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March 18, 2013

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

Submitted via website:
http://www.regulations.gov

The Retail Industry Leaders Association (RILA) welcomes the opportunity to provide comments to the Internal Revenue Service, and Departments of the Treasury, Labor, and Health and Human Services in regards to the Notice of Proposed Rulemaking (NPRM) on Shared Responsibility for Employers Regarding Health Coverage.

Retailers are committed to continuing to offer quality, affordable coverage to their employees and families. RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA members offer health coverage to millions of American workers and their families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs.

RILA continues to appreciate the White House's and Departments' willingness to engage in discussions about the employer requirements under the Patient Protection and Affordable Care Act (ACA) with us and our member companies as the regulatory process unfolds. Specifically, we appreciate the time that regulators have spent with RILA and our members 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.

Our comment letter addresses issues raised in the NPRM as well as issues discussed with the White House and Departments during a meeting with RILA member companies in late February. In addition, RILA formed and leads the Employers for Flexibility in Health Care (E-Flex) Coalition. The E-Flex Coalition's letter on the NPRM, filed separately and attached, includes comprehensive comments developed with extensive input from RILA member companies. RILA supports and incorporates herein the E-Flex Coalition comments urging the Administration to consider carefully these comments as the regulatory development process continues.

Definition of a Full-time Employee, Affordability Test, Wellness

Since the beginning of the regulatory development process, RILA and its member companies have continued to stress to the Administration the need for providing flexibility in the definition of a full-time employee, especially for industries such as retail where there is a large variable hour workforce comprised of part-time, seasonal and temporary employees. The NPRM recognizes the need for flexibility and RILA appreciates the inclusion of look-back measurement and stability periods proposal to determine the status of a full-time employee. In addition, RILA appreciates the inclusion of four options in the NPRM – the statutory rule and three safe harbor methods – for an employer to use to calculate the law's affordability test. Employers do not know and legally should not know an employee's household income, so the inclusion of three safe harbor methods that are not based on household income is welcome.

However, RILA remains concerned about the lack of rules and guidance on how an employer wellness program will be applied to the affordability test calculation. Retailers have embraced the idea that investing in a healthy workforce today not only lays the foundation for a healthier society but also ensures the development of a more productive workforce which is able to enjoy a higher quality of life. We appreciate the recent discussion the White House and Departments had with our member companies on this important issue. We also understand there is a substantial amount of deliberation among regulators in the Administration on this aspect of the calculation. As noted in our January 24, 2013 letter to the Labor Department regarding the ACA wellness initiative, we believe there are protections in the law to safeguard individuals from being discriminated against with respect to wellness programs.

Employers must invest a significant amount of resources into meeting the affordability test. RILA is concerned about the potential issuance of inflexible rules that may stifle employers' ability to create innovative plan designs and willingness to incorporate wellness programs into their coverage structures. We believe the application of the lowest cost plan available to employees is the cost of the plan *after* the application of wellness discounts or *before* the application of wellness surcharges. For example, one of our member employers currently offers a comprehensive PPO for $20 per week for employee self-only coverage. Tobacco users who go through a voluntary on-line cessation program are eligible for the $20 per week premium, which adheres to HIPAA regulations. Tobacco users who choose not to participate in the wellness program pay a 15 percent surcharge, for a total premium of $23 per week. Our interpretation of the statute is that the $20 per week cost is the lowest cost plan, and the one on which the affordability test should be based.

Transition Relief, Compliance Time

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. The NPRM recognizes the challenges employers with non-calendar (fiscal) year plans would face having to comply with the requirements during the plan year that straddles 2013-2014, as the statutory effective date of

January 1, 2014, would require these employers to make benefits changes mid-plan year or risk being subject to possible tax penalties. RILA appreciates the recognition of these challenges and welcomes the limited transition relief for non-calendar plans included in the NPRM. However, RILA remains extremely concerned that all employers, regardless of plan year, do not have ample time to plan, budget, and implement changes in order to comply with the ACA. RILA is also concerned that while the NPRM is what employers should utilize now to comply with the law in 2014, once final rules are released there may not be ample time for employers to comply for plan years in 2015, that straddle 2014-2015, and beyond. Employers cannot plan and make concrete business decisions for the future on a very short notice.

Further, RILA is concerned that the transition relief for non-calendar plans would not be applicable to all employers that have such plan years. Under the NPRM, the transition relief is only available to employers if at least one-fourth of all employees are covered, or at least one-third of all employees were offered coverage under the plan year which included December 27, 2012. RILA strongly urges the transition relief rules be modified to not be conditional or at a minimum, not require the counting of all employees – only those that are subject under the employer responsibility. RILA would welcome the opportunity to discuss this in further detail with Treasury officials.

Break-in-Service/Re-Hire Rules

RILA recognizes the need to eliminate potential employer abuse of terminating an employee at the end of his/her initial measurement period and rehiring the employee with the intent to defer offering health coverage. However, RILA and its member companies are gravely concerned about the proposed rules regarding break-in-service and rehiring of employees, as they are very confusing and would cause significant administrative burdens. It is important to note that employers invest significant time and resources in employee development and training, often at an expense much greater than the cost of health coverage and the decision to be a "bad actor" and abuse the system is one that the majority of employers would not take.

