ERIC

The ERISA Industry Committee

November 14, 2013

CC:PA:LPD:PR (REG–132455–11)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

CC:PA:LPD:PR (REG–136630–12)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: RIN 1545–BL26 (Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans) and RIN 1545–BL31 (Information Reporting of Minimum Essential Coverage)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service ("IRS") for feedback on the proposed regulations under Internal Revenue Code ("Code") section 6055 relating to Information Reporting of Minimum Essential Coverage and under Code section 6056 relating to Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans.[1] ERIC has combined its comments on both Code sections 6055 and 6056 in this comment letter.

ERIC'S INTEREST IN ACA REPORTING

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. ERIC's members are committed to, and known for, providing high-quality, affordable health care. Our members expend considerable resources to maintain plans that cover many disparate populations across a wide range of geographic areas and that operate in all states and territories. These plans provide health care to millions of workers and their families.

[1] Internal Revenue Service, *Information Reporting of Minimum Essential Coverage*, 78 Fed. Reg. 54986 (Sept. 9, 2013), Internal Revenue Service, *Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans*, 78 Fed. Reg. 54996 (Sept. 9, 2013).

1400 L Street, N.W.
Suite 350
Washington, DC 20005
T (202) 789-1400
F (202) 789-1120
www.eric.org

While we appreciate the government's attempts to simplify the required reporting under sections 6055 and 6056, some of the suggested methods generally are not appropriate for most large employers and would entail the diversion of a not insignificant portion of their financial and administrative resources that is not commensurate with the benefit received.

The information generated by these reports will not be available in any case before the year *following* the year in which employees and their dependents will have made a decision as to whether to seek coverage (subsidized or not) in an Exchange. Thus, the *only* use for the information generated by these reports will be to allow the IRS to determine whether an individual owes a shared responsibility penalty for a failure to obtain minimum essential coverage and whether an employer owes a shared responsibility penalty because an employee has obtained subsidized coverage from an Exchange.

In either case, we feel strongly that the most appropriate and cost-efficient method for establishing liability for both the individual and employer penalty would be one in which employers affirm in an annual certification to the government that they have met their shared responsibility requirements to provide minimum essential coverage to their full-time employees and in which individuals assume responsibility for establishing that they have fulfilled theirs. If the need arises for further information from an employee's employer then, in accordance with prevailing procedures, the government can request that the employer provide that additional data. This would avoid the need for a substantial expenditure of administrative and financial resources to generate reporting that is not only unnecessary for the vast number of our employees but will also be confusing and unnerving for them.

Our recommendations and suggestions below emanate from these core principles.

SUMMARY OF MAJOR COMMENTS

As discussed in detail below, ERIC recommends that:

- Companies[2] should only be required to provide information to individuals upon request as the vast majority of workers will not need this information as they are already covered under their employers' plans.

- The reporting and disclosure requirements should make available a check-the-box method for companies that provide minimum essential coverage to 95% of their full-time employees and dependents.

- Employers should not be required to obtain consent for using electronic delivery to provide information required under Code sections 6055 and 6056.

- With respect to covered dependents of an employee, companies should be required to provide names, but not other identifying information.

[2] Internal Revenue Code section 6055 imposes requirements on plan sponsors, while Internal Revenue Code section 6056 imposes requirements on applicable large employers. For ease of reference, we do not distinguish between these two groups in our comment letter as our members are both plan sponsors and applicable large employers.

- Information that is accurate at the time reported should not be required to be updated when circumstances change.

- Members of a controlled group should have the option to file one report for the entire controlled group.

OVERVIEW

The Affordable Care Act ("ACA") generally requires Americans to maintain a minimum level of health coverage or pay a penalty (known as the "individual mandate") for each month in which they do not have minimum essential coverage. Americans can obtain health coverage in a variety of ways, including from their employers or through government-operated health insurance exchanges ("Exchanges"). Some individuals may be eligible for subsidies in the Exchanges based on their income. These subsidies are not available to a worker if his or her employer's least expensive self-only coverage is "affordable", that is, the cost to the employee for self-only coverage does not exceed 9.5% of the employee's household income, and the coverage meets the ACA's "minimum value" standard.

