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THE TREASURY DEPARTMENT'S FINAL EMPLOYER MANDATE AND EMPLOYER REPORTING REQUIREMENTS REGULATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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TREASURY DEPARTMENT'S FINAL EMPLOYER MANDATE AND EMPLOYER REPORTING REQUIREMENTS REGULATIONS

TUESDAY, APRIL 8, 2014

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON HEALTH,
Washington, DC.

The subcommittee met, pursuant to call, at 2:00 p.m., in Room B–318, Rayburn House Office Building, the Honorable Kevin Brady [chairman of the subcommittee] presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON HEALTH

FOR IMMEDIATE RELEASE
April 1, 2014
No. HL–10

CONTACT: (202) 225–3625

Chairman Brady Announces Hearing on the Treasury Department's Final Employer Mandate and Employer Reporting Requirements Regulations

House Ways and Means Health Subcommittee Chairman Kevin Brady (R–TX) today announced that the Subcommittee on Health will hold a hearing on the implications of the recently released final regulations implementing the employer mandate and employer information reporting requirement provisions of the Affordable Care Act. This hearing will allow the Subcommittee to hear directly from the U.S. Department of the Treasury (Treasury) about how the Administration reached decisions to further delay the employer mandate, as well as explain the complicated reporting requirements. The Subcommittee will hear testimony from J. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy. **The hearing will take place on Tuesday, April 8, 2014, in B–318 Rayburn House Office Building, beginning at 2:00 p.m.**

In view of the limited time available to hear from the witness, oral testimony at this hearing will be from the invited witness only. However, any individual or organization not scheduled for an appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND:

In July 2013, the Obama Administration announced a delay of the Affordable Care Act's (ACA) employer reporting requirements and the enforcement of the employer mandate for 2014. The Treasury Department cited concerns about the complexity of the requirements and the need for more time to implement the provisions of the law set to impact employers in 2014.

On February 12, 2014, the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published the final regulations implementing Section 4980H of the Internal Revenue Code (Code) as added by the ACA. On March 10, 2014, Treasury published final regulations implementing Code Section 6055 and 6056, as added by the ACA.

Code Section 4980H imposes a requirement that employers with more than 50 full-time equivalent employees (FTEs) offer health coverage to their workers or pay one of two tax penalties. The statute specifies that the mandate "shall apply to months beginning after December 31, 2013."

Code Section 6055 requires employers and insurers "who provide minimum essential coverage to an individual during a calendar year shall, at such time as the Secretary may prescribe, make a return in such form as the Secretary may prescribe" that contains "the name, address and taxpayer identification number (TIN) of the primary insured and the name and TIN of each other individual obtaining coverage under the policy."

Code Section 6056 requires applicable large employers to provide, "at such time as the Secretary may prescribe" information related to the offer of coverage provided and the name and TIN for each employee offered minimum essential coverage.

These three major regulations implement the bulk of the new mandates on employers required by the ACA. The statutory provisions themselves, as well as the regulatory process of implementing the requirements, have created significant controversy and concern. These final regulations contain further targeted delays and have been criticized by employers and employer groups for adding complexity and not addressing specific concerns raised by employers throughout the regulatory process that has extended over four years.

In announcing the hearing, Chairman Brady stated, **"It is very clear now that the President's health care law, as it was written and even with the President's extensive modifications, is not working. The Administration continues to delay mandates for big business, but ignores the concerns of the hardworking Americans struggling to comply with the law's mandates and taxes. The delay for business has, however, only served to create additional complexity and concerns for business. The information reporting requirements are stunning in their breath and complexity. Employers do not understand these rules, and have serious concerns with how the Treasury Department will collect and use the data necessary to implement these onerous provisions."**

FOCUS OF THE HEARING:

The hearing will focus on the Obama Administration's delays and changes made to the statutory guidelines and deadlines concerning the employer mandate and reporting requirements.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, *http://waysandmeans.house.gov*, select "Hearings." Select the hearing for which you would like to submit, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Friday, April 18, 2014.** Finally, please note that due to the change in House mail policy, the U.S. Capitol Police will refuse sealed-package deliveries to all House Office Buildings. For questions, or if you encounter technical problems, please call (202) 225–1721 or (202) 225–3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any supplementary materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission or supplementary item not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be provided in Word format and MUST NOT exceed a total of 10 pages, including attachments. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. A supplemental sheet must accompany each submission listing the name, company, address, telephone, and fax numbers of each witness.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TDD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available on the World Wide Web at *http://www.waysandmeans.house.gov/*.

Chairman BRADY. This subcommittee will come to order. Today's hearing will examine two very important and complex regulations implementing the reporting requirements of the Affordable Care Act mandates on local businesses and workers. These regulations are long overdue. Businesses have been forced to wait 4 years since the passage of the law for the Treasury Department to finalize these rules. In the meantime, the regulatory process has set off controversy, political firestorms, and executive delays, and most importantly, this process is again raising the question of fairness.

Why is big business receiving better treatment than individual Americans? Why is it fair to enforce some of the laws but not others? And why is it fair to force some to comply while others are getting passes and delays? Another significant question that needs asking, and we will be hoping you answer today, what does any of this have to do with true health care reform? For all the problems that did exist in our health care system prior to the Affordable Care Act, the voluntary employer based system was working. 160 million Americans received coverage from their employer, the largest source of health coverage in America.

The worse part about these regulations, they do nothing to lower the cost of health care, the purported purpose of the Affordable Care Act. Instead, this law adds layers upon layers of new costs, burdens, and concerns about the privacy of government, forcing businesses to gather and report private information about workers' health care. I know workers aren't really comfortable with the IRS gathering and holding data on their personal health care insurance decisions and their family's for their lifetime. Why does the government need to know and track that? Survey after survey of companies and health benefit experts show employers believe the ACA will add to their cost, not lower them.

Unfortunately, local businesses must now keep track of such new terms as look-back period, stability, aggregation rules, and minimum value. To ensure they follow these burdensome government requirements, they will worry if their health care plan meets the Federal Government's definition of affordability. They must now develop reporting systems, invest in a new information technology system, and worry about security of personal data about their workers and their workers' families they will be required to entrust to the scandal prone IRS, and they must grapple with the reality that the information they collect and transmit to the Federal Government will be the main proof the IRS uses to enforce the wildly

unpopular mandate that workers must buy government approved health care or pay a tax against their own employees.

Our witness today is Mark Iwry, a senior advisor to the Treasury secretary and acknowledged expert on employee benefits law. I appreciate you coming back to the committee to discuss these important issues. I am confident that Mr. Iwry will be able to answer any questions about the technical detail of both regulations.

But Mr. Iwry, here is my practical concern. I believe you are the only person in America who is capable of understanding these regulations. I am confident you understand how they relate to specific employer/employee relationships and arrangements, but I seriously doubt many companies do.

I know the business owners in my district with multiple franchises, low profit margins, and high worker turnover have little idea how all this is supposed to work. I know they most likely don't have the extra money lying around to invest in the IT required to comply with the information reporting requirements.

These are complex issues, and that is why the White House delayed the mandate on companies, but a 1 year delay does not make any of this less complex, for the businesses in my district or anyone else's, so I ask, what does anything have to do—this have to do with true health care reform that lowers health care costs?

Finally, the American people still have not been given an adequate answer about questions of fairness. We understand the mandate on businesses is costly. That is why you gave big business a break. Why is it fair to not give the same break to individual Americans and their families? Many families are frightened by the Affordable Care Act; the new plans they didn't want, the higher premiums, the doctors, and hospitals they can no longer see.

They are not alone. Congressional Budget Office has stated that 8 million Americans are going to lose their health care insurance at work as a result of the Affordable Care Act. That isn't fair and it certainly isn't health care reform. These are the questions surrounding these controversial reporting regulations. We hope to gain more insight today.

Before I recognize Ranking Member Dr. McDermott for the purpose of an opening statement, I ask unanimous consent that all members' written statements be included in the record. Without objection, so ordered.

I now recognize Ranking Member Dr. McDermott for his opening statement.

Mr. MCDERMOTT. Thank you, Mr. Chairman.

Well, you heard a good deal of wringing of hands here and those gnashing teeth from the Republicans about this hearing today, about how the ACA is unworkable. Of course, this is all fantasy. It is another stunt cooked up by the Republicans to satisfy the extremist of the Koch brothers and the producers at Fox News. Let's start with some facts.

Thanks to ACA, every American now has health security because they can no longer be locked out of the market or discriminated against because of a pre-existing condition. More than seven million people have signed up for health insurance through the Federal and state based marketplaces. More than 11 million have been determined eligible for Medicaid between October and February

this year, and three million adults are now covered by their parent's coverage. These are real people, real stories, real progress, not actors, paid by extremist PAC money to appear in fraudulent GOP attack ads. Sorry, the fight has been lost for the Republicans on ACA. The law is succeeding, and all the focus here about the ACA is not going to change that. These bogus hearings like today's proceedings only delay the inevitable.

What you are hearing argued today is, the government shouldn't have given time to business to implement it. If we had gone ahead and done it, then the claim would have been we ran too fast, so it sort of like is the porridge too hot or is it too cold or is it just right. This day is coming when the Republicans will attempt to destroy the ACA by spinning and turning to fix it or be loving it to death, but today, the cries are about employer responsibility regulations, which were designed by the Treasury to help employers transition to the new ACA requirements. Certainly you ought to be able to acknowledge that truth, that the economy has improved since the ACA became the law.

We got eight million new jobs since the ACA came, and you could say it is because of ACA. I won't but some could. Today's Republican cries certainly won't acknowledge that this week's Gallup Poll confirmed that the uninsured rate in America is the lowest since 2008. This reduction to an uninsured rate of 15 percent is driven by the coverage enrollment under ObamaCare.

Declines in the uninsured rate were largest among low income and black people in this country. Instead, Republicans will surely offer up again a series of mistruths and half truths and misinformation, so be clear, the CBO has definitely stated that there is no compelling evidence that part-time employment has increased as a result of ACA. We can also be clear that the ACA eliminates job lock, empowering Americans to change jobs, to become entrepreneurs, and to leave work to take care of a child or a sick loved one.

But most importantly, Republican misinformation has nothing to do with the story of a constituent of mine named Ingrid. In 2008, she had a terrible fall in her home. She was rushed to an emergency room where she was cared for and her life was saved. Yet Ingrid was stuck with a $23,000 hospital bill, which she didn't have. She couldn't afford health insurance. A few months later she was forced to sell her home to pay off the hospital bill. Today, she is happy, healthy, and covered because of ACA. She no longer has to choose between food on her table or life-sustaining medicine. She doesn't have to make that choice. Due to the health security act, she has both.

So, before Republicans who have to plan to replace—whoever will plan to replace ACA, join the real world and inevitably drop this sad effort to kill a law that saves lives and saves money, they will stage a few more repeal votes, I am sure, on the floor. This won't be the last one, we will have hearings, because they will not give up the attempt to deny that it is the law of the land and it is working.

They will likely expend a little more elbow energy trying to throw Ingrid off and the millions others back into the cold harsh winter of no health coverage, no peace of mind, and no protection.

I can't wait for the day when we can get to work actually fixing the things in the law that need to be fixed, and that day will come as sure as I am sitting here.

I yield back the balance of my time.

Chairman BRADY. Today we will hear from Mr. Mark Iwry, senior advisor to the secretary and deputy department assistant secretary for Retirement and Health Policy, U.S. Department of Treasury. Mr. Iwry, you are recognized for 5 minutes.

Mr. IWRY. Mr. Chairman, thank you.

Ranking Member McDermott, Members of the Subcommittee, I appreciate the opportunity to testify on the recently issued final regulations regarding the employer shared responsibility provisions and the information reporting provisions of the Affordable Care Act.

The employer responsibility provisions are contained in section 4980H of the Internal Revenue Code. Final regulations under section 4980H were published in February. Excuse me. The information reporting provisions for employers and insurers are in Section 6056 and 6055 of the code, and final regulations relating to information reporting were published last month and will be used to help administer the employer and the individual shared responsibility provisions and the premium tax credits.

The final regulations provide employers with the guidance they need to comply with the employer responsibility provisions and provide flexible and practical means of doing so. Before developing the proposed regulations, Treasury issued 4 successive notices describing potential approaches to implementing the employer responsibility provisions and invited public comment on each. The comments and comments on the proposed regulations from a wide range of stakeholders were considered carefully in developing the final rules.

The rules contain various simplifications, including an optional look-back measurement period to make it easier and more practical for businesses to determine whether employees are full-time, if their hours vary between full-time and part-time, and if they are seasonal employees.

This look-back measurement period was designed based on existing employer health care practices to be helpful and administrable. The rules also provide 3 optional alternative safe harbors that make it easy for employers to determine whether the coverage they offer is affordable to employees, and the final rules provide guidance, largely prompted by comments on the proposed regulations on whether employees of certain types or in certain occupations are considered full-time, including volunteers such as volunteer firefighters and first responders, seasonal employees, and adjunct faculty.