RILA member companies have significant workforce turnover rates and the volume of terminated employees who later rehire within a 26-week period is substantial. Capturing this volume of employees and assessing their break in service by looking back 26 weeks in historical records will cause a tremendous administrative burden and require significant IT resources. For example, one retailer has identified more than 12 different scenarios for which a tracking system would have to be coded to handle the turnover and rehire situations should the policy in the NPRM be implemented.

While we also appreciate the spirit of the alternative rule of parity option, this adds a layer of programming complexity and will require even greater IT resources to systemically calculate the individual's employment tenure in comparison with the service break duration. RILA recommends: 1) providing sufficient time for employers to deploy needed system programming; and 2) reduce the time period an employer must treat the individual as a rehire from 26 weeks and allow an employer flexibility to establish break in service rules based on the rehire policies or patterns of their company.

In addition, the NPRM couples a break in service due to employment termination and an unpaid leave of absence under one category. Many employers treat employees on an approved company leave of absence, in addition to "special unpaid leaves," as a continuing employee. Only upon the employee's failure to return to work at the end of the approved leave period is the employee terminated from employment. Allowing the employer to count weeks of an unpaid leave as zero hours, versus a break in service, is consistent with treating the individual as an employee of the company during the approved leave of absence. For example, an individual may be placed on an approved Workers' Compensation leave for a consecutive period greater than 26 weeks. Such employees have not terminated employment and to treat them as terminated for benefits eligibility purposes will likely require additional programming, new HR status codes, etc. RILA recommends that an unpaid leave of absence may be counted as zero hours for the duration of the approved leave and while the individual is counted as an "employee" of the employer. Alternatively, the rules could expand the category of "special unpaid leave" to include all company approved leave of absence programs.

We understand that the Administration initially viewed the NPRM as similar to rules used in the pension and retirement arena but it is important to note that the counting of hours worked is not used as is the case with these proposed rules for health coverage. Additionally, we are very concerned that this will result in inconsistent eligibility rules for employees – resulting in confusion as to enrollment options under employer-sponsored coverage or insurance Exchanges.

Reporting Requirements

RILA eagerly awaits the proposed rules on the collection and remittance of data required under IRS Code Sections 6055 and 6056. As we noted in a previous comment letter, the collection and remittance of this data 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 Sections 6055 and 6056 will require employers to gather data from multiple IT systems and vendors. As the Administration develops the reporting regulations, RILA urges that regulations 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 onto federal or state databases. RILA is very concerned that employers may be required to provide the same data to employees and plan enrollees. The administration complexities of being required to do so is mindboggling to employers.

In addition, RILA eagerly awaits the proposed rules under section 18B of the Fair Labor Standards Act (FLSA). RILA appreciates the constructive conversation the White House and Departments had with its member companies recently about communications with employees and employer reporting requirements. We welcome the opportunity to follow up with additional information and details in the coming weeks and months. We would, however, like to note a concept discussed that we feel may enable a smoother transition to ACA enactment for employers, employees, Exchanges, and the Departments. We believe there should be a federal government website/portal established 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 – meets 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. The same pre-certification information can be provided to an employee upon request in a simple one-page form or on an internal company webpage that contains information to satisfy the section 18B requirement.

Communications with Employees and Employers

As previously noted, RILA members recently engaged in a robust conversation with regulators from the White House, and Labor, Treasury, and Health and Human Services Departments about the lack of information available to individuals and employers about the insurance Exchanges or Marketplaces, and the challenges employers will face in the coming months in answering employees' questions regarding Exchange coverage and other aspects of the ACA. The human resources (HR) department of a business is the first place an employee is going to go to with questions about health coverage – whether employer-sponsored coverage or insurance products in the Exchanges. In the case of retail businesses, a store manager will likely be the one fielding questions from employees about coverage options in the Exchanges.

Our retailer HR departments are experts in developing and distributing communications to employees about benefits elections and coverage options. Due to the nature of our business, where the vast majority of employees are located in individual stores and distribution centers, and not in headquarters where the HR departments are housed, our HR professionals understand the complexities of providing information to a large population of employees and their families across the country. RILA welcomes the opportunity to provide the Administration with additional input on the development of information tools employers and employees can utilize as we near the Exchange open-enrollment season. We stress, however, that the dissemination of information to employees must be done in a manner that recognizes an employer holds no legal authority or responsibility to advise or counsel individual employees on the election of coverage options in an Exchange.

In addition, RILA continues to stress to the Administration the importance of providing employers with clear, easy to understand information about implementing the employer requirements under the ACA. There are many consulting businesses and law firms that are providing inaccurate and confusing information to employers about requirements under the ACA. RILA strongly urges the Departments and agencies to produce and post on a public website additional information on specific steps businesses should be taking to comply with the law. The lack of real-world implementation information from the Administration is creating an environment where employers are being exposed to misinformation and advice that may lead to employers not complying with requirements under the law.

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Employer-sponsored coverage is the crown jewel of the American healthcare system. RILA is committed to ensuring employer-sponsored health coverage remains a viable option for the 170 million Americans receiving coverage today. RILA and the E-Flex Coalition look forward to continuing to provide constructive business operations information and policy recommendations to the White House and the Departments as the ACA regulatory development and implementation process proceeds.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.

Attachment:
Employers for Flexibility in Health Care Coalition letter