

Employers for Flexibility in Health Care Coalition

Preserving Employer-Sponsored Health Coverage under the ACA

October 9, 2014

The Honorable Jacob Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretaries Lew and Burwell:

With the implementation of the Affordable Care Act (ACA) in full swing, the Employers for Flexibility in Health Care (E-FLEX) Coalition is writing today in hopes of continuing the constructive working relationship we have had with the Administration throughout the development of the regulations to implement the employer provisions of the law. The Coalition hopes that by raising concerns we are hearing from employers, of all sizes across the country about the challenges of complying with the ACA's administrative requirements for employers, we can work with the Administration to develop solutions that would help minimize the number of employees who have to repay advanced premium tax credits (APTCs) each year because their eligibility for premium tax credits was determined using inaccurate or outdated information, and ease the significant compliance burden on employers.

The E-FLEX Coalition includes leading trade associations and businesses in the retail, restaurant, supermarket, temporary staffing, hospitality, construction, 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 the Treasury, Health and Human Services, and Labor Departments, as well as the White House, since 2011 about the employer requirements under the ACA, including the information reporting requirements and the operational functions of state and federally-facilitated Exchanges. 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. To that end, the E-FLEX Coalition in this letter aims to highlight outstanding questions and key concerns about implementation of the ACA with regard to:

- Information reporting under Internal Revenue Code sections 6055 and 6056
- Determination of employee eligibility for premium tax credits
- The employer notification process when Exchanges have determined employees eligible for premium tax credits
- Repayment of APTCs for 2015

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Information reporting under Code sections 6055 and 6056

The ACA's information reporting requirements for employers and insurers will require significant systems investments for many organizations. In many cases, employers will have to build entirely new systems to ensure that all of the data that the IRS is requiring is being collected (beginning January 1, 2015) and reported (beginning in 2016).

The IRS and Treasury Department released final rules for the information reporting requirements on March 5, 2014, but did not release draft forms until July 24, 2014, and draft instructions for the forms until August 28, 2014. The IRS has not yet released the technical specifications for employers to report the required information electronically. (The final regulations require employers who file more than 250 forms annually to report information to the IRS electronically.)

Although the first reports are not due to the IRS until 2016, employers with as few as two employees that are members of a controlled group with 50 or more full-time equivalent employees must begin collecting information under sections 6055 and 6056 on January 1, 2015, when the employer mandate generally takes effect. Given the complexity of the changes and build-outs that will have to be undertaken, businesses are waiting for the IRS to provide a complete picture of the data and technology requirements employers will need to incorporate before beginning work on the systems changes. Employers now have less than three months to get these systems in place to begin collecting information and many fear they will need to compile this complex set of data manually in the first year. The less time that the IRS gives businesses to make the required systems changes, the more difficult and costly it will be to have systems in place. Even third-party vendors that are used by some employers for functions such as payroll and hours scheduling are not equipped to handle the reporting on behalf of employers due to lack of final forms and instructions, and technical specifications from the IRS.

In addition, the IRS is requiring employers and insurers to collect Social Security numbers for all covered individuals, including dependents, under the information reporting requirements. This is information that many employers and insurers do not currently collect, and employers are extremely concerned about this added privacy challenge. Because the IRS has not released the technical specifications for electronic reporting, employers cannot build their systems to meet the necessary encryption and data security standards.

Over the last four years, the E-FLEX Coalition has raised concerns and offered commonsense solutions that would reduce the reporting burden for employers, increase the accuracy of APTC eligibility and decrease the risk of APTC recapture for employees. These reporting requirements will cover millions of employees, and employers need better information to securely implement these difficult requirements.

The questions listed below regarding the information reporting requirements are top-of-mind for the employer community in the fall of 2014.

1. When will the IRS release the technical specifications for electronic submission of the ACA's information reporting requirements for employers and insurers?
2. What encryption and data security standards will the IRS provide for in the technical specifications?
3. Given that the IRS is accepting comments on the draft forms and instructions until November 3, 2014, when can the business community expect to see final forms and instructions?

