



**National  
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*Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow*

December 13, 2011

*Submitted via e-mail: Notice.comments@irsounsel.treas.gov*

The Honorable Douglas H. Shulman  
Commissioner of Internal Revenue  
CC:PA:LPD:RU (Notice 2011-73)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**Re: Notice 2011-73 – Request for Comments on Health Coverage Affordability  
Safe Harbor for Employers (Section 4980H)**

Dear Commissioner Shulman:

The National Business Group on Health is pleased to respond to the Internal Revenue Service's request for comments on the proposed health coverage affordability safe harbor for employers under section 4980H of the Internal Revenue Code (Code).

The National Business Group on Health represents approximately 337 members, mostly large employers, including 67 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 55 million American employees, retirees, and their families. Our members employ and provide health benefits for employees under a wide variety of work arrangements, including full-time, part-time, seasonal, and temporary. In addition, our members often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business.

The National Business Group on Health and our members appreciate and applaud the IRS's proposal for an affordability safe harbor. The safe harbor will provide greater certainty and make it easier for employers to assure that the coverage they voluntarily provide to employees meets the government's affordability criteria and minimizes penalties under the "shared responsibility" provisions of the Affordable Care Act.

As our members prepare for implementation of § 4980H and other new Code provisions under the Affordable Care Act, a primary concern will be minimizing the administrative and cost burdens associated with these requirements. Allowing plan sponsors flexibility

to adapt their Affordable Care Act compliance procedures to existing payroll and reporting arrangements will reduce these burdens and allow plan sponsors to devote more resources toward maintaining and improving health benefits for their employees. Therefore, the National Business Group on Health welcomes the Service's efforts to develop a workable and practical method for determining the affordability of an employer's coverage for § 4980H purposes. **The National Business Group on Health also supports:**

- (1) **Allowing employers flexibility to coordinate safe harbor affordability determinations with existing plan and payroll arrangements and**
- (2) **Allowing employers to coordinate affordability safe harbor determinations with look-back/stability period safe harbor determinations.**

We provide further discussion of these recommendations and responses to the Service's specific requests for comments below.

The National Business Group on Health supports the Service's proposal of an affordability safe harbor for employers under § 4980H, as described in Notice 2011-73. This safe harbor would simplify the process of determining whether coverage is affordable for § 4980H(b) purposes and make assessable payments more predictable for plan sponsors. However, our members have some specific concerns regarding implementation of the safe harbor for which we offer the following recommendations:

**A. *Regulations should clarify that plan sponsors can make prospective safe harbor determinations that coincide with the fiscal year or plan year.***

Notice 2011-73 states that application of the safe harbor for a given year "would be determined after the end of the calendar year and on an employee-by-employee basis, taking into account the W-2 wages and the employee contribution." Notice 2011-73 also states that employers also could use the safe harbor prospectively. However, the notice does not state how plans' yearly affordability safe harbor determinations will be used to determine monthly assessable payments required under § 4980H. As noted above, managing compliance costs is a significant concern for our members. Therefore, it is likely that many will avail themselves of the option to make affordability determinations prospectively with the aim of determining the amount of assessable payments due, if any, prospectively as well.

Furthermore, many of our members will face significant administrative and cost burdens if they are required to track, on a per-participant basis, (a) changes in employment status (such as wage or full-time or part-time status) that occur during the plan year, particularly if the plan year is not the calendar year, or (b) changes in plan contributions associated with status changes (such as switching from employee-only to family coverage due to a qualifying event or working for multiple related employers in a single calendar year). Currently, many employers' recordkeeping and payroll systems are not designed to track

such cost changes on an individual basis, and we believe that modifying these systems would involve substantial costs.

**For the reasons described above, the National Business Group on Health recommends:**

- **That implementing regulations provide additional guidance on the method for making prospective affordability safe harbor determinations and how such determinations will affect liability for assessable payments.**
- **That regulations allow a “look-back/stability period” similar to that described in Notice 2011-36 that will allow employers to use the prior year’s wage levels for purposes of affordability safe harbor and assessable payment determinations for the following plan year. Having the affordability safe harbor coincide with the fiscal or plan year would maximize efficiency when determining affordability and liability for assessable payments. Therefore, we recommend that regulations implementing the safe harbor allow a 12-month stability period that coincides with a fiscal year or plan year.**
- **That final regulations limit the number of affordability safe harbor and assessable payment redeterminations that employers must perform during the plan year, e.g., by limiting redeterminations to those involving at least a 10% increase or decrease in wage or contribution levels.**

***B. The safe harbor should allow plan sponsors to use the same periods for purposes of the affordability safe harbor and the look-back/stability safe harbor for determining full-time status described in Notice 2011-36.***

As discussed above, we believe that allowing affordability safe harbor determinations that coincide with the fiscal year or plan year would maximize efficiency for both employers and employees. Allowing employers to perform affordability safe harbor determinations and look-back/stability safe harbor determinations for full-time/part-time status at the same time would also minimize administrative and cost burdens. Therefore, we recommend that the Service allow employers to use the same time periods (from 3 to 12 months) when making determinations for the affordability safe harbor and the look-back stability safe harbor for full-time status.

***C. The safe harbor should allow plan sponsors to use different stability periods for different groups of employees.***

Although we anticipate that many employers will find it most efficient to use a single stability period for all employees, the Service should take into account that large employers often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business. In addition, large employers often allow acquired entities to maintain their existing work and benefit arrangements to

minimize disruption for employees who work for the acquired entity. For such an employer, implementing a single measurement/stability period for all lines of business may necessitate changes to existing work and benefit arrangements, which could be highly disruptive for employees and the employer's existing administrative and recordkeeping processes. Therefore, the affordability safe harbor (and the look-back/stability safe harbor described in Notice 2011-36) should allow employers use different stability periods for different groups of employees when appropriate for their business needs.

**D. *Generally, the affordability safe harbor should allow employers flexibility to adapt to the needs of their businesses and employees.***

Because the affordability safe harbor may involve substantial plan recordkeeping and other administrative requirements, we anticipate that employers will strive to maintain employees' status (for affordability purposes) for longer periods. However, plan sponsors' business needs and employee populations can vary widely and change over time, and the safe harbor should allow sufficient flexibility to accommodate these changes. **Therefore, the National Business Group on Health recommends that the safe harbor:**

- **Permit a plan sponsor to change a stability period mid-plan year if necessary for business purposes;**
- **Permit a plan sponsor to apply the affordability safe harbor to new employees who have not been employed for an entire year based on a reasonable estimate of W-2 wages for the year; and**
- **Permit a plan sponsor to perform affordability determinations on the date of hire, first date of the calendar month, or first date of the pay period based on a reasonable estimate of W-2 wages.**

Thank you for considering our comments and recommendations on the proposed affordability safe harbor for employers under Code § 4980H. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,



Helen Darling  
President