While about 96 percent of U.S. employers are exempt from the employer shared responsibility provisions because they have fewer than 50 employees, for the 4 percent of employers to whom the provisions do apply, the rules provide a gradual phase-in which is described in my written statement.

With respect to information reporting, many of the comments received before and after issuance of the proposed regulations urged that the final rules provide streamlined ways to comply, especially

for employers offering highly affordable coverage to all or virtually all of their full-time employees, and many comments requested that the rules permit use of a single form for self-insuring employers that are reporting under both Section 6056 and 6055.

Accordingly, the final regulations were issued with a view to simplifying and streamlining the proposed reporting rules to make them as practical and workable as possible, consistent with effective implementation of the law. That includes the need to provide individuals with the information that they need to complete their tax returns accurately for purposes of the individual shared responsibility provisions and potential eligibility for the premium tax credit, and providing the IRS with the information it needs for effective and efficient tax administration.

Final rules contain several key simplifications. Employers that self-insure will have a streamlined way to report under the both employer and the insurer reporting provisions using a single consolidated form. In addition, employers that make a qualifying offer to any of their full-time employees are provided a simplified alternative to reporting monthly employee specific information on those individuals.

Together with the other agencies in the executive branch, Treasury is implementing the Affordable Care Act to provide affordable, quality, health coverage for millions of American families.

We welcome the opportunity to continue our work with the committee to achieve those objectives.

Thank you, Mr. Chairman, and I look forward to answering the committee's questions.

Chairman BRADY. Thanks, Mr. Iwry. I know you have worked very close with businesses to implement the mandate on companies and their reporting requirements. Treasury has received compliments from employers on the work on the mandate, not so much about the reportable requirements, and these employer groups you worked with most closely that are the most upset about these new reporting requirements. In other words, they aren't misinformed. They understand the rules.

The retail industry leaders association call these regulations mind boggling for businesses of all sizes. National Restaurant Association described the regulations as overwhelming, it will create a morass of confusion for restaurant operators, typical small businesses in our communities.

I assume you believe you did the very best you could, so is there a problem with the Affordable Care Act that needs to be changed to make this workable or did Treasury get the regulations wrong?

Mr. IWRY. Mr. Chairman, first of all, I would suggest that the employer reporting regulations are not excessively complex. The final regulations do provide simplified reporting methods that we expect many employers, especially when they have time to study and digest the rules, will be able to use. For example, an employer making a qualifying offer to full-time employees would be able to report in a very summary fashion. Employers that are self-insuring will be able to use a single consolidated form for the 6056 and the 6055 reporting, and for employers that don't qualify for the simple simplified reporting methods, we don't think that in fact the report-

ing rules are asking for more than is reasonably necessary to administer the statute.

At the employer level, name and address and employer I.D. number, contact person, basic information necessary to check compliance. At the employee level, generally, the individual's offer of coverage, whether they received an offer of affordable minimum value coverage from the employer, whether they took the offer, whether they enrolled in it, and if the individual is going to apply for a premium tax credit, we need to know whether the employer did make them an offer that would preclude them from eligibility for the premium tax credit.

And Mr. Chairman, since these credits are available on a monthly basis, the information reporting is monthly, but we made the greatest effort we could to simplify and to try to streamline talking to a lot of employers, employer organizations, in the process. Where it is possible not to use month-by-month reporting, we provided an option to just have one code for the whole year if the information is sufficiently uniform across the year. If it is possible to avoid detailed information such as what was the dollar amount of the offer to the employee, which the statute asks for because the employee would not be entitled to a premium tax credit if they had an offer from the employer that was affordable, that was not more than 9.5 percent of their household income.

We have looked for ways to help employers avoid having to do any work that could be avoidable, to incur any cost that might be avoidable or might be reduced. If an employer makes an offer that is sufficiently affordable to the individual, they wouldn't have to indicate what the dollar amount the individual would have had to pay is, as long as it is below an amount that would preclude the individual from being eligible for a tax credit, in any event.

We are just trying to look to the bottom line, Mr. Chairman, in order to streamline things as much as possible for the business, and that includes, of course, small as well as larger businesses.

Chairman BRADY. Mr. Iwry, I don't question your intention or the hard work you did to put these together. That is not at issue here, but I have read the simplified approach, and coming at it from a chamber of commerce background working with local businesses having filed these myself, even the simplified form approach, extremely complex, and I think burdensome and so limiting. I predict very few businesses will be able to use that approach. I just tell you that from my viewpoint.

So, a couple of quick points. You last testified before this committee on July 17th in the wake of the Treasury blog post "Delaying the Mandate on Businesses." You explain the command of the Treasury believed it had the authority under IRC 7858 to delay the employer mandate.

We asked several times in a straightforward question if that gives you the authority to delay the employer mandate, does it also give you the authority to delay the individual mandate, if that was the policy the White House chose to pursue. At the time you said we have not analyzed the question. I know we have had 9 months to look at this issue. So at this point, 9 months later, what was the result of your analysis? Do you have the authority to delay the mandate on individuals and families?

Mr. IWRY. Mr. Chairman, thank you for that question.

What we have done has been to take back the comments of the committee at that hearing, raising the question should the individual responsibility provision be the subject of transition relief as well? We had thought about that carefully before the hearing, of course, but because the committee was interested in that and raised the question again, we considered it further and concluded that there is not good reason to delay individual shared responsibility, and if I could share our thinking with you, Mr. Chairman, first of all——

Chairman BRADY. Can I ask this because I think we recognize you decided not to provide that same fairness for individuals, and I know you have a list of reasons why, but the question is, do you have the authority to delay that mandate for individuals?

Mr. IWRY. Mr. Chairman, if we don't believe that it is appropriate to be delaying that provision, if we believe that it is actually fair to individuals to keep that provision in place because it helps protect them from preexisting condition exclusions, from various aggressive practices that used to be possible in the insurance industry in the market, then we don't reach the question whether we have legal authority.

There are a lot of things that we don't think we should do. We can't be, and wouldn't be considering whether we have the same authority that we have with respect to the employer responsibility where there is good reason to have given stakeholders the additional time that they very much asked for. There is good reason there to consider whether we had authority to do what was necessary.

In the case of the individual responsibility provision, individuals who can't afford to pay that, don't have to pay it. As you know, sir, there is a hardship exemption that HHS can provide for people who can't afford it. People who can't afford the coverage but want the coverage, they can get that through premium tax credits or Medicaid, so we did not see a reason to——

Chairman BRADY. So the point being is that——

Mr. IWRY [continuing]. Provide more phase in.

Chairman BRADY [continuing]. You have chosen not to for the reasons outlined, but the question still is do you have the authority to. You didn't have the authority to extend tax credits to those outside the exchanges, you did that. So you didn't have the authority to extend the deadline for signing up, but you did that.

So a basic question again is, do you have the authority, whether you choose to use it or not, to extend the individual mandate?

Mr. IWRY. Congressman——

Chairman BRADY. In your view. Because I know 9 months ago you assured us you would analyze it and get us back that answer, so what is the answer to the question.

Mr. IWRY. Congressman, we did analyze whether there was any reason to extend the time for the individual responsibility provision, beyond the statutory phase in or extension that is provided for 2014 and for 2015, such that the provision does not apply fully until 2016.

So, on top of that statutory phase in, as you know, 1 percent of pay this year; 2 percent, 2015; 2.5 percent, these are the maximums, by 2016. So the statute has phased that in.

We don't see a reason to add administrative phase ins on top of the statutory phase in, and indeed, we do think, Mr. Chairman, sincerely that this individual shared responsibility provision makes possible the key insurance reforms which have had even bipartisan support in Congress.

Chairman BRADY. Sure. So, do you have the authority, should you choose to, to extend the individual mandate, to delay it?

Mr. IWRY. Mr. Chairman, that is a question that we don't reach because we do not believe that we have any cause to or that we should delay it, and therefore, we don't have the predicate for entering into the analysis of whether we would have legal authority.

There are so many other things that we do not believe we should do. We certainly don't reach the question in those other areas, whether we have the legal authority to do something that we believe is unnecessary.

Chairman BRADY. Have you done—since you chose not to, have you done the analysis? Maybe we will go back to when you told us you would go back and do the analysis, did you do that?

Mr. IWRY. Mr. Chairman, again, what we did was to——

Chairman BRADY. No, I recognize—the good news is you are talking to a committee that has been following your work very closely, but did you go back and do the analysis on the authority to extend it?

Mr. IWRY. We don't think we have the authority to extend something that—a provision that—where there is no need. There is no need in terms of adminstrability. Individuals can fill out their tax forms to indicate very readily whether they have paid their—whether they have coverage, and if they don't, whether they are exempt, and if they are not exempt, to make the payment. The tax forms are easy for individuals to complete in that regard. Lord knows I am not suggesting our tax system as a whole is simple or easy to navigate, but this particular task for the individual is not a difficult task.

Employers, by contrast, in complying with the employer responsibility rules, have more to deal with. They are providing the plans for all of their employees.

Chairman BRADY. So, I just want and I want to give you plenty of time to answer, so you could do it in very clear way. So your answer is you do not have the authority to extend the individual mandate because you don't see the need to?

Mr. IWRY. Well, Mr. Chairman, let me make clear. I am not one of the practicing lawyers at the Treasury Department. My role is not to do the legal analysis. I am not a policy person, but I am——

Chairman BRADY. But the analysis—and I'm not—you did do the analysis as promised?

Mr. IWRY. Mr. Chairman, I would like to go back, if I may, to the hearing record and to the transcript to make sure that I am understanding what we undertook.

Obviously, we are happy to help you and to be cooperative in your important oversight work, so if I am misunderstanding what we agreed to do in July, then that is on me, Mr. Chairman.

Chairman BRADY. But absent that—I mean, at the time they said we have not analyzed, we are going to do that.

Simple question, did you do the analysis?

Mr. IWRY. I did not do a legal analysis of the authority to extend a provision that we don't believe should be extended, and it would not be good for the American people to extend.

Chairman BRADY. If you have done the analysis, you would be glad to forward that to us? If it has been done as of this date, you would be glad to share that with the committee?

Mr. IWRY. Mr. Chairman, I will be happy to go back to my legal counsel colleagues at Treasury. We have an excellent legal team, very experienced, very knowledgeable and take this question back to them and see what they have to say and then get back to you.

Chairman BRADY. Perfect. Thanks, Mr. Iwry.

Mr. IWRY. Thank you, Mr. Chairman.

Chairman BRADY. Dr. McDermott.

Mr. MCDERMOTT. I am a little puzzled by the line of questioning. It sounds like the way you operate in Treasury, I am not a lawyer either, so I'm going to share that with you. You decide is there something we should do to make this thing work, and then you look to see if you have authority to do that. Is that a fair shortcut to the answer of what you do?

Mr. IWRY. First, Dr. McDermott, if I may just clear something up of less importance. I am a lawyer but a recovering one, if I may say, and I am not part of the legal counsel team at Treasury. I am more involved in the policy, but if you could clarify your question for me.

Mr. MCDERMOTT. The question is, Mr. Brady went at you about seven different ways like a good reporter or a good lawyer about whether or not you had done the analysis about whether you had the authority, but your answer was, over and over again, I didn't—we never got to that point because we didn't think it was something that needed to be done or even looked at. If it was something we thought need to be done, we would have then done the analysis can we do it. Is that fair?

Mr. IWRY. Mr. McDermott, I am in general agreement with the way you are approaching this. You know, the authority to provide regulations in general, under the Tax Code, including to provide transition relief on those occasions where transition relief is worth considering, is contained in the statute, section 7805(a) of the Internal Revenue Code, and the statutory language reads as follows: It says that the Secretary of the Treasury, and I quote, "shall prescribe all needful rules and regulations for the enforcement of the Tax Code, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."

In other words, rules that are necessary, including transition relief that may be called for, and the authority has been used to postpone the application, or to provide—of new legislation, to provide transition relief with respect to the effectiveness, timing of new legislation, on various occasions, across Administrations of both parties, for more than 2 decades. I am not aware of any instance where the Treasury Department provided a transition relief in a case where they believed that it was not appropriate to provide transition relief.

Mr. MCDERMOTT. I should hope not.

Mr. IWRY. And the list of examples, which is not a complete list that we provided to the committee in our testimony last year in July and then again in letters to the committee, examples of past exercises of this well established authority under 7805(a) of the Tax Code, exercises the Treasury discretion, to give transition relief, that list of instances, and again, I am sure there are more than that. That wasn't intended to be illustrative, are all instances where the Treasury concluded that there was a legitimate need for more time, that stakeholders who were affected, taxpayers who were affected by the law would be able to implement it effectively if they had more time, and in some cases, the tax system as a whole would need more time in order to——

Mr. MCDERMOTT. Let me interrupt you. My time is almost gone.