The ACA requires large employers to offer minimum essential coverage that is affordable and provides minimum value to full-time employees and their dependents or pay penalties (known as the "employer mandate"). Large employers that fail to offer their full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage are required to pay an excise tax equal to 1/12 of $2,000 per month times the number of its full-time employees in excess of 30 if at least one full-time employee receives a premium tax credit or cost-sharing reduction through an Exchange. Large employers that offer minimum essential coverage that is not affordable or does not meet the minimum value standard are required to pay an excise tax equal to 1/12 of $3,000 per month times the number of their full-time employees who receive a premium tax credit or cost-sharing reduction through an Exchange. This excise tax is capped so that it does not exceed the penalty that would have applied if the employer did not offer coverage.

To determine whether these requirements have been satisfied, the ACA requires reporting to the IRS under Code sections 6055 and 6056.

Under Code section 6055, plan sponsors must report to the IRS who is covered by the plans and the months in which they were covered. Plan sponsors must also provide this information to the employees who are enrolled in their plans along with additional contact information for the plan.

Under Code section 6056, large companies must report to the IRS information that includes: (1) the employer's contact information, (2) whether the company offered minimum essential coverage to full-time employees and their dependents, (3) the months during which coverage was available, (4) the monthly cost to employees for the lowest self-only minimum essential coverage, (5) the number of full-time employees during each month, and (6) information about each full-time employee and the months they were covered under the plan. Large companies must also provide this information to full-time employees as it relates to them along with contact information for the plan.

As discussed in greater detail below, the proposed regulations to Code section 6056 include a general method of reporting as well as several potential simplified methods. Under the general method, companies would use separate forms for Code section 6055 and 6056 that are created by the

IRS. These forms would report the information described above. The forms would be filed with the IRS and copies sent to employees with identifying information about the plan.

COMMENTS

I. The ACA reporting rules will require companies to expend considerable time and resources.

The reporting requirements imposed by the ACA create significant burdens for large plan sponsors. These companies will be required to create costly interoperable systems to compile, aggregate, and report the data required by the ACA.

Companies frequently have multiple systems that gather and store the data required to be reported under Code sections 6055 and 6056. Many employers use different systems to track benefits and payroll data. A recordkeeping system that houses an employee's benefit elections may not have data regarding the total number of full-time employees. Many employers do not collect dependents' taxpayer identification numbers on any system. Additionally, it is not uncommon for businesses to have multiple payroll systems as a result of mergers and acquisitions. Furthermore, information on former employees is often stored in separate systems from those used for current employees.

Coordinating the information required by the ACA will be complicated and time-consuming. Merging the data from these various systems significantly increases the complexity and cost of providing the information to the government and making disclosures to individuals. Some members have estimated that it will take 8,000 hours to build and test a system that could extract the required information from a benefits recordkeeping system and create the necessary files. Additional time will be needed to create and distribute the required disclosures as well as for establishing and testing connectivity with the IRS for reporting purposes. All of this, of course, translates into additional costs for employers.

ERIC members have provided us with estimates of the substantial initial costs of creating a new system with the necessary interfaces to generate the information required by the ACA. Cost estimates from ERIC members range from an initial outlay of $40,000 to $75,000 to as much as $150,000 to $200,000, depending on the size of the employer and whether separate forms are necessary for the 6055 and 6056 reporting or whether one combined form will be used. Additional funds would be needed to report for section 6055 purposes for former employees who receive health coverage from the employer.

Our members have also estimated the cost to produce the annual report on an ongoing basis. (In all cases, though, as detailed further below, these costs will be substantially reduced if reports may be transmitted to employees electronically rather than via the mail.) Members have indicated that the cost to mail paper disclosures, including expenses for paper, envelopes, printing, labor, and postage, would approach $0.87 per individual for a one-page document. Another member has estimated that it will cost $5,000 for ongoing fulfillment, with additional mailing costs of around $1.25 per individual. Another expects the annual costs for distributing the disclosures to their employees to be around $40,000 - $50,000 once the systems have been developed.

