THE VOICE OF FOOD RETAIL
Feeding Families Enriching Lives

CC:PA:LPD:PR (REG–138006–12)
Internal Revenue Service
Room 5203,
POB 7604, Ben Franklin Station,
Washington, DC 20044

*Submitted electronically via [http://www.regulations.gov](http://www.regulations.gov)*

RE: **Notice of Proposed Rulemaking for Shared Responsibility for Employers Regarding Health Coverage**

Dear Sir or Madam:

On January 2, 2013, the Internal Revenue Service (IRS) published a Notice of proposed rulemaking for Shared Responsibility for Employers Regarding Health Coverage (REG–138006–12). The Food Marketing Institute (FMI) appreciates the opportunity to provide comments to the IRS's Notice of Proposed Rulemaking of the shared employer responsibility provisions enacted as part of the Patient Protection and Affordable Care Act ("ACA") in § 4980H of the Internal Revenue Code.

FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. The supermarket industry employs approximately 3.5 million Americans on profit margins of approximately one percent, so policies involving employees' benefits can have profound impacts.

FMI is an Executive Committee member of Employers for Flexibility in Health Care ("E-Flex") coalition. E-Flex has submitted comments to the Proposed Rulemaking which FMI signed on to and supports. These comments serve to supplement the E-Flex comments.

**Introduction**

FMI has been continually seeking flexibility and minimize new burdens in the new health care law's implementing regulations, in order for food retailers and wholesalers to continue providing health coverage that is affordable and of value to both the employee and the employer. To that point, FMI appreciates and supports the Administration's allowance for flexibility for employers to 'look back' up to one-year to account for

fluctuating work schedules when determining coverage eligibility for employees who do not have a pre-determined work schedule, as well as providing a safe-harbor for employers who can demonstrate that an employee's premium cost does not exceed 9.5 percent of an employee's wages. In that context, FMI also seeks the Administration's consideration of the following comments to address provisions in the Proposed Rule related to certain aspects of determining employee eligibility, affordability and minimum value, allowance of wellness programs, reporting and liability, and transition rules.

**Determination of Full-Time Employee Status for Purposes of Coverage Eligibility**

FMI supports the optional look-back measurement period afforded employers in the Proposed Rule to measure the monthly full-time hour equivalence for current employees, as well as for new employees with variable or unpredictable hours. FMI also supports the Proposed Rule's administrative flexibility provided by allowing an administrative period between the measurement and stability periods and by allowing certain employee categories for different measurement periods. In addition, FMI supports allowing the use of a pay-period-based and/or calendar month-based measuring period chosen by the employer to batch look-back measurements. FMI members' workforces generally fluctuate throughout the year with many employees entering and leaving at various times throughout a given month, let alone throughout the year, with their work schedules changing with customer demands, and these provisions should help provide some predictability and stability for employers to determine coverage eligibility.

Many FMI members also employ seasonal employees whose terms and work schedules may fluctuate to address customer needs. We appreciate that employers are provided a reasonable, good faith interpretation of the term seasonal employees for purposes of section 4980H, and the example of a specific time limit of not more than six months in the proposed rule. FMI also seeks your consideration of allowing for up to seven months to allow for a margin of error or seasonal exception. We look forward to continue working with you to ensure that seasonal employees are appropriately defined and remain a resource during the ebbs and flows in the retail business.

FMI is concerned with proposed provisions, rules and calculations to address re-hired employees. These proposed rules are complicated and would require separate employee tracking systems, including for periods when the employee was not employed. This complication would be magnified for large employers with multiple locations, multiple states, and potentially different plans when an employee may voluntarily leave one location and be re-hired at another. Creating an additional set of rules to capture breaks in service could also dismantle the administrative flexibility otherwise provided the through measurement and stability periods. We look forward to the opportunity to explore more reasonable options as you consider this issue.

**Offer of Coverage**

FMI appreciates the clarification that generally applicable substantiation and recordkeeping requirements in section 6001 qualify as an employer having properly offering coverage to eligible employees, as well as the general acknowledgement that offers may be made electronically. FMI also supports the Administration's adoption of a "substantially all" threshold for employers to be treated as offering coverage to full-time employees (and their dependents).

**Affordability and Minimum value**

FMI supports the affordability test safe-harbor provided in Section 4980H(b) to employers who may demonstrate that the lowest cost, self-only employer-sponsored coverage does not exceed 9.5 percent of employees' W-2 wages, employees' rate of pay or the federal poverty line. While preserving the affordability test's 9.5 percent household income general rule, these options provide valuable options that allow employers to pre-determine whether the coverage they are offer is affordable and to base that determination on information that is available to the employer.

FMI also believes that premium incentives or discounts afforded to an employee through an employer-sponsored wellness program should be incorporated into accounting the employee premium share in the affordability test. For many FMI members, wellness programs are a critical component to maintaining both employer and employee health care costs, while also providing a valuable benefit to workers.

FMI is still reviewing the final regulations addressing minimum value calculation under 4980H(B) and the options provided, including a minimum value calculator, designed-based safe-harbors, the potential use of actuarial certification, and other potential means for small-group markets. FMI believes all of these options should be made available to all employers and supports as many options as possible for all employers that are administratively simple and do not dictate or discount certain benefits. Minimum value certifications should also be flexible enough to allow for including employer contributions to Health Reimbursement Arrangements or Health Savings Accounts in the minimum value certification.