I want to enter something in the record from the National Retail Foundation, which—or Federation, which represents 42 million Americans, and their tax counsel says "the Administration"—this is a quote, "should receive a gold medal for recognizing the enormous complexities of the Affordable Care Act and its agility and flexibility in working with retailers and others in crafting these much needed common sense reforms and provisions. Continuing simplicity, streamlining, and clarification of the Affordable Care Act are in the best interest of the employers and the employees and the Administration and the Congress. The National Retail Federation will continue its constructive conversations with the Congress and the Administration itself, plus members, with compliance."

It sounds like at least one business organization, a fairly large one, thought you did a good job in working out what needed to be done, and I think that is really what is necessary for people to understand here. You are talking about 5 percent of employers are covered by this, since 95 percent have less than 50 employees, and 95 percent of those already give coverage to their employees, so we are talking about a very small number of people who apparently the chairman hears from. I don't hear from them, frankly.

Chairman BRADY. Thank you, Doctor. Without objection, the letter will be introduced.

[The information follows:]

National Retail Federation®
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Retailers Applaud Announcement on the Affordable Care Act

For Immediate Release
Stephen Schatz or Bethany Aronhalt (855) NRF-PRESS
Press@nrf.com

Retailers Applaud Announcement on the Affordable Care Act
New Regulations Will Assist Small Business Owners & Help Businesses Comply

WASHINGTON, February 10, 2014 – The National Retail Federation today issued the following statement from Vice President and Employee Benefits Policy Counsel Neil Trautwein on the Administration's announcement on the Affordable Care Act:

"The Administration should receive a gold medal for recognizing the enormous complexities of the Affordable Care Act, and its agility and flexibility in working with retailers and others in crafting these much-needed and commonsense reforms and revisions.

"Continued simplicity, streamlining and clarification of the Affordable Care Act are in the best interest of employers and employees and the Administration and Congress. The National Retail Federation will continue its constructive conversations with Congress and the Administration as it helps its members with compliance.

"The retail industry appreciates the cooperation and responsiveness of the Administration and Department of Treasury in this process."

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's This is Retail campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation. www.nrf.com.

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Chairman BRADY. The votes are occurring. I would like to ask Chairman Johnson to ask his question, and then we will recess after votes and reconvene after votes continue.

Mr. Johnson.

Mr. JOHNSON. Mr. Iwry, as you know I am chairman of the Social Security subcommittee, and one of my long-standing priorities has been to protect American Social Security numbers. This new health law requires the IRS to collect massive new amounts of personal information, including Social Security numbers, when identifying theft and privacy are growing concerns of all Americans. How many Americans will have their Social Security numbers collected, stored, and reported? All of them that are involved in health care, right?

Mr. IWRY. Mr. Chairman——

Mr. JOHNSON. Let me ask you another one if you can't answer that. Who will collect the Social Security numbers? Is it employers, insurers, or both?

Mr. IWRY. Mr. Johnson, regarding your first question, I believe that the Social Security numbers are now collected as part of the 1040 form that applies to—that is filed by tens of millions of American taxpayers. We are happy to get you the exact number. My recollection is that there are more that 100 million tax filing units, and they provide taxpayer I.D. numbers, typically Social Security numbers, currently to the IRS.

Mr. JOHNSON. Well, how are we going to protect them? You know we are losing them.

Mr. IWRY. Sir, we share very much that concern. The importance of maintaining the security and privacy of the information is a high priority. The IRS has been very vigilant about that.

Over its history, and we all, I think, recognize as you are suggesting, sir, that recent events in the private sector, for example, underscore the importance of the point you are making that privacy and security are key, but we don't think that we are taking risks with privacy and security in the case of these reporting provisions.

Mr. JOHNSON. Well, but under this law, you are giving those numbers to your employer. Now we just give them to the IRS when we file our tax return. How are you going to protect those numbers?

Mr. IWRY. Mr. Johnson, many employers do have the Social Security numbers. Typically employers have the Social Security numbers of their employees now. We recognize, though, that there is a legitimate balancing here and that, you know, we agree with your concern that privacy and security of the personal data be treated with the utmost care and seriousness. And these reporting provisions are intended to give effect to that concern, and one way that they do that, one way that they do that, sir, is that when taxpayer identification numbers are provided as part of the Affordable Care Act reporting, for the purpose of making sure that the tax system is in fact running the way it should and that people are not being charged with individual responsibility payments. When in fairness they shouldn't be because they did have coverage or that people get—in order to make sure people don't get premium tax credits that they are not entitled to under the law, the Social Security

numbers or the other taxpayer identification numbers that are collected for the purpose of making sure that the tax administration is proper and appropriate, those are provided by the employer or the reporting entity—it could be an insurance company, to the IRS—and a statement is provided to the individual, to the employee as well.

But that statement, which is the document that might otherwise present more of an issue here because it is not going through that existing safe channel from employers to the IRS, that statement will have a truncated, a truncated taxpayer I.D. number.

In other words, those are the numbers that many of us now see on our documents that have some of the digits of the Social Security number and then the rest Xed out for security so that if that statement falls into the wrong hands, the Social Security number is still secure.

Mr. JOHNSON. Well, that is not very convincing. I think it is going to be tough to assure every American that their most private information is safe from criminals because they are attacking us every day.

Thank you, Mr. Chairman.

Chairman BRADY. Thank you, Mr. Chairman.

We are short on vote time. We will recess after the votes.

[Recess.]

Chairman BRADY. Let's reconvene the hearing.

Thanks for being patient, Mr. Iwry, appreciate it very much, and the audience as well.

So, the chair recognizes Mr. Pascrell.

Mr. PASCRELL. Thank you, Mr. Chairman.

Good morning, good afternoon, and good evening. Open enrollment began October the 1st. More than 7 million Americans have enrolled in private coverage and 3 million have enrolled in Medicaid or the Children's Health Insurance Program. Yesterday, Gallop announced for the fourth straight time that the rate of uninsured Americans has declined and is now at the lowest level recorded since 2008.

Before the ACA, many people were paying for plans that didn't provide them with the coverage they need, the plans they purchased at high out-of-cost, pocket costs and artificially low caps on coverage. Americans were denied coverage for preexisting conditions, and insurance companies arbitrarily increased their premiums to the point where they couldn't afford insurance. My colleagues on the other side refuse to acknowledge any benefits that have resulted from this law.

Let me interject this. Back 9 years ago when we passed that Part D in an excruciating vote 3 o'clock, 4 o'clock in the morning. I don't know if you remember that. But at that time, if you remember what happened after it, Democrats mostly voted against it. Republicans voted it, and the reason why we passed it were your votes. Most of us had campaigned against it before the vote. And what did we do? We went back into our districts.

I remember the first three towns I went to, Clifton, Wayne, and Nutley, in my district at that time, and talked and said, look, I was against it, but this is going to be a good benefit down the road, it has got some kinks, it has got some problems, but we will work

those things out over the years. And my brother Tom Price said at the time, at the beginning of Part D rollout, most American people heard only about what was wrong with the program. Doesn't that sound familiar?

My good friend Sam Johnson I worked very closely with this year, said to CMS officials, you guys have done a super job. So, despite what had happened, automatic enrollment of dual eligibles took us into 2, 3, 4, 5 months after the passage. There were serious, serious problems.

Low income beneficiaries were not receiving the payment assistance that they were eligible. There was big confusion about those roles. States had to step in to pay for seniors' drugs. In fact, in New Jersey, they had to come up with $20.6 million because the rollout was not working.

Enrollment wasn't nearly what it needed to be, what they expected it to be. By February, late February of 2006, only 5.3 million seniors had signed up, where nearly 20 million seniors were without drug coverage.

Now, let me say this, Mr. Chairman, this hearing is simply another attempt by your colleagues to spread misinformation, chip away at the ACA, to distract from the fact that this law has already helped millions of Americans get quality affordable—you know, admit that some things are right. We have admitted that some things are wrong. Can't you bring yourselves to that so that to work together, think how many more people would be enrolled?

If the governors would have not been complicit, been cooperative, think how many more people would have been enrolled? If the governors who chose not to accept Medicaid money into their coffers of their own state to help the poor, think how many more people would have been enrolled in Medicare over the 3-and-a-half million that are enrolled since this program went into effect?

Most disappointed to see delays related to the Affordable Care Act. I appreciate Treasury's desire to make sure the employer responsibility provisions are well crafted and incorporate the feedback of the business community in other stakeholders before moving forward with implementation. From my perspective, the final rule published by Treasury in February, addresses a number of concerns that I have heard from the business community.

Mr. Iwry, can you please discuss Treasury's process for soliciting feedback from the business community and other stakeholders, and Number two, can you tell the committee what some of that feedback was and how Treasury addressed the stakeholders' concerns? That is the bottom line.

Chairman BRADY. Mr. Iwry, we have about 5 seconds left in the time allotted, so perhaps you could do it by a letter to Mr. Pascrell and the committee, would be helpful.

Mr. IWRY. Happy to do that, Mr. Chairman.

Chairman BRADY. Your time expired. Mr. Gerlach.

Mr. GERLACH. Thank you, Mr. Chairman.

I want to refer back to our colleague Mr. McDermott's opening statement, when he said that it is fantasy, pure fantasy that the Republicans contend that the ACA is unworkable. If that is the case, why did you do these delays?

Mr. IWRY. Mr. Gerlach, we do not believe that the ACA, the Affordable Care Act is unworkable. The reason we did provide transition relief in accordance with Treasury's authority to do so under the Tax Code, with respect to the employer shared responsibility provisions is that stakeholders made the case to us. Businesses——

Mr. GERLACH. That it was unworkable to them?

Mr. IWRY. Made the case to us, sir, that with more time——

Mr. GERLACH. Why did they need more time?

Mr. IWRY. With more time they would be able to better adapt their reporting systems, they——

Mr. GERLACH. So under the time frame that the law allowed, they did not have the time to conform their systems to what was being required of them; that is why they requested more time?

Mr. IWRY. Congressman, the business community started out in dialogue with us on what their top priorities would be——

Mr. GERLACH. I am just asking why did they solicit and seek more time that these delays now allow them, why did they seek more time? And you apparently, as the department, assented to that——

Mr. IWRY. Right.

Mr. GERLACH. Assented to that and you gave them more time.

Mr. IWRY. We did, sir. And the reason they sought more time, as it was explained to us on many occasions, was not generally that they thought they could not comply but that they thought it would be much more effective, it would be much less difficult if they have the time to study the rules, to digest them, to adapt their systems, whether it is for collecting information or expanding their plan to cover people.

Mr. GERLACH. Did they ever explain to you that they would have to put more manpower into complying with the regulations? Did they explain to you it would cost more money for them for information technology changes? Did they talk to you about the increased cost that they would experience for legal charges and accounting changes? Did they explain all of those items that would make it very, very difficult for them to comply with the law the way it was written?

Mr. IWRY. Congressman, starting as long as 3 years ago when we began an intensive dialogue with stakeholders, the business community as well as other stakeholders, the points were made that if the rules were not made simple and administrable enough, then they would impose costs that might otherwise be avoidable.

Mr. GERLACH. Did you ever seek then to try to independently assess what the implication, what the increased cost would be on the employer community that is affected by this employer mandate? Did you go out and do an independent study that is something similar to the American Health Policy Institute study on large employers that this ACA, over 10 years, is going to increase their cost by 151 billion to 186 billion?

Did you do any independent assessment as a department about what the increased burdening of this mandates would have on those employers of over 50?

Mr. IWRY. Congressman, throughout the Treasury's notice and comment rulemaking process——

Mr. GERLACH. Did you do a study, sir?

Mr. IWRY. We assess, do our best——

Mr. GERLACH. Sir, did you do a study, independently, to determine what the increased cost would be on those over 50 employees to determine what they would experience under these mandates? It is a very simple question.

Mr. IWRY. Congressman, we talked and listened to——

Mr. GERLACH. I know you talked and listened. You said that over and over again. Did you do an independent study? Would you please answer the question?

Mr. IWRY. Congressman, I would be happy to answer it.

Mr. GERLACH. Please do.

Mr. IWRY. I am not aware of——

Mr. GERLACH. Thank you. You are not aware of any independent study. Is that your answer?

Mr. IWRY. I am not aware of a Treasury Department study of the cost of——

Mr. GERLACH. Thank you. Why do you think that was not done?

Mr. IWRY [continuing]. The employer responsibility provision.

Mr. GERLACH. Why do you think that was not done if there was no study done? Why? Why didn't you do that to independently determine what the impact of this law was going to have on those employers?

Mr. IWRY. Congressman, we were getting a considerable amount, considerable amount of specific feedback from employers——

Mr. GERLACH. So it was unnecessary?

Mr. IWRY [continuing]. All through the process.

Mr. GERLACH. So it was unnecessary?

Chairman BRADY. Mr. Iwry, all time is expired. Perhaps you can answer that by——

Mr. GERLACH. I will follow up with some additional questions, Mr. Iwry, if I may, and I would appreciate your very specific response to the questions.

Mr. IWRY. I will be happy to respond.