The time and resources that companies will need to devote to these reporting and disclosure requirements are substantial. Collectively, ERIC members expect to spend around $20 million

initially and an additional $0.5 million every year to comply with the ACA reporting requirements. The use of resources of this magnitude must be left to decisions by the companies themselves, who are in the best position to determine the most efficient allocation. Rather than requiring companies to expend considerable time and money to distribute information that is unlikely to be used, the IRS should provide for the simplified methods described below and request additional information from employers to the extent it is needed.

II. Companies should only be required to report or make available limited information to employees and the government.

As discussed above, the reporting requirements under Code sections 6055 and 6056 impose significant burdens on employers. ERIC's members devote considerable time and resources to their benefit plans. However, they must balance the provision of high quality, affordable health care with the need to contain the costs for these programs. Any additional burdens placed on plans could adversely affect the ability of these employers to continue to provide generous benefits and could result in increased costs for participants.

Most employees of large employers are offered affordable, minimum essential coverage that provides minimum value coverage. The U.S. Department of Health and Human Services indicates on its website that 99.2% of private employers with 500 or more employees offered health care coverage.[3]

Furthermore, participants already receive the vast majority of the information required to be provided under Code sections 6055 and 6056. They receive information about their health benefits through summary plan descriptions, open enrollment materials, company websites, the summary of benefits and coverage, Forms W-2, and countless other communications. Participants are often overwhelmed by all of the disclosures that must be given to them.

Executive Order 12866 "Regulatory Planning and Review" and Executive Order 13563 "Improving Regulations and Regulatory Review" direct agencies to balance additional costs of regulations on companies with a corresponding benefit to the system. They also direct agencies to maximize net benefits, promote flexibility and reduce regulatory burdens on companies.

As indicated above, the additional costs, both administrative and financial, generated by the requirement to provide customized statements to individuals under Code sections 6055 and 6056 by no means produce an offsetting benefit to employees or the government. In fact, the benefit is quite small compared to the costs, even if electronic disclosure is permitted. (For electronic disclosure, the burden of soliciting and maintaining a record of an individual's consent is not insubstantial.)

The purpose of reporting under Code sections 6055 and 6056 is to determine: (1) whether an individual is subject to an individual mandate for failure to obtain the requisite health coverage; and (2) whether the employer is potentially liable for the employer penalty for failure to offer coverage to

---

[3] U.S. Department of Health and Human Services, *Percentage of Employers Offering Health Insurance to Employees and Early Retirees*, available at https://healthmeasures.aspe.hhs.gov/measure/16. *See also*, Kaiser Family Foundation, *Percent of Private Sector Establishments That Offer Health Insurance to Employees, by Firm Size*, available at http://kff.org/other/state-indicator/firms-offering-coverage-by-size/ (showing 95.9% of employers with 50 or more employees offer coverage).

95% of their full-time employees. The information that could potentially be gathered under Code section 6056 is not sufficient to determine an employer's liability for failure to offer affordable, minimum value coverage as that liability is contingent upon an employee receiving a subsidy for Exchange coverage; before a penalty may be levied upon an employer, the government must first ascertain whether an individual actually received such coverage. Further, the required information from their employers will be of extremely limited utility to employees once they receive it. The information required under Code sections 6055 and 6056 is provided on a lookback basis, i.e., it is reported after the end of the year in which the employee received the reported coverage AND after the end of any open enrollment periods for calendar year plans of the employer. By the time employees are eligible for an open enrollment period for the following calendar year, the information they were provided about the employer's plans pursuant to Code sections 6055 and 6056 will be outdated and may no longer apply.

The bottom line, then, is that it is inappropriate for the government to require voluminous reporting under Code section 6055 to individuals and to the government that is not of any real utility to employees and is of only limited utility to the government. The most cost-effective way for the government to assess whether an employer offers minimum essential coverage to 95% of full-time employees is for the employer to fulfill its reporting responsibilities under Code section 6056 by filing a statement with the government that the employer provides the requisite coverage. Any additional liability on affordability and minimum value can really only be gleaned through detailed and specific correspondence between the government and an employee and between the government and the employer. This can be done only with respect to specific employees and not by casting a large net to capture large volumes of information that is not sufficient to establish employer liability.