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4. How is the IRS communicating to employers generally – and specifically to small employers between 50 and 100 full-time equivalent employees – that employers must begin collecting data for reporting under section 6056 as of January 1, 2015? The draft instructions necessarily contain a statement that employers may not rely on the draft forms. This caveat, in addition to confusion around the breadth of the delay for small employers has left many small employers confused about their tax year 2015 reporting obligations.
5. Will the IRS incorporate the short time frame for work on the data collection and reporting systems into its economic impact analysis?

Determination of employee eligibility for premium tax credits

When an individual goes to an Exchange and applies for an APTC, eligibility is determined in many cases on tax information from two years prior – e.g., eligibility for APTCs for 2014 was determined based on tax information for 2012. Because many individuals had different jobs or worked for different businesses two years ago, this approach to determining eligibility for APTCs could put many individuals at increased risk for having to repay part or all of their APTC when they file their taxes for 2014. This process could also force employers to spend additional resources to appeal unwarranted tax penalties.

Employers believe it is in the best interests of individuals, the IRS, and businesses themselves to do everything possible to minimize the number of employees who have to repay APTCs. Recognizing that there is no comprehensive electronic data source available for Exchanges to verify employer-sponsored coverage, many businesses have urged the IRS to allow for a voluntary certification system under the ACA's information reporting requirements so that employers could prospectively report to the IRS that they are offering coverage to full-time employees that meets the ACA's requirements. Under such a system, employers could attest that they offer coverage that meets the ACA's minimum value standard and could certify that they offer at least one plan that meets one of the employer safe harbors for affordability that the Treasury Department provided in the final rules on the employer mandate under Code section 4980H. HHS could amend its data sharing agreement with the IRS to allow state and federally-facilitated marketplaces to access such information in determining eligibility for premium tax credits.

Such certification is authorized by the ACA under section 1514 and could improve the accuracy of initial eligibility determinations for APTCs 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 process for year-end information reporting on the coverage offered to individual employees, reducing the complexity and burden of ACA compliance for employers, while helping the IRS, and state and federally-facilitated Exchanges improve their data collection, eligibility determination and verification processes.

Regrettably, the IRS did not provide for such a voluntary, prospective reporting system by employers in the final regulations under Code sections 6055 and 6056. The E-FLEX Coalition welcomes any opportunity to work with the Administration or the Congress to refine the information reporting process under the ACA and mitigate any unintended administrative problems arising from potentially significant numbers of individuals having to repay APTCs as part of the regular tax filing process because of a burdensome and incomplete process for determining eligibility for APTCs in 2014 and 2015.

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Notification of employers that Exchanges have determined employees eligible for premium tax credits

In some cases, an employee might seek an APTC for Exchange coverage even though employer-sponsored coverage that meets the ACA's requirements is available. There have been specific instances in 2014 in which an employee was offered coverage through his or her employer that meets the ACA's employer coverage standards, declined that coverage, and instead sought coverage and an APTC in an Exchange. In some cases, Exchanges deemed individuals eligible for APTCs without verifying whether they had access to employer-sponsored coverage, raising the possibility that the individual could have to repay all or part of the premium tax credit as part of the regular tax filing process.

To help avoid such situations, section 1411 of the ACA requires Exchanges to notify employers when an employee is deemed eligible for a premium tax credit and gives employers the option of responding with information showing that employer-sponsored coverage that meets the ACA's requirements is available to the employee. Although there will be instances in which employees nonetheless could be determined eligible for premium tax credits generally based on household income, in many other cases employees could seek Exchange coverage because of a misunderstanding of the employer offer of coverage or of the eligibility requirements for APTCs.

HHS has said that Exchanges generally have not provided these notices to employers thus far because employers will not face excise taxes under Code section 4980H for 2014. However, members of the E-FLEX Coalition are very concerned that not sending these notices for eligibility determinations for 2014 could increase the number of employees who might have to repay all or part of an APTC because a workable employer notification system is not currently in place. In addition, because the current automatic re-enrollment process for Exchanges does not include a timely re-verification process, the likelihood for repeated errors is increased. Some key areas of concern for employers about the notification and appeals processes are highlighted below.