Mr. GERLACH. Thank you

Chairman BRADY. Dr. Price.

Mr. IWRY. Thank you.

Mr. PRICE. Thank you, Mr. Chairman, and thank you, Mr. Iwry, appreciate you being here.

Dr. McDermott opened his comments by saying that he felt this was a bogus hearing; do you think this is a bogus hearing?

Mr. IWRY. Congressman, I think the committee has an important oversight role to play with respect to Treasury Department, and I very much respect and I know the Treasury Department and the IRS very much respects the committee's prerogatives and the committee's important role and function in oversight.

Mr. PRICE. And when requests are made of members of the executive branch, it is incumbent upon the executive branch to comply with those requests, isn't it?

Mr. IWRY. Congressman, certainly the executive branch, the Administration, and I can only speak for, of course, Treasury, in my case, but we view the requests of this committee with respect, of

course, and we take the committee's requests seriously and view the committee's role as not only legitimate but important.

Mr. PRICE. Thank you.

You mentioned that this employer reporting requirement only hits 4 percent of employers out there. Is that an accurate statement?

Mr. IWRY. Mr. Price, the employer responsibility requirements, including the employer reporting requirements, apply to employers that have at least 50 full-time employees or full-time equivalent employees.

Mr. PRICE. About 4 percent. I have only got a little time.

Mr. IWRY. And that that is about 4 percent of the total number of employers in the United States.

Mr. PRICE. And how many employees is that?

Mr. IWRY. It is a considerable number of employees, and I would do not know offhand, as I is it here, the exact number, but I have seen the data, sir, and we would be happy to——

Mr. PRICE. That would be great.

Mr. IWRY [continuing]. Get you the exact——

Mr. PRICE. I think it is around——

Mr. IWRY [continuing]. Number of the best data that we have.

Mr. PRICE. I think it is around 90 million, I think, somewhere in that ballpark, but I would look forward to that response.

I want to follow up on Mr. Gerlach's line of questioning. You mentioned, and I think this quote is accurate, that the request of the employers is, quote, "to get the basic information to check compliance," unquote.

Did you all—I know you didn't do a study, but did you all estimate what that costs an employer to comply with that requirement?

Mr. IWRY. Congressman, you are asking whether we estimated what it would cost the employer to comply with which requirement?

Mr. PRICE. With the employer required reporting requirements on their employees, and whether or not they have been provided a—been eligible for a subsidy or credit?

Mr. IWRY. We have not, to my knowledge, that is, I am not aware of the Treasury, and there may be some other——

Mr. PRICE. So it just wasn't——

Mr. IWRY. Maybe in the executive branch that did this, but I am not aware that Treasury went beyond the very intensive dialogue and——

Mr. PRICE. Would the fact——

Mr. IWRY [continuing]. With the gathering from the business community.

Mr. PRICE. But you just didn't think it was important enough to do that.

Mr. IWRY. Congressman, we felt it was very important to——

Mr. PRICE. To hear from them.

Mr. IWRY [continuing]. Balance, to take the costs into account, and that is why we asked the business community——

Mr. PRICE. So what are the costs? I mean, you are going to take the costs into account, you have to know what the costs are, right?

Mr. IWRY. Certainly, and Congressman, depending on the specific provision, depending on how particular rules are simplified or the degree to which they are simplified, the cost is going to vary. The businesses themselves didn't have generally——

Mr. PRICE. I understand. I have got just a little time, and I want to get to another question.

Mr. IWRY. Yes, sir.

Mr. PRICE. This starts this year. There will be credits and subsidies that will be provided to employees based upon this information. There will be some errors made just because of the nature of the beast. When an error is made and an employee gets a subsidy or a credit that they are not eligible for in hindsight, is the IRS going to go back and get that money back from that taxpayer?

Mr. IWRY. Congressman, let me address that this way. The Affordable Care Act provides that if an individual obtains a premium tax credit based on information that turns out to be either not correct or not current and based on the current final information such as the income of that household for the year in which the coverage, and therefore, the premium tax credit was provided, the law provides for a reconciliation process in connection with the individual filing their tax return with the IRS. So——

Mr. PRICE. That means getting that money back from that taxpayer.

Mr. IWRY. There could be either an additional tax credit that the person is entitled to. If they claimed less than they were entitled to, for example, it might turn out that their income was actually lower than what was anticipated.

Chairman BRADY. Mr. Iwry, I apologize——

Mr. PRICE. My time is expired.

I look forward to providing some questions in written form and look forward to a proper response.

Chairman BRADY. Thank you very much. Mr. Smith is recognized.

Mr. SMITH. Thank you, Mr. Chairman, and thank you, too, Mr. Iwry, for your time here today.

Many Nebraskans have expressed their concern to me that many of the changes made to this health care law have been made without congressional approval, and I was wondering, is the Administration working on legislation that they would—to propose before Congress to codify any of these changes that have already been made?

Mr. IWRY. Congressman, are you referring to the transition relief with respect to the employer shared responsibility provisions?

Mr. SMITH. Really any of the—can you agree that there have been many changes made or delays in time frames and so forth that have been issued? Is the Administration working on anything to propose that in the form of legislation?

Mr. IWRY. Congressman, the Treasury Department, and I can speak for only with respect to Treasury since that is where I work, the Treasury Department has exercised its authority to provide various safe harbors for businesses and other stakeholders, transition relief for stakeholders of various kinds pursuant to its well established and long held authority. Under section 7805(a) of the Internal Revenue Code, we have authority to interpret the Tax Code

and particularly, sir, when there is a new law, what the statute refers to as an alteration of the law relating to internal revenue, authority with respect to a new law to issue rules and regulations to give effect to it, and when we get the kind of credible comments from stakeholders that we received regarding the need for more transition relief in some cases or as much simplification and streamlining as possible, which we have tried our best to do in the case of the reporting as well as the employer responsibility regulation.

Mr. SMITH. There are many folks who are concerned that the executive authority is not being used appropriately, and would the Administration be open to, from your perspective, be open to proposing legislation that would codify any of these changes?

Mr. IWRY. Congressman, the kind of practical common sense interpretations, of the tax statutes at issue that Treasury has provided in connection with employer responsibility, regulations, and the reporting regulations, are consistent with Treasury's existing statutory authority. That statute exists in the form of Section 7805A of the Internal Revenue Code as it has been in effect, not only recently, but for years and for more than two decades, sir.

Mr. SMITH. So, no legislation would be necessary, is what you are saying?

Mr. IWRY. No legislation would be necessary, beyond since we have the legislative authority in 7805A to issue the rules and regulations that we have issued with respect to employer responsibility and employer an insurer reporting. That legislation is already on the books, and we have exercised it in much the same way that Treasury Department under previous Administrations, both Republican and Democrat, have exercised that existing statutory authority.

Mr. SMITH. Okay. Following up on Mr. Johnson's questions relating to the information associated with the Social Security numbers and other information, has the IRS tested if they have the ability to process and protect the gathering of the information that certainly I would think would be shared at a much greater velocity as there are more questions being asked on the tax returns relating to health care?

Mr. IWRY. Congressman, this is not a matter of personal health information being shared with the IRS. We are talking about——

Mr. SMITH. But has the IRS tested the security of that information to your knowledge?

Mr. IWRY. I believe—to my knowledge, sir, and I am at Treasury, I don't work in the IRS per se, but my understanding is that the IRS constantly checks its systems to make sure that the kind of security of information and privacy that the committee is expressing concern about and that the administration is likewise extremely concerned be kept, maintained in as tight a way as possible, as protective a way as possible for the American taxpayer and the American people in general, that the IRS continually makes sure that its systems are secure and do protect individual taxpayer information from breaches of security or breaches of privacy.

And, indeed, the current system where employers obtain Social Security numbers from individuals and where Social Security num-

bers are placed on the tens of millions of 1040 returns that are filed every year, the Social Security numbers on millions of 1099 reports, numbers collected by financial institutions and submitted to the IRS on those reports, that is all part of that system, and I know the IRS takes the utmost care with that.

Mr. SMITH. Thank you, Mr. Iwry.

My time has expired.

Chairman BRADY. Mr. Kind.

Mr. KIND. Thank you, Mr. Chairman.

Mr. Iwry, thank you for coming to provide a little bit of clarification today.

Take us back if you will as far as the Treasury's determination for the one year moratorium on the employer reporting requirements under Section 7805A, the transitional discretion authority, because it just seemed to me that when I heard the administration make the announcement for the one-year delay, it was based on the feedback that the administration was getting from the business community. In essence we are saying it is not that we don't want a report, it is just that we need more time to upgrade our systems and our software so that when we do report, we are going to be able to report as accurately as possible.

And I think to the administration's credit, you heard that feedback from the business community and said all right, fine then we understand this could be difficult in the initial stages, so we will exercise 7805 discretion with this and give you a little bit more time to upgrade your system so that you can report accurately a little bit. Is that close to the finding or the determination that the administration used as far as the one year delay in reporting?

Mr. IWRY. Mr. Kind, I agree with you. The factual predicates for the exercise of our well-established authority under the tax code to issue rules and regulations, including ones that would provide appropriate transition relief in connection with a change in law, that was very much a part of the factual predicate; and there were a whole variety of organizations from the plan sponsor community, including employer organizations with members that did not sponsor or have yet to sponsor health plans for their employees who asked for additional time.

And as you say, many of them indicated we are prepared to comply with this. Many of them said frankly we think this is a good law, we think that this will help the American people. Obviously there is a diversity of opinion on that in the business community, but many of them did say in any event, we know this is the law of the land, and we are prepared to comply with it. Please just give us additional time. And, Mr. Kind, that is not unusual.

When major legislation is enacted, I think one thing that probably everyone can agree on here, I would imagine, is that this legislation is major, this is big. When something is, when a significant reform is enacted, when major legislation is enacted, it is very common, very typical, for Treasury's notice and comment rulemaking process, to elicit very detailed, thoughtful, informative comments from the stakeholders, from the taxpayers, including the business community, that shed more light on how the statute needs to be applied, that shed light on the practical concerns or challenges that any major piece of legislation poses.

Mr. KIND. Just so we are clear, this is clearly not the first administration that has invoked section 7805A authority for transitional relief. In fact, I have had an opportunity to review in the past the letter the Treasury did submit to Chairman Camp of this committee highlighting some of the specific instances in the past where previous administrations have invoked this authority as well; is that correct?

Mr. IWRY. Mr. Kind, that is very true. We submitted a list of instances that illustrate that for more than the last 20 years, the Treasury Department has exercised its authority under 7805A of the Tax Code, to provide transition relief of various kinds to a limited degree, limited in scope, limited in time, with respect to a variety of new tax-related legislation.

And it has been very typical for the taxpayer community to say, no, you know, we have studied this law; and we now realize, particularly through the process of proposed regulations and comments, that everything is more complicated than it first appears. It is not just the Affordable Care Act.

Mr. KIND. Mr. Chairman, I would ask unanimous consent that that letter be submitted for the record for purposes of this hearing.

Chairman BRADY. Without objection.

[The information follows:]

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

July 9, 2013

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Upton:

Thank you for your letter to Secretary Lew dated July 3, 2013, regarding implementation of the Affordable Care Act ("ACA"). Because your letter concerns a matter of tax policy, it was referred to me.

Your letter asks about the decision, announced on July 2, 2013, to provide transition relief with respect to three provisions of the ACA: reporting by certain employers under section 6056 of the Internal Revenue Code ("the Code"); reporting by insurance companies, self-insuring employers, and other entities that provide health coverage under section 6055 of the Code; and the employer shared responsibility provisions under section 4980H of the Code.

The Treasury Department is providing this transition relief after having engaged in a dialogue with stakeholders (including employers, governmental entities, and others) and reviewing written comments about the employer and insurer reporting requirements.[1] We received comments requesting transition relief due to concerns about complying with the reporting requirements and the time needed to implement them effectively. We recognize that the vast majority of businesses that will need to do this reporting already provide health coverage to their workers, and we want to make sure that businesses are able to comply with the reporting requirements effectively and efficiently.

To address these concerns, we are providing an additional year before the ACA mandatory employer and insurer reporting requirements begin. This is designed to meet two goals. First, it will allow us to consider ways to simplify the new reporting requirements consistent with the law. Second, it will provide additional time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees. We expect to publish proposed rules implementing these provisions this summer, after a dialogue with stakeholders – including those responsible employers that already provide their full-time workforce with coverage far exceeding the minimum employer shared responsibility requirements – in an effort to minimize the reporting, consistent with effective implementation of the law.

[1] These written comments are publically available at www.regulations.gov.

We recognize that this transition relief for reporting will make it impractical to determine which employers owe shared responsibility payments (under section 4980H) for 2014. Accordingly, we are extending this transition relief to the employer shared responsibility payments. Today, we published formal guidance describing this transition relief. See Notice 2013-45.

The Notice is an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing new legislation like the ACA. Administrative authority is granted by section 7805(a) of the Internal Revenue Code.