Thus, we recommend that employers be permitted to elect an alternative solution, whereby companies would: (1) certify to the IRS that they provide minimum essential coverage to 95% of their full-time employees and dependents in fulfillment of their reporting responsibilities under Code section 6056; and (2) post a notice on the company's website that employees can obtain the information required by Code section 6055 upon request. Plan sponsors would then provide such information within a reasonable period of time to the few individuals who requested it and in response to specific government inquiries regarding employer penalties based on the Exchange subsidies received by individual employees.

We also suggest the following changes to the proposed regulations, as described below.

III. The IRS should simplify the way information is reported.

A. The methods proposed by the IRS are not feasible for ERIC members.

The IRS proposes several methods in the preambles to the proposed regulations for simplifying the reporting requirements under Code sections 6055 and 6056. We strongly agree that it is essential to develop workable methods for simplified reporting. In general, however, the methods proposed in the regulations would generate additional costs for many of our members, instead of reducing their burdens. Additionally, the conditions that the IRS has placed on use of a simplified method are too restrictive to be useful to our members.

Any approach ultimately used by the IRS to simplify the reporting rules must be optional. Depending on the approach used by the IRS, some employers may find it cost-effective to just use the

general method of filing forms created by the IRS and providing copies of the forms to their employees.

1. The IRS's proposed simplification methods using Form W-2 would result in substantial additional costs for many large employers.

The preamble to the proposed regulations suggests that Code § 6056 information may potentially be reported on Form W-2 instead of using a separate return and making separate disclosures to employees enrolled in the health plan. The IRS anticipates that an existing box on the Form W–2 could be used to provide the monthly dollar amount of the required employee contribution for the lowest cost minimum value self-only coverage offered to the employee and using a letter code to describe the offer of coverage. The IRS anticipates that this approach could be used for any employee employed by the employer for the entire calendar year when there was no change in: (1) the offer of health coverage, (2) the individuals to whom the offer is made, and (3) the employee contribution for the lowest-cost option for self-only coverage.

The IRS also proposed a variation on this approach where the employee contribution for self-only coverage was below a certain amount, such as $800 per year (i.e., less than 9.5 percent of the federal poverty line for a single individual). The IRS indicates that under this approach, either the employer's coverage will be affordable or the employee's household income will be low enough that the individual mandate would not apply. The IRS indicates that an employer that uses this method would not be required to file a Code § 6056 report to the IRS for those employees but would instead indicate on a Code § 6056 transmittal that it had chosen to use this method. If the Form W–2 used an EIN other than the employer's EIN, the employer might be required to identify its employees and their social security numbers on the Code § 6056 transmittal.

The IRS also suggests another variation where large employers with self-insured plans could provide only the return filed under Code § 6055 to the IRS (with detailed information on coverage provided to individuals) and include a letter code on the employees' Forms W–2 to indicate whether minimum value coverage was offered to employees, spouses and/or dependents. To use this relief, self-insured plans would need to: (1) provide mandatory, minimum value coverage to employees, (2) offer that coverage to spouses and dependents, and (3) require no employee contribution. Employers would thus provide summary information on the Code § 6056 transmittal form but would not provide further information reporting under Code § 6056.

While we appreciate the IRS's efforts to simplify the reporting requirements, some ERIC members have indicated that modifying the Form W-2 would be very expensive and, in some cases, not really feasible, particularly if several indicator codes are required. They indicate that changing Form W-2 would often require an upgrade to payroll systems to add new fields. They would also need to modify their online Form W-2 and printing interface. Additionally, they would need to add an interface from their healthcare eligibility / enrollment administrator to provide the necessary data to their payroll team for the information that would need to be populated in the new fields.

Furthermore, these simplified methods proposed generally rely on the creation of two systems: one for employees who meet the conditions of a simplified approach, and one for those who do not. These dual-system methods are generally not useful to employers; they simply add to the cost and complexity of the required reporting, including the cost of designing a system to calculate which

system to use for each employee. It also creates opportunities for errors, which are not helpful under any circumstances.

