THE VOICE OF FOOD RETAIL
Feeding Families Enriching Lives

July 2, 2013

CC:PA:LPD:PR (REG-125398-12), Room 5230,
Internal Revenue Service,
Ben Franklin Station,
Washington, DC 20044

Submitted electronically via http://www.regulations.gov (IRS REG-125398-12)

RE: **Notice of Proposed Rulemaking for Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit (IRS REG-125398-12)**

Dear Sir or Madam:

On May 3, 2013, the Internal Revenue Service (IRS) published a Notice of Proposed Rulemaking for Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit (the "Proposed Rule") related to the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)). The Food Marketing Institute (FMI) appreciates the opportunity to provide comments to the IRS's Notice of Proposed Rulemaking since policies involving employees' benefits can have profound impacts upon supermarket industry, including the approximately 3.5 million Americans it employs.

Food Marketing Institute proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores.

Food retailers and wholesalers employ 3.5 million full-time, part-time and seasonal workers—many operating under fluctuating work schedules in order to meet employee needs and varying consumer demand. FMI has been continually seeking flexibility and to 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.

FMI is an Executive Committee member of Employers for Flexibility in Health Care ("E-Flex") coalition. FMI's comments serve to reinforce and supplement the E-Flex comments related to the method of determining minimum value and affordability of employer-sponsored plans that were provided in E-Flex comment letters dated October 31, 2011; June, 11, 2012; and March 15, 2013.

FMI appreciates the Administration's consideration of comments intended to enable employer-sponsored coverage. In that vein, FMI remains concerned that some of the proposals put forward in the IRS REG-124398-12 will have unintended consequences to penalize some of the coverage and wellness offerings that FMI's food retailer and wholesaler membership provide to their employees, particularly the mechanisms for determining minimum value of coverage and the accounting of wellness programs in determining minimum value and employee affordability associated with the Patient Protection and Affordable Care Act ("ACA") in § 4980H of the Internal Revenue Code and also noted in comments submitted by FMI regarding the Notice of Proposed Rulemaking for Shared Responsibility for Employers Regarding Health Coverage (REG–138006–12).

Determining Appropriate Value to Health Reimbursement Arrangements, Health Savings Accounts and Employee Wellness Programs

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 asserts that the Proposed Rule dismisses an underlying premise behind one of the law's voluntary mechanisms for promoting employee wellness and reigning in increased health care costs by disallowing accounting for employer-based wellness programs. The ACA promotes employer wellness programs and encourage opportunities to support healthier workplaces. Not properly valuing wellness programs is contradictory to spirit of the law. FMI respectfully seeks for the agency to account for the full value of these programs to be included in all of the calculation and all other methods used to certify the value of the over-arching employer-sponsored health plan.

While FMI has significant concerns about effective parameters of the recently released final rules on "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans" (78 Fed. Reg. 33158), if such an employer-based wellness program meets the rules' requirements and therefore is non-discriminatory, the employer contributions, credits to the employee should be fully-valued in the plan's minimum value certification, and any premium discount should be allowed to be used in the calculations for the affordability test under the Shared Responsibility for Employers Regarding Health Coverage (REG–138006–12). Since non-discriminatory protections have been incorporated into the rules governing the wellness programs, FMI respectfully disagrees with the Proposed Rulemaking's assertion that employees' earned benefits through a wellness program should be automatically be granted to anyone. Otherwise, employer-

based wellness programs will lack any measures to incentivize employee participation in health promotion programs.

FMI also believes the Proposed Rule dismisses congressional intent in the promotion of employer-sponsored wellness programs as illustrated by the increased size of the allowable incentive for employer-sponsored wellness programs, allowing for preventive care without cost-sharing, and providing federal funding for other wellness programs that are included in the broader Affordable Care Act. 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.

FMI also seeks for the temporary allowance permitting employers to measure affordability and minimum value as if all employees have met an employer's wellness program criteria to apply to all plan years.

Mechanics for Calculating Minimum Value of Employer-Sponsored Health Benefits

FMI appreciates the options provided to determine minimum value on a pass or fail basis based on whether the plan covers at least 60% of the costs of the coverage under 4980H(B) 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 include the value and reduced cost-share provided in employee wellness programs (as noted in above comments) and be flexible enough to allow for including employer contributions to Health Reimbursement Arrangements or Health Savings Accounts in the minimum value certification.

The Proposed Rule appears based on covering 60 percent of the costs of coverage on four core benefits, including 1) physician and mid-level practitioner care; 2) hospital and emergency room services; 3) pharmacy benefits; and 4) laboratory and imaging services. FMI appreciates the Administration's reaffirmation that this minimum value certification is not linked to the coverage of the 10 essential health benefits required by Qualified Health Plans in the individual and small group markets and that these benefits are considered to be broad categories where minimum value will be driven by the underlying claims. FMI also seeks for a de minimus variation to be allowed in determining minimum value. Specifically related to the agency's proposed design-

based safe-harbors, FMI appreciates the guidance that these safe-harbors provide but also seeks for clarification that the safe-harbor examples are not the means to set prescriptive standards or a de facto standard to trigger increased enforcement. FMI also seeks for the option for use of a certified actuary to be available to all employer-sponsored plans rather than limited to those with non-standard features. Providing as many options as possible for employer-sponsored plans allows for flexibility so plans may provide value to a diversity of employee interests.

FMI appreciates the opportunity to comment on the Proposed Rule. We believe that if IRS and the Administration follow the recommendations contained within these comments, employers will have greater flexibility in meeting a diversity of employee needs in the coverage they offer, as well as to continue innovative approaches to encourage preventive care and lower health care costs through employee wellness programs. 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
Director, Government Affairs

Erik R. Lieberman
Regulatory Counsel