This authority has been used to postpone the application of new legislation on a number of prior occasions across Administrations. For example, the Small Business and Work Opportunity Act of 2007 made changes to the standards return preparers must follow to avoid penalties. The amendments were effective May 25, 2007. On June 11, 2007, the Treasury Department released Notice 2007-54 providing that the IRS would follow the standards in prior law in determining whether to assert penalties for returns due on or before December 31, 2007. Similarly, the Airport and Airway Extension Act, Part IV (signed August 5, 2011) reinstated the air transportation and aviation fuels excise taxes retroactively to July 23, 2011, when they had expired. On September 9, 2011, the Treasury Department released Notice 2011-69 providing that the excise taxes would not be imposed on purchases of air transportation services made after July 22, 2011 and before August 8, 2011.[2]

Once the reporting regulations have been issued, the Administration will work with employers, insurers, and other reporting entities to strongly encourage them to voluntarily implement this information reporting in 2014, in preparation for the full application of the provisions in 2015. Real-world testing of reporting systems in 2014 will contribute to a smoother transition to full implementation in 2015.

Finally, it is important to note that this transition relief does not affect employees' or other individuals' access to the premium tax credits available under the ACA, nor does it have any effect on the effective date of any other provision of the ACA, including the insurance market reforms, the individual responsibility provisions, and the various revenue provisions. As you know, the ACA is projected to provide health insurance for nearly 30 million additional Americans. Together with the other departments involved, we are implementing the ACA to build on the progress we have already seen in making health coverage better and more affordable.

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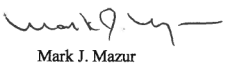
[2] See also, e.g., Notice 2000-5 (waiving corporate penalties for certain estimated taxes due December 15, 1999, which were affected by the retroactive amendment of section 6655 by the Tax Relief Extension Act of 1999); Notices 2005-29, 2006-2, and 2007-4 (postponing the statutory effective date of the section 470 loss disallowance rules applicable to certain pass-through entities); Notices 2005-94, 2006-100, 2007-89, and 2008-115 (waiving reporting of certain deferred compensation under section 409A for 2005 through 2008 and, subsequently, until the year after final regulations are published); Announcement 95-48, Notice 96-64, and Notice 99-40 (postponing the effective date of various statutory changes in qualification rules affecting governmental plans by deeming these plans to satisfy those requirements until a later date); Notice 2010-91 (postponing the statutory effective date for 3% withholding on contractors under section 3402(t)); Notice 2011-88 (postponing the effective date for required backup withholding payments made in settlement of payment card and third-party network transactions, as enacted by the Housing Assistance Tax Act of 2008); Notice 2012-34 (postponing the statutory effective date for amendments to the cost basis reporting regime enacted by the Energy Improvement and Extension Act of 2008); and Notice 2013-14 (extending the statutory deadline for submitting a pre-screening notice to claim the Work Opportunity Tax Credit).

Sincerely,



Mark J. Mazur
Assistant Secretary for Tax Policy

Enclosure

cc: The Honorable Tim Murphy
The Honorable Marsha Blackburn
The Honorable Michael C. Burgess
The Honorable Joe Barton
The Honorable Joseph R. Pitts
The Honorable Phil Gingrey
The Honorable Billy Long
The Honorable Steve Scalise
The Honorable Cory Gardner
The Honorable Bill Johnson
The Honorable Pete Olson
The Honorable Gregg Harper
The Honorable Renee Ellmers
The Honorable Henry Waxman
The Honorable Diana DeGette
The Honorable Frank Pallone

Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)

NOT-129718-13

Notice 2013-45

I. PURPOSE AND OVERVIEW

This notice provides transition relief for 2014 from (1) the information reporting requirements applicable to insurers, self-insuring employers, and certain other providers of minimum essential coverage under § 6055 of the Internal Revenue Code (Code) (§ 6055 Information Reporting), (2) the information reporting requirements applicable to applicable large employers under § 6056 (§ 6056 Information Reporting), and (3) the employer shared responsibility provisions under § 4980H (Employer Shared Responsibility Provisions). This transition relief will provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law. This transition relief also is intended to provide employers, insurers, and other providers of minimum essential coverage time to adapt their health coverage and reporting systems. Both the information reporting and the Employer Shared Responsibility Provisions will be fully effective for 2015. In preparation for that, once the information reporting rules have been issued, employers and other reporting entities are encouraged to voluntarily comply with the information reporting provisions for 2014. This transition relief through 2014 for the information reporting and Employer Shared Responsibility Provisions has no effect on the effective date or application of other Affordable Care Act provisions.

II. BACKGROUND

Sections 6055, 6056, and 4980H were added to the Code by §§ 1502, 1514, and 1513, respectively, of the Patient Protection and Affordable Care Act (ACA), enacted March 23, 2010, Pub. L. No. 111-148.[1] Section 6055 requires annual information reporting by health insurance issuers, self-insuring employers, government agencies, and other providers of health coverage. Section 6056 requires annual information reporting by applicable large employers relating to the health insurance that the

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[1] Section 4980H was amended by § 1003 of the Health Care and Education Reconciliation Act of 2010 (HCERA) (enacted March 30, 2010, Pub. L. No. 111-152) and was further amended by § 1858(b)(4) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (enacted April 15, 2011, Pub. L. No. 112-10). Section 6056 was amended by §§ 10106(g) and 10108(j) of the ACA and was further amended by § 1858(b)(5) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011. In this notice, the term Affordable Care Act refers to the ACA and HCERA, collectively.

employer offers (or does not offer) to its full-time employees. Section 4980H(a) imposes an assessable payment on an applicable large employer that fails to offer minimum essential coverage to its full-time employees (and their dependents) under an eligible employer-sponsored plan if at least one full-time employee enrolls in a qualified health plan for which a premium tax credit is allowed or paid. Section 4980H(b) imposes an assessable payment on an applicable large employer that offers minimum essential coverage to its full-time employees (and their dependents) under an eligible employer-sponsored plan but has one or more full-time employees who enroll in a qualified health plan for which a premium tax credit is allowed or paid (for example, if the coverage offered either does not provide minimum value or is not affordable to that full-time employee).

III. TRANSITION RELIEF

Q-1. When will the rules be published regarding § 6055 Information Reporting and § 6056 Information Reporting? How will these provisions apply for 2014?

A-1. The Affordable Care Act requires information reporting under § 6055 by insurers, self-insuring employers, government agencies, and certain other parties that provide health coverage and requires information reporting under § 6056 by applicable large employers with respect to the health coverage offered to their full-time employees. Proposed rules for the information reporting provisions are expected to be published this summer. The proposed rules will reflect the fact that transition relief will be provided for information reporting under §§ 6055 and 6056 for 2014. This transition relief will provide additional time for dialogue with stakeholders in an effort to simplify the reporting requirements consistent with effective implementation of the law. It will also provide employers, insurers, and other reporting entities additional time to develop their systems for assembling and reporting the needed data. Employers, insurers, and other reporting entities are encouraged to voluntarily comply with these information reporting provisions for 2014 (once the information reporting rules have been issued) in preparation for the full application of the provisions for 2015. However, information reporting under §§ 6055 and 6056 will be optional for 2014; accordingly, no penalties will be applied for failure to comply with these information reporting provisions for 2014.

Q-2. What does the 2014 transition relief for § 6056 Information Reporting mean for application of the Employer Shared Responsibility Provisions for 2014?

A-2. Under the Employer Shared Responsibility Provisions, an applicable large employer generally must offer affordable, minimum value health coverage to its full-time employees or a shared responsibility payment may apply if one or more of its full-time employees receive a premium tax credit under § 36B. The § 6056 Information Reporting is integral to the administration of the Employer Shared Responsibility Provisions. In particular, because an employer typically will not know whether a full-time employee received a premium tax credit, the employer will not have all of the

information needed to determine whether it owes a payment under § 4980H. Accordingly, the employer is not required to calculate a payment with respect to § 4980H or file returns submitting such a payment. Instead, after receiving the information returns filed by applicable large employers under § 6056 and the information about employees claiming the premium tax credit for any given calendar year, the Internal Revenue Service (IRS) will determine whether any of the employer's full-time employees received the premium tax credit and, if so, whether an assessable payment under § 4980H may be due. If the IRS concludes that an employer may owe such an assessable payment, it will contact the employer, and the employer will have an opportunity to respond to the information the IRS provides before a payment is assessed.

For this reason, the transition relief from § 6056 Information Reporting for 2014 is expected to make it impractical to determine which employers owe shared responsibility payments for 2014 under the Employer Shared Responsibility Provisions. Accordingly, no employer shared responsibility payments will be assessed for 2014. However, in preparation for the application of the Employer Shared Responsibility Provisions beginning in 2015, employers and other affected entities are encouraged to voluntarily comply for 2014 with the information reporting provisions (once the information reporting rules have been issued) and to maintain or expand health coverage in 2014. Real-world testing of reporting systems and plan designs through voluntary compliance for 2014 will contribute to a smoother transition to full implementation for 2015.

Q-3. Does this affect employees' access to the premium tax credit?

A-3. No. Individuals will continue to be eligible for the premium tax credit by enrolling in a qualified health plan through the Affordable Insurance Exchanges (also called Health Insurance Marketplaces) if their household income is within a specified range and they are not eligible for other minimum essential coverage, including an eligible employer-sponsored plan that is affordable and provides minimum value.

Q-4. What does this mean for other provisions in the Affordable Care Act?

A-4. This transition relief through 2014 for § 6055 Information Reporting, § 6056 Information Reporting, and the Employer Shared Responsibility Provisions has no effect on the effective date or application of other Affordable Care Act provisions, such as the premium tax credit under § 36B and the individual shared responsibility provisions under § 5000A.

IV. DRAFTING INFORMATION

The principal author of this notice is Kathryn Johnson of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice contact Kathryn Johnson at (202) 927-9639 (not a toll-free call).

Mr. KIND. Mr. Iwry, it just seems like the administration is in a tough position given the political debate surrounding the Affordable Care Act. You're damned if you do, and you're damned if you don't. If you don't provide some transitional relief, you are going to get criticized for doing that, and if you do provide relief, you are criticized for not helping make the program collapse because things just aren't ripe yet or timely in compliance.

So, I would encourage the administration to continue using the pragmatic discretion that you have working with the business community to try to make this work for all Americans.

Thank you, Mr. Chairman.

Chairman BRADY. Mr. Iwry, thanks for being here today. As you know, there are continued concerns about the cost in compliance for the regulations, so we are going to continue this dialogue going forward.

And, secondly, please do check on the analysis that was done on the authority. I would like to have that forwarded to the committee. I will follow with a letter to you to that effect.

So, again, thank you very much, and thanks for being patient during the votes.

Mr. IWRY. Thank you very much, Mr. Chairman.

Chairman BRADY. This subcommittee is adjourned.

[Whereupon, at 3:55 p.m., the subcommittee was adjourned.]

[Submissions for the Record follows:]

Employers for Flexibility in Health Care Coalition

Employers for Flexibility in Health Care Coalition

April 7, 2014

The Honorable Kevin Brady
Chairman
House Ways & Means Committee
Subcommittee on Health
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Jim McDermott
Ranking Member
House Ways & Means Committee
Subcommittee on Health
1106 Longworth House Office Building
Washington, DC 20515

Dear Chairman Brady and Ranking Member McDermott:

The Employers for Flexibility in Health Care (E-FLEX) would like to thank you for convening a hearing on the final regulations under section 4980H (the employer mandate) and sections 6055 and 6056 (information reporting to the IRS) that the Department of the Treasury and the Internal Revenue Service issued recently.

The E-FLEX Coalition includes leading trade associations and businesses in the retail, restaurant, hospitality, supermarket, construction, temporary staffing, agriculture, and other service-related industries, as well as employer-sponsored health plans insuring millions of American workers. The E-FLEX Coalition represents employers who create millions of jobs each year, employ a significant percentage of the U.S. workforce, offer flexible working environments for employees, and are a leading contributor to the nation's economic job recovery.

The E-FLEX Coalition has engaged in a constructive dialogue with Treasury since 2011 about the employer requirements under the ACA, including the information reporting requirements. As evidenced by our previous comment letters and meetings with the Administration, the Coalition has sought to work with the Administration to develop regulations that provide workable options for employers to administer and offer health coverage to their employees. E-FLEX Coalition members appreciated the flexibility for employers with variable hour workforces that Treasury provided in the final regulations on section 4980H, particularly transition relief for non-calendar year plans, the look-back measurement method of determining employee's full-time status and three employer affordability safe harbors. These common-sense provisions acknowledge the real-world circumstances in which employers will be working to comply with the ACA.