- *Format for notices.* With less than six weeks before open enrollment for 2015 begins, HHS has not indicated what information will be included in notices to employers. In 2014, some states sent notices that were of little or no use to employers because the notices did not include TINs, birthdates or identifiable information for the employee deemed eligible for a tax credit. As a result, employers did not know to which John or Jane Doe employee a notification applied, making it difficult for employers to appeal in such cases and potentially exposing employees to APTC repayments.
- *Physical delivery of notices.* HHS plans to send employer notices to the address that employees provide in their applications for premium tax credits. This could result in Exchanges sending notifications to an individual store location or other location, rather than the corporate office's department that is responsible for processing such notices, thereby delaying an employer's response to the notice.
- *Timing for sending of notices.* Our understanding is that HHS currently plans to send notices to employers in batches beginning in spring 2015. This timing could give rise to an employee who had a qualifying offer of employer coverage remaining in Exchange coverage far longer than the individual might have if the employer was notified of the eligibility determination in a more timely fashion. For example, if the APTC in this case is effective January 1, 2015, but an Exchange notification is not sent to the employer until March—in the best case scenario—the ensuing 90-

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day appeals process and final resolution could result in significant tax consequences for the employee, requiring the repayment of much of the 5+ months of APTC. Furthermore, if the employee is no longer able to afford the Exchange coverage without the APTC, current law does not allow for a mid-year special enrollment opportunity for such employees to re-enroll in employer coverage, leaving such employees potentially uninsured and exposed to significant APTC recapture. The E-FLEX Coalition urges the Administration to reconsider establishing a voluntary prospective reporting system for employers to help improve the accuracy of APTC determinations in light of the shortcomings of the intended approach to employer notification.

- *Employer appeals process.* To date, the Administration has not provided information to the employer community about the mechanics of the employer appeals process as outlined in CFR §155.555(b). For example, employers do not have any insight as to the appeals entity HHS will charge with processing employer appeals, and employers are similarly unaware of whether state-based Exchanges will establish their own employer appeals entities or rely on HHS to process employer appeals. These details are critically important to the business community, especially for multistate employers who need to establish processes and train personnel for how to respond to notifications that may vary by state in both format and appeals procedures when Exchanges have determined employees eligible for premium tax credits.

Repayment of APTCs for 2015

Given employers' limited experience with Exchange notifications regarding employee eligibility for premium tax credits during 2014, we remain very concerned about the workability and efficiency of the employer notification and appeals processes for 2015. If significant delays occur between when eligibility determinations are made, employer notifications are sent, and appeals are resolved, employees could face substantially larger APTC repayments under Code section 36B than would otherwise be necessary under a well-functioning notification/appeals system.

In recognition that 2015 is largely a practice year in which Exchanges and employers will be testing out and gaining valuable experience with a complex notification and appeals process, we urge the Administration to consider a grace period if such tax consequences occur as a result of inaccurate APTC determinations, delayed notifications, wrong addresses, lack of personally-identifiable information on notifications, appeals backlogs, or other process inefficiencies during this learning period.

Conclusion

The E-Flex Coalition sees significant challenges in the months ahead for the employer community as the ACA's employer responsibility provisions come into full effect, especially given the short time frame provided for employers to put in place systems to comply with the ACA's burdensome information reporting requirements under sections 6055 and 6056. Nonetheless, Coalition members believe there are options available to the Administration to mitigate many of these challenges and minimize the number of individuals who have to repay all or part of any advanced premium tax credit due to inaccurate subsidy determinations while also easing the compliance burden on employers. This shared goal of the Administration, individuals and the employer community could be achieved in large part by basing the determination of eligibility for advanced premium tax credits on more accurate up to date information that employers could voluntarily report on a prospective basis and by developing a process

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for Exchanges to provide timely, actionable information to employers when employees are determined eligible for premium tax credits.

We look forward to continuing to work with you to improve implementation of the employer provisions of the ACA.

Sincerely,

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

Cc:

The Honorable Harry Reid (D-NV)
The Honorable John Boehner (R-OH)
The Honorable Ron Wyden (D-OR)
The Honorable Orrin Hatch (R-UT)
The Honorable Tom Harkin (D-IA)
The Honorable Lamar Alexander (R-TN)
The Honorable Dave Camp (R-MI)
The Honorable Sander Levin (D-MI)
The Honorable Fred Upton (R-MI)
The Honorable Henry Waxman (D-CA)
The Honorable John Kline (R-MN)
The Honorable George Miller (D-CA)

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

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