary to execute certain job duties. For example, no one treats a chef’s attending culinary school as “hours of service” spent working for his or her employer. If a repair technician claimed to be owed hours of service from his or her employer because of “practicing” by damaging and then repairing devices in his or her home, that claim would be rejected. For these reasons, the Coalition would be opposed to extending the unique rules proposed for academic employment to other fields of endeavor.

**Whether special rules should be adopted regarding offers of enrollment opportunities with respect to “short term employees,” i.e. individuals expected to be employed as full-time employees but for a period only slightly longer than three months.**

The Preamble to the Proposed Regulations notes that the employer shared responsibility provisions will not apply to full-time employees who are hired for three months or less, because, so long as an employer was otherwise offering coverage, penalties would not be assessed for any employee that was not offered coverage during the initial three months of employment.

The Preamble acknowledges that issues may exist for short-term employment that exceeds three months. According to the Preamble, Treasury and the IRS acknowledge such issues, but they are concerned that any accommodation of such issues might result in abuses that outweigh the problems employers may encounter in offering short-term employees health coverage for a period that is likely to be no longer than five months. The Preamble asks for further comments regarding offers of enrollment opportunities with respect to these short-term employees.

The Coalition cannot endorse Treasury’s and the Service’s suspicions regarding “abuses” resulting from employers’ applications of regulatory details. Nonetheless, the Coalition agrees with the conclusion that no special rule should govern the obligation to offer an enrollment opportunity to short-term employees.

As noted in the Coalition’s comments in response to Notice 2012-58, it would be very rare in the world of small and independent business for an individual to have a specified date of termination at the time he or she is first hired. Thus, the concept of a “short term employee” has no place in the real world environment for small and independent business. It follows that an employer of the kind represented by the Coalition is unlikely to benefit from a rule that relieves employers of a duty to offer coverage to an individual initially determined to be a full-time employee no later than ninety day after of hire. Thus, the Coalition urges Treasury and the Service to avoid creating any special rule governing the enrollment opportunity of “short term employees.”
Respectfully submitted,

American Supply Association
American Wholesale Marketers Association
Automotive Aftermarket Industry Association
National Association of Wholesalers-Distributors
National Club Association
National Federation of Independent Business
National Roofing Contractors Association
National School Supply & Equipment Association
Small Business & Entrepreneurship Council
Tire Industry Association