Conversely, the E-FLEX Coalition remains concerned that the final regulations on the ACA's information reporting requirements are unduly burdensome for employers and of limited use to employees. In numerous comment letters (see attached) and meetings over almost three years, the E-FLEX Coalition provided detailed proposals to the Administration for less onerous approaches to information reporting that would give employers the option of prospectively certifying to the IRS that coverage meeting the ACA's minimum value standard and an employer affordability safe harbor was available to full-time employees. Such an approach could improve the accuracy of initial eligibility determinations for premium assistance tax credits and reduce the potential for individuals to be subjected to unexpected repayments of any tax credits for which Exchanges incorrectly deemed them to be eligible. In addition, the proposed approach could facilitate a more limited approach to information reporting on the coverage offered to individual employees, reducing the complexity and burden of ACA compliance for employers.

In light of the approach taken in the final information reporting regulations, the E-FLEX Coalition is exploring legislative options for reforming the information reporting requirements under sections

6055 and 6056. For example, members of the E-FLEX Coalition have expressed support for S. 2176, the Commonsense Reporting Act of 2014, introduced by Sen. Mark Warner last month. The bill would eliminate the ACA's requirement for employers to collect and report Social Security numbers for all plan enrollees and would implement an opt-out system with respect to employees receiving information electronically. Importantly, the bill also would require the Department of the Treasury, in consultation with the Departments of Health and Human Services and Labor and the Small Business Administration, to conduct a study and report to Congress on the development of a prospective reporting system.

Although sharp differences in opinion about the ACA remain, the E-FLEX Coalition remains optimistic that well-intentioned people on both sides of the debate can come together on common-sense changes to the ACA that will make compliance in the real world less onerous for businesses without affecting employees' access to health coverage. The E-FLEX Coalition looks forward to continuing to work with all Members of Congress on a bipartisan basis to strengthen and preserve employer-sponsored coverage.

Sincerely,

Employers for Flexibility in Health Care (E-FLEX) Coalition

For more information please contact any member of the E-FLEX Coalition's Executive Committee:

Christine Pollack, Retail Industry Leaders Association, christine.pollack@rila.org
Michelle Reinke Neblett, National Restaurant Association, mneblett@restaurant.org
Rob Rosado, Food Marketing Institute, rrosado@fmi.org
Ed Lenz, American Staffing Association, elenz@americanstaffing.net
Peter Rubin, Aetna, rubinp@aetna.com

International Association of Fire Chiefs

INTERNATIONAL ASSOCIATION OF FIRE CHIEFS

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April 10, 2014

The Honorable Kevin Brady
Chairman
Subcommittee on Health
Committee on Ways and Means
U.S. House of Representatives
1101 Longworth House Office Building
Washington, D.C. 20515

The Honorable Jim McDermott
Ranking Member
Subcommittee on Health
Committee on Ways and Means
U.S. House of Representatives
1101 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Brady and Ranking Member McDermott:

On behalf of the more than 10,000 chief fire and emergency medical services (EMS) officers of the International Association of Fire Chiefs (IAFC), thank you for holding a hearing to examine the final rule issued by the Internal Revenue Service (IRS) on the Employer Shared Responsibility Provision of the Patient Protection and Affordable Care Act (PPACA). While the IAFC sincerely appreciates the IRS' exemption of nominally compensated volunteers under the final rule, the IAFC is concerned that the IRS has not clearly defined "reasonable benefits… and nominal fees" for volunteer personnel.

Nearly 780,000 volunteer firefighters and EMS personnel serve communities throughout the United States. In response to a declining number of volunteer emergency responders, many communities have begun offering incentives to recruit and retain volunteers. The value of these incentives can vary widely from community to community. As a result, the IRS' exemption of nominally compensated volunteers is helpful but not entirely understood without a clear statement from the IRS about how it will define the terms "reasonable benefits (including length of service awards), and nominal fees."

In 2006, the IAFC contacted the U.S. Department of Labor (DOL) to seek a definition for the term "nominal fee" for volunteer firefighters with respect to the Fair Labor Standards Act (FLSA). In its opinion letter to the IAFC, the DOL responded that "…an amount not exceeding 20 percent of the total compensation that the employer would pay to a full-time firefighter for performing comparable services would be deemed nominal." As a result, volunteer and combination fire departments across the United States are familiar with, and adhere to, the "20% Bright-Line Test." The IAFC strongly encourages the IRS to adopt the "20% Bright-Line Test" when defining "nominal fee" for volunteers with respect to the PPACA's Employer Shared Responsibility Provision.

Thank you for your attention to this issue and for your strong support of the Protecting Volunteer Firefighters and Emergency Responders Act of 2014, H.R. 3979. I strongly urge you to encourage the IRS to adopt the DOL's definition of the terms "reasonable benefits (including length of service awards), and nominal fees" for volunteer emergency responders with respect to the PPACA's Employer Shared Responsibility Provision.

Sincerely,

Chief William R. Metcalf, EFO, CFO, FFireE
President and Chairman of the Board

/ed

Kenneth H. Ryesky, Esq.

KENNETH H. RYESKY, ESQ., STATEMENT FOR THE RECORD, UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS & MEANS, SUBCOMMITTEE ON HEALTH, HEARING ON TREASURY DEPARTMENT'S FINAL EMPLOYER MANDATE AND EMPLOYER REPORTING REQUIREMENTS REGULATIONS:

I. INTRODUCTION:

The Health Subcommittee of the House Ways & Means Committee held a Hearing on 8 April 2014, where testimony was given by Mr. J. Mark Iwry, a Senior Advisor in the Treasury Department. Public comments were invited. This Commentary is accordingly submitted.

II. COMMENTATOR'S BACKGROUND & CONTACT INFORMATION:

Background: The Commentator, Kenneth H. Ryesky, Esq., is a member of the Bars of New York, New Jersey and Pennsylvania, and is an Adjunct Assistant Professor, Department of Accounting and Information Systems, Queens College of the City University of New York, where he teaches Business Law courses and Taxation courses. Prior to entering into the private practice of law, Mr. Ryesky served as an Attorney with the Internal Revenue Service ("IRS"), Manhattan District. In addition to his law degree, Mr. Ryesky holds BBA and MBA degrees in Management, and a MLS degree. He has authored several scholarly articles and commentaries on taxation and on Adjunct faculty, some of which are enumerated in Appendix A to this Commentary.

Contact Information: Kenneth H. Ryesky, Esq., Department of Accounting & Information Systems, 215 Powdermaker Hall, Queens College CUNY, 65-30 Kissena Boulevard, Flushing, NY 11367. Telephone 718/997-5070; E-mail: kenneth.ryesky@qc.cuny.edu or khresq@sprintmail.com.

Disclaimer: Notwithstanding various discussions between the Commentator and other concerned interested individuals and organizations, this Commentary reflects the Commentator's personal views, is not written or submitted on behalf of any other person or entity, and does not necessarily represent the official position of any person, entity, organization or institution with which the Commentator is or has been associated, employed or retained.

III. ADJUNCT FACULTY AT AMERICA'S COLLEGES AND UNIVERSITIES:

Mr. Iwry's testimony briefly mentioned the current regulations' specific guidance for the treatment of Adjunct faculty [1] as employees. [2] In 2011, Adjunct faculty comprised approximately 50% of instructional faculty at American degree-granting institutions; the percentage had steadily risen from approximately 21% in 1970, and in all likelihood has continued to rise.[3]

The traditional rationale for employing Adjunct faculty is that it enables the college and the students to benefit from the valuable real world experience and expertise of individuals whose situations do not otherwise fit into the traditional full-time faculty mold. [4] This traditional rationale has shifted over the years to the use of Adjunct faculty as a cheap source of labor. [5]

But the fiscal "savings" realized by the colleges have come at a steep cost. The alienation of Adjunct faculty from the social systems that are America's colleges and universities has adversely affected their abilities to teach with full effectiveness. As noted in the course of the

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[1] Terms including but not limited to "Adjunct Faculty," "Part-Time Faculty," "Contingent Faculty," "Ad Hoc Faculty," "Special Lecturers," and Sessional Instructors" are used to refer to such individuals. This Commentary shall use the terms "Adjunct" or "Adjunct faculty," with the inclusive intent of embracing all such professional educators.

[2] The guidance on Adjunct faculty in the Final Regulations is set forth at length in the Preamble, VI(C)(1), published in 79 F.R. 8544, at 8551 - 8552 (12 February 2014) .

[3] U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2012 (Pub. NCES 2014-015, December 2013), Table 290 at p. 418 <http://nces.ed.gov/pubs2014/2014015.pdf>.

[4] *See* Knight v. Alabama, 900 F. Supp. 272, 302 (N.Dist. Ala. 1995); Chang v. University of Rhode Island, 606 F. Supp. 1161, 1227 (D.R.I. 1985) ("URI is prone to hire adjunct or specialized clinical faculty in fields (e.g., nursing, dental hygiene) laden with heavy clinical components."); Javier A. Galván, "Practical Suggestions to Internationalize the General Education Curriculum," *J. Hispanic Higher Educ.* 85, 89 (2006); James Stenerson, et al., "The Role of Adjuncts in the Professoriate," *Peer Review*, p. 23, at 24 (Summer 2010); *see also* Shawn G. Kennedy, "College Changing along with the Students," *N.Y. Times*, March 29, 1981, p. LI-21 (quoting Jay J. Diamond, a dean at Nassau County Community College: "Many of our adjunct faculty members are lawyers, businessmen and engineers and we consider their expertise and experience valuable … They allow us to stay up-to-date.").

[5] *See, e.g.* NLRB v. Cooper Union, 783 F.2d 29, n. 3 at 32 (2d Cir. 1986), *cert. denied* 479 U.S. 815 (1986); Barnabas v. Board of Trustees of the University of the District of Columbia, 686 F. Supp. 2d 95, 99 (D.D.C. 2010); Vandever v. Junior College District, 708 S.W.2d 711 (Mo. App. 1986); Cheryl Halcrow & Myrna R. Olson, "Adjunct Faculty: Valued Resource or Cheap Labor?" Focus on Colleges, Universities, and Schools 2(1), p. 1 (2008); Robin Wilson, "Contracts Replace the Tenure Track for a Growing Number of Professors," *Chronicle of Higher Education*, June 12, 1998, p. A-12; Phyllis Bernstein, "Colleges Use More Adjuncts," *N.Y. Times*, November 17, 1985, p. LI-25).

rulemaking process for the regulations discussed by Mr. Iwry, the Affordable Care Act has only exacerbated the detrimental processes upon Adjunct faculty, thereby further disabling the American educational system.[6]

Against the foregoing background, the following two points are noted:

A. The work of Adjunct faculty differs from that of the typical employee in the American workforce. The teaching process begins long before the class roll call, and ends long after the class is dismissed.

B. The colleges and universities, having used the Affordable Care Act as their stated justification for cutting back on the assigned courses (and therefore the paychecks) of their Adjunct faculty members, are now benefiting from the Administration-decreed postponements of the Affordable Care requirements. The failure of the academic institutions to correspondingly postpone the cutbacks in the teaching loads and paychecks of their Adjunct faculty members constitutes bad faith on the part of the colleges and universities.

13 April 2014
Respectfully submitted,

Kenneth H. Ryesky, Esq.

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[6] *E.g.* IRS-2013-0001-0009 Dorey Diab, Stark State College, 14 January 2013 <http://www.regulations.gov/contentStreamer?objectId=09000064811b90ab&disposition=attachment&contentType=pdf>; IRS-2013-0001-0055, Yvonne Marie Brandon, 22 February 2013 <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0055>; IRS-2013-0001-0074, James Lynn Johnson, 7 March 2013 <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0074>.

APPENDIX A:
RELEVANT PRIOR DISCOURSES BY THE COMMENTATOR:

Published Articles:

"Counting, Not Curtailing, Adjuncts' Work," *Chronicle of Higher Education*, 10 May 2013, p. A33, available at <http://chronicle.com/article/Counting-Not-Curtailing/139031>.

"Part Time Soldiers: Deploying Adjunct Faculty in the War against Student Plagiarism," 2007 BYU EDUC. & L. J. 119 (2007) <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1236&context=elj>.

"Information & Instructional Technology: Bringing Adjunct Faculty into the IT Fold," Conference presentation, Instructional/Information Technology in CUNY, New York, 14 November 2003 [ERIC Document No. ED490813] <http://files.eric.ed.gov/fulltext/ED490813.pdf>.

Congressional Hearing Statements:

Statement, Senate Committee on Finance Hearing: Impact of the Employer Mandate's Definition of Full-time Employee on Jobs and Opportunities, 28 January 2014, <https://docs.google.com/file/d/0B1NeqTrEJoniWEl3SDhhWUtYTVE/edit>

Statement, *Hearing on* Tax-Related Provisions in the President's Health Care Law, House Ways and Means Committee, Subcommittee on Oversight U.S. House of Representatives,113th Congress, 1st Session, 5 March 2013, <https://docs.google.com/document/d/1WuB3y0M45oAjVo7y2UDS_adflCeuGipR3UmaO7d4FDw/edit?pli=1>

Rulemaking Hearing Statements:

IRS Notice of Proposed Rulemaking RIN 1545–BL33 [REG-138006-12], 78 F.R. 218, Shared Responsibility for Employers Regarding Health Coverage (2 January 2013): Written Commentary, 28 January 2013 <http://www.regulations.gov/contentStreamer?objectId=09000064811dbea2&disposition=attachment&contentType=pdf>; Oral testimony at rulemaking hearing (23 April 2013), unofficial transcript available from Tax Analysts, 2013 TNT 80-16, Doc 2013-9982.