FMI member companies are also constructively interested in the proper implementation of the Proposed Rulemaking addressing Nondiscriminatory Wellness Programs in Group Health Plans. For many FMI members, wellness programs are a critical component to maintaining both employer and employee health care costs, while also providing a valuable benefit to workers. FMI submitted comments on the effect of the Nondiscriminatory Wellness Programs in Group Health Plans Proposed Rule on employers' ability to implement attainment incentives, to maintain health care costs, and to comply with the Affordable Care Act's employer shared responsibility provisions. To that end, it is critically important that whatever means used for calculating minimum

value must allow for incorporating employers' spending on employee wellness programs, in-house clinics (which may require lower cost-sharing for on-site prescriptions, diagnostic tests, etc.), as well as other approaches aimed at improving and maintaining employee health as a means to encouraging preventive health care utilization, improving health outcomes, and lowering health care cost growth that makes coverage affordable to both the employee and employer.

Some FMI members also voluntarily provide health benefits to part-time employees. FMI seeks as much flexibility as possible within 4980H and the ACA's insurance market reforms, to preserve employers' ability to voluntarily offer niche health benefits, such as Health Reimbursement Arrangements, Health Savings Accounts, wellness programs, and other benefit programs, to part-time employees without being subject to a penalty.

**Reporting**

FMI's members remain concerned about the potential for administratively burdensome and multiple reporting requirements and penalty structure for employers to communicate and demonstrate compliance to individuals, Exchanges, Department of Treasury, Internal Revenue Service, Department of Health and Human Services, and other agencies. Since formal guidance has yet to be released and employers do not yet know what type of data, forms or systems will be needed, employers are also unsure whether they will have the ability to comply with 2014 and even 2015 reporting requirements. FMI urges the Administration to minimize new reporting requirements and echoes the E-Flex coalition's comments to build upon current employer reporting forms and mechanisms.

**Transition Periods**

With less than 9 months to go before the ACA's employer rules become effective, FMI seeks a transition period for all employers with fluctuating workforces to comply with the Shared Responsibility rules through at least 2014 without being subject to penalty. A plethora of ACA's employer rules were just released within the last 90 days and still more critical components have yet to be released such as the protocols, reporting and/or potential rules for how employers interact with federal and state agencies.

FMI is concerned that employers do not have enough time to review all of ACA's employer rules in their entirety to then properly adjust their coverage plans, to build compliance systems, and to develop reporting mechanisms to be in compliance by 2014. For example, while the 4980H Shared Responsibility Proposed Rule provides needed flexibility for employers with variable hour employees, mechanisms such as the look-back/measurement period and corresponding stabilization periods are unfamiliar to most employers and require education, training and time for initial implementation and operation for employers to have confidence in their compliance. Other rules, such as rule changes to employee wellness programs impact how employers may need to

adjust their benefit plans and cost-structures. These changes to employer-sponsored health coverage often need to be re-negotiated and then communicated to employees no later than an employer's open enrollment, which under current conditions, would need to occur as early as October 2013.

In addition, the final regulations should allow a separate transition for employers' coverage provided through contributing to multiemployer plans based on the terms of collective bargaining agreements entered into with the unions representing those employees. Some employers in the retail food industry provide health benefits to employees through agreements that run for multiple-year periods that extend beyond the effective date of the new shared responsibility requirements and ACA coverage mandates. The Proposed Rule's transition rule for applicable large employer members participating in multiemployer plans recognizes the need for a transition period for these plans but does not address employers' concerns with obligations to terms of current agreements satisfying the ACA's employer shared responsibility requirements. We request the opportunity for additional discussions on this matter.

We appreciate the acknowledgement in the Proposed Rule of the need to provide some transitional relief to employers, but we believe that transition should be provided to all employers who are attempting to comply with complicated and unprecedented health coverage rules. Some of the transition provisions provided in the Proposed Rule, such as for non-calendar plans, are understandable but are based on conditions that are predetermined, and therefore additional compliance time should be afforded to all employers.

In the meantime, we seek your engagement in outreach to employers to understand their obligations under the "shared responsibility" rules, but also the flexibility provided and how to operate these mechanisms. For example, employers need a one-stop shop to figure out whether they are a large employer, how to initiate the look-back and waiting periods work for determining employee eligibility, and the tools to construct a plan that meets the affordability and minimum value requirements. Currently, ACA's rules for employers are scattered among several federal Departments and agencies, let alone the exponential rules and guidance being set forth by states to implement (or opt out of) several ACA components that impact employers' coverage and reporting responsibilities. Employer-focused outreach is critical for employers to understand the rules, as well as the options provided, in order for employers to properly meet their health coverage obligations under this new law.

FMI appreciates the opportunity to comment on the proposed rulemaking to implement the Employer Shared Responsibility provisions of the Affordable Care Act. While employers' compliance burdens under the Affordable Care Act cannot be understated, adoption of FMI's comments to the 4980H Shared Responsibility Proposed Rule would provide some reasonable flexibility to allow employers to continue offering employer-sponsored health coverage to eligible employees that is affordable and of value to both

employees and employers. We hope to maintain a constructive dialogue as your agencies finalize these rules to implement the Affordable Care Act. Please contact me Robert Rosado at (202) 220-0642 or rrosado@fmi.org or Erik Lieberman at (202) 220-0614 or elieberman@fmi.org for further discussion on any of these issues.

Sincerely,

Robert Rosado
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Regulatory Counsel