New York State Commission on Higher Education, Hearing, 5 December 2007, Oral Testimony and Written Commentary; *Adjunct Faculty & Academic Excellence*, Written Commentary available at <http://worldcat.org/arcviewer/4/AO%23/2010/12/23/H1293125405429/viewer/file120.pdf>.

National Restaurant Association, NRA

Statement of the National Restaurant Association

HEARING: THE TREASURY DEPARTMENT'S FINAL EMPLOYER MANDATE AND EMPLOYER REPORTING REQUIREMENTS REGULATIONS

BEFORE: SUBCOMMITTEE ON HEALTH
COMMITTEE ON WAYS & MEANS
U.S. HOUSE OF REPRESENTATIVES

BY: ANGELO AMADOR, ESQ.
VICE PRESIDENT, LABOR & WORKFORCE POLICY
NATIONAL RESTAURANT ASSOCIATION

MICHELLE REINKE NEBLETT
DIRECTOR, LABOR & WORKFORCE POLICY
NATIONAL RESTAURANT ASSOCIATION

DATE: APRIL 7, 2014

Statement for the record for the hearing

"The Treasury Department's Final Employer Mandate and Employer Reporting Requirements Regulations"

Before the

Subcommittee on Health,
Committee on Ways & Means,
U.S. House of Representatives

By the

National Restaurant Association

April 7, 2014

Chairman Brady, Ranking Member McDermott, and members of the Subcommittee on Health of the Committee on Ways and Means. Thank you for the opportunity to submit comments for the record regarding the April 8, 2014 hearing, "The Treasury Department's Final Employer Mandate and Employer Reporting Requirements Regulations." We are pleased to share the views of the members of the National Restaurant Association on these regulations.

THE RESTAURANT AND FOODSERVICE INDUSTRY

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Our mission is to help our members establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 990,000 restaurant and foodservice outlets employing 13.5 million people who serve more than 130 million guests daily. Restaurants are job-creators. While small businesses comprise the majority of restaurants, the industry as a whole is the nation's second-largest private-sector employer, employing about one in ten working Americans.[1]

The unique characteristics of our workforce create compliance challenges for restaurant and foodservice operators under the health care law. It's difficult for restaurants to determine how the law impacts them and hence what they must do to comply. Many of the determinations employers must make to figure out how the law impacts them – for example, the applicable large employer and full-time employee determinations – are much more complicated for restaurants than for other businesses that have more stable workforces with less turnover.

[1] *2014 Restaurant Industry Forecast.*

Restaurants are employers of choice for many looking for flexible work schedules and the ability to pick up extra shifts as available. As a result, we employ a high proportion of part-time and seasonal employees. We are also an industry of small businesses — more than seven out of ten eating and drinking establishments are single-unit operators. Much of our workforce could be considered "young invincibles," as 43 percent of employees are under age 26.[2] Hence, high turnover is the norm. In addition, the restaurant business model produces relatively low profit margins of only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant.[3]

Business owners crave certainty, because it enables them to plan for the future and make decisions that benefit their employees, customers, and their communities. One of the most difficult things to predict about the impact of this law are the choices employees will make.

Will they accept restaurant operators' offers of coverage more than they have in the past?

Will our young workforce choose to pay the individual mandate tax penalty instead of accepting the employer's offer of coverage in 2015, 2016, and beyond?

Will those under 26 years of age choose to remain on their parents insurance, rather than accepting the employer's offer of coverage?

Will exchange coverage be less expensive than what is currently available and can operators afford to offer the coverage required by the law?

The overarching challenge restaurant and foodservice operators face in complying with the law is to first understand its complicated and interwoven requirements. By far, the definition of "full-time employee" under the law poses the greatest challenge. It does not reflect current workforce practices and could have a detrimental impact on a restaurant operator's ability to offer flexible schedules for his or her employees.

In addition, the applicable large employer determination is too complex. It stifles smaller employers' ability to manage their workforces, expand their businesses and prepare to offer health care coverage. The automatic enrollment provision could cause financial hardship and greater confusion about the law for some employees, without increasing their access to coverage.

Finally, the employer information reporting requirements are confusing for restaurant and foodservice operators and lack flexibility for employers with workforces like ours. Our industry has never needed to track such a massive amount of employee and dependent data, nor take on the administrative and monetary burden of putting a new system in place with 9 months time – raising great concerns for many.

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[2] Bureau of Labor Statistics, U.S. Department of Labor.
[3] *2014 Restaurant Industry Forecast.*

All of these factors combine to complicate what a restaurant and foodservice operator must consider when adapting their business to comply with the law.

THE REGULATORY PROCESS

The National Restaurant Association has actively participated in the regulatory process, from the beginning, to ensure that the implementing regulations and federal agencies' guidance consider the implications for businesses that are not just one type or size. As co-leaders of the Employers for Flexibility in Health Care (E-Flex) coalition, the National Restaurant Association partners with other businesses and organizations with similar workforce characteristics. Together we advocate for greater flexibility and options within the implementing regulations, especially for those that employ many part-time, seasonal, or temporary employees. The E-Flex Coalition also submitted comments for the record to this hearing and the National Restaurant Association concurs with those comments.

From the beginning, we viewed the development of implementing regulations for all of the employer requirements in totality as restaurant and foodservice operators must do as they determine how to operationalize the implementing regulations in their own businesses. To that end, our comment letters reiterated the point that it was imperative that the Administration examine all of the employer provisions as a whole because the employer requirements are inextricably linked. We think of IRC § 4980H as the front half- and IRC §§ 6055 and 6056 as the back half of the process employers follow to comply. Simply put, IRC § 4980H contains the rules about offering what kind of coverage, to whom, when and how; while IRC §§ 6055 and 6056 are all about IRS data collection from employers and insurers to assist the IRS in the enforcement of the individual and employer mandates, and to administer the premium tax credits. Together these rules make up the bulk of the employer requirements under the law.

The statute and implementing regulations are complex, and it is difficult for restaurant and foodservice operators to easily determine how to comply with the law. A contributing factor to the uncertainty many feel about the law is the complexity of the rules and how difficult it is for many to determine what they must do to comply under them.

EMPLOYER SHARED RESPONSIBILITY (IRC § 4980H)

The Department of Treasury first issued a request for comments under IRC § 4980H in May 2011 with IRS Notice 2011-36. Throughout the two and a half year process, the E-Flex Coalition and the National Restaurant Association submitted ten comment letters in response to various IRS Notices, and proposed rules from the Departments of Treasury and Health and Human Services concerning details of IRC § 4980H. The Treasury Department adopted many of our ideas about how to provide flexibility for employers with workforces with variable hour and seasonal employees.

We appreciate that the Final Rule on Employer Shared Responsibility provided flexibility for employers with variable hour and seasonal workforces, like that in the restaurant and

foodservice industry. For example, early on, the Treasury Department recognized that an alternative way to determine full-time employee status was needed as a monthly determination "may cause practical difficulties for employers, employees, and the State Exchanges….[including] uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability."[4]

Thus, the optional Lookback Measurement Method was proposed and we are pleased to see it maintained in the Final Rule. The Affordability Safe Harbors for Employers are also important as employers cannot know employees' "household income" to determine if their offered plan(s) meet the affordability standard in the law. While complex, these rules will help provide predictability for restaurant and foodservice operators to know which employees they must offer coverage to or face a penalty, and if the employee contribution they set will meet the affordability test. The rules also provide predictability especially for variable hour and seasonal employees as to when coverage would be offered and for how long.

We appreciate that the targeted transition relief provided for in the January 2, 2013, Proposed Rule on Employer Shared Responsibility was extended in the Final Rule. New procedures, provided in the Final Rule on how small employers transitioning into applicable large employer status, help smaller employers transition into the large employer requirements. The transition relief for non-calendar year plans was also included in the Final Rule and will be helpful as many in our industry want to maintain focus on customer service rather than administering benefits throughout the end of year holiday season when traffic peaks. Many have non-calendar year plans for that reason.

The Administration announced[5] July 2, 2013, and, subsequently, on July 9th, through IRS Notice 2013-45, broader transition relief and voluntary compliance in 2014 for the Employer Reporting requirements under IRC §§ 6055 and 6056, and, hence, the Employer Shared Responsibility requirements under IRC § 4980H. Early on in the regulatory process, we recognized that employers will need a significant amount of time to make changes, communicate with employees and get systems ready to implement the law. The broader transition relief allows employers time to learn the § 4980H rules and to implement the law within their operations.

The restaurant and foodservice industry welcomed the broad transition relief as well, after asking the Administration and Congress for more time to receive, understand, and comply with the complex implementing regulations for IRC §§ 6055 and 6056. As early as October 2011, the National Restaurant Association, as part of the E-Flex coalition, submitted comments to the Administration requesting transition relief and time to implement the reporting requirements under IRC §§ 6055 and 6056, once the rules were issued.

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[4] IRS Notice 2011-36, page 13.
[5] "Continuing to Implement the ACA in a Careful, Thoughtful Manner," Mark Mazur, Treasury Notes Blog, July 2, 2013: http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx

Employers need the rules for these reporting requirements to set up the systems that will track data on each full-time employee and their dependents, which will then be reported to the IRS and to employees annually. While the first report was not originally required to be submitted to the IRS until January 31, 2015, six months (July-Dec 2013) was too short a time frame for employers to receive the rule, set up systems or engage vendors to develop information technology systems that would begin tracking the necessary data as of January 1, 2014. We welcome transition relief that will allow restaurant operators more time to learn the rules and implement the law.

While we are pleased overall with the flexibility provided in the Final Rule on IRC § 4980H, issues remain that cannot be addressed by regulation and must be addressed by an act of Congress. Within IRC § 4980H, these include the definition of full-time employee – defined under the law as 30 hours of service per week on average. Aligning the health care law's definition of full-time status with current levels would help avoid any unnecessary disruptions to employee' wage and hours, and would provide significant relief to employers.

We thank Congressman Todd Young for championing, as well as the Committee on Ways and Means and the entire U.S. House of Representatives, for passing H.R. 2575, the "Save American Workers Act." We look forward to working in a bipartisan way with your colleagues in the Senate on this issue. In the Senate, Senators Susan Collins and Joe Donnelly have introduced S. 1188, the "Forty is Full Time Act."

The definition of applicable large employer (ALE) is also overly complex. This annual determination is administratively burdensome and costly, especially for those employers just above or below the 50 full-time equivalent employee (FTE) threshold who must most closely monitor their status.[6] As a step towards helping employers comply with the law, Congressman Luke Messer introduced, H.R. 2577, the "Small Business Job Protection Act," that would change the definition of small business from under 50 FTEs to under 100 FTEs. Senator Heidi Heitkamp recently introduced a similar bill in the Senate, S. 2188, the "Small Business Stability Act."

Restaurant and foodservice operators also seek clarity regarding the treatment of seasonal team members when determining whether the employer is an applicable large employer and associated requirements for offering coverage under IRS § 4980H. The statue and regulations now contain multiple confusing definitions of seasonal worker, the seasonal worker exemption, as well as new and ongoing seasonal employees under the optional Lookback Measurement Method. Our members need greater simplification and uniformity of the seasonal provisions under the law to better enable compliance and reduce confusion.

In addition to compliance challenges within IRC § 4980H, there remain concerns with other provisions of the law that only Congress can address. Namely, the automatic enrollment provision that requires employers with 200 or more full-time employees to enroll full-time

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[6] In 2015, employers with 50-99 FTEs may qualify for transition relief and may not be required to offer coverage or pay a penalty until 2016.

employees in coverage unless they opt-out within the first 90 days. Congressman Richard Hudson introduced a bill, H.R. 1254, the "Auto Enroll Repeal Act," that would eliminate the duplicative and potentially financially burdensome auto-enroll requirement for employers with 200 or more full-time employees.

INFORMATION REPORTING ON HEALTH INSURANCE COVERAGE (IRC §6055) AND EMPLOYER HEALTH INSURANCE COVERAGE (IRC §6056)

The employer reporting requirements are a key area of implementation for employers – the required information reporting under IRC §§ 6055 and 6056. These employer reporting requirements are a critical link for employers in the chain of the law's implementation. This information will be used by the IRS to enforce the employer shared responsibility and individual shared responsibility provisions, and to administer the premium tax credits. The requirements represent what could be a significant employer administrative burden and compliance cost.

Final Rules on Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans (IRC § 6056) and Information Reporting of Minimum Essential Coverage (IRC § 6055) were published in the *Federal Register* by the Internal Revenue Service and the Department of Treasury on March 10, 2014. Previously, Proposed Rules were issued on September 9, 2013, but, unlike the IRC § 4980H proposed rule that provided employers certainty of the rules when they were issued, the reporting rules provided no guidance on which employers could rely.

As a result, employers were not able to start working in advance of final rules to prepare to comply with these complex information reporting requirements. Prior to the proposed rule, the IRS' first request for comment was issued in mid-2012 with IRS Notices 2012-32 and 2012-33. The E-Flex Coalition, the National Restaurant Association and many of our state restaurant association affiliates, submitted comments prior to that first request, as early as October 2011, with ideas on how to simplify and streamline the employer reporting requirements.

Our long-standing goal has been the creation of a streamlined reporting process that helps individuals by minimizing employees' exposure to the recapture of advance premium tax credit overpayments at the end of the tax year by providing, upfront to the Exchanges, accurate and timely information about employer-provided health insurance -- and that helps employers by reducing unnecessary administrative burdens while facilitating simplified administration of the IRC § 4980H employer requirements. We have brought forward to the Treasury and IRS a number of policy proposals to achieve this goal.

The National Restaurant Association is disappointed that the IRS did not adopt our proposals to simplify and streamline the information reporting requirements.

Through the regulatory process, the National Restaurant Association put forward several alternatives. The two most significant structural ideas included voluntary prospective reporting and a certification process paired with targeted reporting that would benefit employers of all sizes and structures. First, prospective reporting would allow employers to voluntarily report

general information into the IRS about coverage options and to whom coverage is available so that the IRS might have the most accurate employer coverage information on file. As part of this proposal, the IRS could modify its data sharing agreement with the Centers for Medicare and Medicaid (CMS) to allow for Exchange access to verify general information about employer offers of coverage through the federal data hub. This would ensure better accuracy of the up-front advanced premium tax credit eligibility determinations and minimize recapture of advanced premium tax credits by the IRS at the end of the tax year.

Second, we proposed a certification process paired with targeted information reporting on only certain employees (i.e., exceptions-based reporting), not on the entire employee population. We envisioned a simplified method in which employers could certify that they have offered minimum essential coverage to all full-time employees and dependents, as the statute states. Targeted reporting could then be applied, in which individuals' statements are sent only to employees for whom the employer receives notification from an Exchange that the employee received a premium tax credit. This would reduce the number of statements sent to employees, helping to reduce the employer's administrative burden and cost. Under our proposal, this streamlined reporting option could be used by any employer and would not be limited to certain groups of employees within an employers' workforce.

The Final Rule did provide simplified reporting methods, but limited the use of these options narrowly to employers who can satisfy certain requirements. The IRC § 6056 Final Rule lays out two methods for employer reporting – the General Reporting Method and the Simplification Methods. The General Reporting Method requires applicable large employers to tabulate and track offers of coverage by employee tax identification number, by calendar month, beginning January 1, 2015, and report this information both to the IRS and to full-time employees at the beginning of 2016 for the first time. Thirteen individual data points alone must be tabulated by calendar month. Employers' systems are generally not set up to track information by calendar month, but by payroll period. This will only add to the administrative burden of compliance with the law for applicable large employers, especially for smaller operators. The Simplification Methods laid out in the Final Rule are limited in scope and it is not likely restaurant operators will be able to utilize these on a large scale and, instead, will be forced to use the General Reporting Method.

In addition to the complexity and volume of data required under these rules, we are also concerned about data privacy, as both reporting requirements require employers to track and report the data by tax identification number. This goes against employers' attempts in recent years to move away from using social security numbers or tax identification numbers to identify employees within their own company systems. It also raises concerns about transmission and retention of such data.

We encourage the Subcommittee to examine ways to simplify the reporting requirements under IRC §§ 6055 and 6056 and provide flexibility for employers like restaurant and foodservice operators. The National Restaurant Association supports a bill by Senator Mark Warner as a first step in determining how the rules may be simplified. S. 2176, the "Commonsense Reporting Act," would: (1) allow self-funded employers, insurers and others providing minimum essential coverage to report in only the name and dates of birth of

dependents, unless they are already collecting the tax identification number, (2) simplify the process for electronic delivery of the IRC §§ 6055 and 6056 statements to employees, and (3) require the Treasury Department to work with Departments of Health and Human Services and Labor to report to Congress about the barriers and steps necessary to create an employer voluntary prospective reporting system.

CONCLUSION

Thank you for holding this hearing to examine the Final Rules for the employer requirements under IRC §§ 4980H, 6055 and 6056. We appreciate the flexibility allowed for under IRC § 4980H, however, the complexity of the information reporting regulations under §§ 6055 and 6056 must be addressed. Many restaurant and foodservice operators will have to use the general reporting method, especially if they want to use one method of reporting for all of their employees. These rules are confusing and lack flexibility for employers with workforces like ours and now operators must prepare their systems to track this data beginning January 1, 2015 – less than 9 months away.

Thank you again for the opportunity to submit this written statement for the record regarding the Treasury Department's final employer mandate and employer reporting requirements regulations. We are committed to working with Congress to find solutions to the challenges our members face as they implement the health care law.

Retail Industry Leaders Association, RILA

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April 8, 2014

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Dear Chairman Brady and Ranking Member McDermott:

On behalf of the Retail Industry Leaders Association (RILA), I appreciate the Subcommittee holding a hearing on the final rules for the Affordable Care Act's (ACA) employer mandate, Code section 4980H, and reporting requirements, Code sections 6055 and 6056. RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers and service suppliers, is committed to ensuring employer-sponsored health coverage remains a viable option for the nearly 170 million Americans receiving coverage today. For the millions of employers committed to providing employees and their families with quality and affordable healthcare, one of the most significant challenges is the implementation of the ACA.

Since enactment of the ACA, RILA and the Employers for Flexibility in Health Care (E-Flex) Coalition, a coalition of leading trade associations and businesses that have large ratios of variable-hour workforces, have provided comprehensive policy recommendations to the Internal Revenue Service (IRS), and Departments of the Treasury, Health and Human Services, and Labor, on the numerous employer requirements under the ACA. Specifically, RILA, its member companies, and the E-Flex Coalition developed extensive policy recommendations on the 4980H, 6055, and 6056 requirements.

While the regulatory development process for 4980H and dialogue with the Treasury Department were productive, and yielded a favorable outcome for retailers, the same cannot be said for the regulatory development process for 6055 and 6056 reporting requirements. We remain extremely frustrated that our meetings with the IRS on the 6055 and 6056 rules were few and not productive, and the comment process was not as constructive as it was it was under 4980H. The final rules do little to streamline the reporting process or address possible inaccurate tax credit eligibility determinations.

Employer Shared Responsibility – Code section 4980H

RILA and our members companies appreciate the flexibility included in the final 4980H rules. We also value the time that Treasury officials spent with our member companies on the telephone and in-person regarding various operational issues and policy ideas that directly impact employers, especially

retailers who have large variable hour workforces. These discussions and policy developments yielded positive results in the 4980H rules. Specifically, retailers appreciate that the final rules included:

- *Transition relief for non-calendar year plans.* Due to the nature of the retail industry where busy business seasons often occur during the fall and end of the year, many retailers utilize a non-calendar year plan year so employee focus and company resources are not taken away from the business of selling goods and services in order to make benefits selections and implement a new plan year. With the final rules, the employer mandate is effective for plan years beginning on or after January 1, 2015. Many retailers have plan years that straddle January 1. This relief means that these businesses do not have to change their plan mid-year to comply with the 4980H requirements.

- *Codification of the look-back measurement period.* Due to the nature of the retail industry, hours worked can fluctuate based on employee preference and business needs. The three-to twelve-month look-back measurement period followed by a stability period is a flexible approach that can avoid the revolving door, or churn effect of employees bouncing between employer-sponsored plans, coverage through an Exchange, or a federal program such as Medicaid or Medicare. The stability would benefit employees by maintaining consistent and predictable coverage, while also benefiting employers by avoiding the burdensome administration costs associated with a frequently changing employment status.

- *Codification of three affordability test safe harbor options.* The law's affordability test based on household income is problematic to businesses. Employers do not know and legally should not know an employee's household income. The final rules' inclusion of three safe harbor methods that are not based on household income is welcomed.

Reporting Requirements – Code sections 6055 and 6056

RILA noted to the IRS and Treasury numerous times that the collection and remittance of the data required under sections 6055 and 6056 will prove to be an extremely daunting task for retailers. There is no uniformity in the way employers track this data, or whether the tracking is done in-house or through a third-party vendor. The requirements under 6055 and 6056 will require employers to gather data from multiple IT systems and vendors. The administration complexities of being required to report on 6055 and 6056 to both the IRS and employees/plan enrollees is mindboggling to retailers.

Prior to release of the final rules, we urged the Administration to take into consideration: the need to streamline the reporting process as to lessen compliance and cost burdens on retailers in an economically-challenging environment; the significant amount of time it will take for employers to comply with regulations and build new or modify existing IT systems; and the security of uploading sensitive, personally identifiable information into federal or state databases.

The final rules do little to streamline or lessen the administrative burdens of the 6055 and 6056 requirements. While the rules allow for combined reporting for 6055 and 6056, they do nothing to ease the burdens of the amount of data that is required to be collected and reported.

Additionally, the so-called alternative reporting methods are complicated and narrow, and are not likely to be used by retailers. These alternative methods also run counter to the flexibility included in the 4980H rules. Specifically, the qualifying offers method requires an employer to offer a plan with an affordable test based on federal poverty level (FPL) to all employees, spouses, and dependents for all 12 months of the calendar reporting year. The 4980H rules provide employers with two options in addition to the FPL in meeting the affordability test and do not require employers to offer coverage to spouses. Due to the variable nature of the retail workforce and retailers use of non-calendar year plans, it is unlikely that many retailers would likely qualify for this method that requires consistency for all 12 months of a calendar year.

RILA and its member companies remain concerned that individuals may inadvertently be approved for tax credits through the Exchanges based upon misinformation about employer-sponsored coverage that actually meets the 4980H requirements. As we have discussed with the IRS and Departments, we feel there are ways to enable a smoother transition to ACA enactment and compliance for Exchanges, the Departments, individuals, and employers. We also believe that streamlining and simplifying the reporting requirements would be beneficial from a technological stand-point to the IRS and Exchanges. One such concept is the establishment of a federal government website/portal in which an employer can pre-certify at the beginning of its plan year that at least one of its plans complies with the employer shared responsibility requirements – by meeting the affordability and minimum value tests. This data can be shared with and utilized by Exchanges when individuals apply for coverage, and could significantly reduce the "pinging" of employers by Exchanges when individuals apply for coverage. This concept was not included in the final rules.

RILA and the E-Flex Coalition are exploring legislative options for reforming the 6055 and 6056 requirements. A first step in reforming these requirements, RILA worked with Senator Mark Warner and his colleagues in developing S. 2176, the Commonsense Reporting Act of 2014. S. 2176 would provide businesses with relief from having to collect and report on Social Security numbers for all plan enrollees and implement an opt-out system with respect to employees receiving information electronically. S. 2176 would also require the Departments of the Treasury, Health and Human Services, and Labor to conduct a study and report to Congress on the development of a prospective reporting system, a concept that RILA strongly supports.

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Thank you again for holding this important hearing. RILA looks forward to continuing to work with the Ways and Means Committee and your colleagues in Congress in a bi-partisan manner to strengthen and improve the employer-sponsored health system, and lessen the burdens of the ACA requirements on retail employees and retail job creators.

Sincerely,

Bill Hughes
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Hearing on the Treasury Department's Final Employer Mandate and Employer Reporting Requirements Regulations

This is to inform you how adjunct faculty in the nation have been adversely affected by the Employer Mandate. Even though Colleges have had the compliance deadline pushed back, they are not passing this delay on to adjunct faculty.

Colleges have cut teaching loads of Adjunct Faculty in order to play it safe and not have to provide healthcare coverage for the group. Even with the new IRS Regulations that state that a reasonable method to calculate hours worked by adjunct faculty would be to add 1 ¼ hours to each credit hour and use 2 ¼ hours worked per credit hour, the colleges are afraid that someone may go over and they are reducing our loads by several credits per semester. This has caused a severe economic hardship on many of us since our income is being cut almost in half, plus we are not being provided healthcare coverage. Some of our members have gone on public assistance, some are in homeless shelters and one that I know of is presently living out of his car. These are professional educators, with advanced degrees and student debts to pay off who are teaching the 'leaders of the future'. Do you think this sets the proper example for students to attempt to succeed in life?

By allowing adjunct faculty to teach their current teaching loads, before the reductions, we can still maintain a standard of living equal to middle class status. Many of our members do not need healthcare since they are covered by a spouse, another job, Medicare, a retirement plan, etc. There should be some way for these adjunct faculty at least to receive an exemption from ACA. There also needs to be more oversight in the colleges and penalties for purposely cutting hours to avoid ACA.

Please hear our plea and do something to save our income and keep us whole.

Thank you.

William J. Lipkin

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