Additionally, the option suggested by the IRS based on an offer of mandatory coverage at no cost to the employee is simply not a viable option. To use this relief, self-insured plans would need to: (1) provide mandatory, minimum value coverage to employees, (2) offer that coverage to spouses and dependents, and (3) have no employee contribution. We could not identify any ERIC member who could use this approach. All of our responding members indicated that they did not mandate coverage, as some employees preferred to be covered under other health plans, such as those available from their spouses' employers. Furthermore, all of the responding ERIC members indicated that their employees contribute to their plans.

2. The IRS proposal to simplify reporting based on level of W-2 wages is not useful for large employers as currently constructed.

The IRS proposes to simplify reporting where the level of Form W-2 wages is high enough that reporting for purposes of the employer shared responsibility payment may not be necessary.

While the general idea appealed to some of our members, most continued to express concerns about the need to create dual systems to track employees by wage level and to then calculate which system to use for each employee; these members do not wish to use dual system tracking for the reasons enumerated above. As discussed below, however, a "check-the-box" on the Code section 6055 reporting might be a more useful approach instead of one based on mandating information on the Form W-2.

3. The additional simplification for companies who cover all employees was problematic.

The IRS has also suggested that simplified reporting may be available for employers who offer coverage to virtually all of their full-time employees. For this relief to apply, companies would need to represent that the only employees not offered coverage are not full-time employees or were otherwise ineligible for coverage (e.g., they were in a waiting period). The government notes that if an employee who was offered coverage claimed a premium tax credit through an Exchange, the employer could be asked to confirm whether that employee was a full-time employee during that calendar year.

While members found this approach potentially useful, some large companies have groups of full-time employees that are not offered coverage. For example, union workers may negotiate to be covered under a national plan, and interns are frequently not covered. As a result, dual systems would be required for this approach as well. As a result, we urge the IRS to utilize our proposal below instead.

B. Plan sponsors should instead be able to use a check-the-box approach on the Code section 6055 reporting to simplify reporting.

As discussed in Section II above, companies should be able to simply certify to the IRS that they offer minimum essential coverage to 95% of their full-time employees and dependents and post

a notice on the company's website that employees can obtain the information required by Code section 6055 upon request.

In the event that the IRS does not adopt the approach in Section II, ERIC suggests that employers should be permitted to elect an additional option instead of the options suggested in the preamble to the proposed regulation. The IRS should allow reporting and disclosures under Code sections 6055 and 6056 to be made by having the option to check a box on the Code section 6055 reporting. To use this option, companies would certify that they offer minimum essential coverage to at least 95% of full-time employees and their dependents.

These companies would comply with the reporting and disclosure requirements for Code section 6055 by providing to the IRS: (1) the name, address and employer identification number for the entity filing the information, (2) the name, address and TIN for the enrolled employee, (3) the name(s) of the persons (such as dependents) covered as a result of the employee's election, and (4) the dates of coverage for these individuals. Instead of reporting the information required by Code section 6056, they would instead check a box on the 6055 reporting form that indicates that the employer offers minimum essential coverage to at least 95% of full-time employees and their dependents. A copy of the information provided to the IRS would be disclosed to each enrolled employee based on his or her relevant information along with the phone number for the plan sponsor.

The plan sponsor would be certifying under this approach that it would not be subject to a penalty under Code section 4980H(a) as it covers at least 95% of full-time employees and their dependents. As a result, the IRS would be informed that the shared responsibility penalty under Code section 4980H(a) does not apply. Additionally, the Code section 4980H(b) penalty would not apply for the vast majority of full-time employees as the plan provides minimum value coverage. We do not propose a certification with respect to "affordability" because, in general, these verifications would require expensive systems to track compliance for different groups of employees; for our members, the cost would generally greatly exceed any benefit, and the information is more efficiently and inexpensively provided on an ad hoc basis. In the event that employees request a subsidy, the IRS could contact the employer for additional information and determine based on the employer's response whether the shared responsibility penalty under Code section 4980H(b) would be applicable.

Under this approach, employers would not be required to specify which employees are considered to work full-time; this would be an additional expensive compliance feature that yields no corresponding benefit. Many ERIC member companies offer health benefits to the vast majority of their workers, including employees who do not work full-time for them, and would not otherwise have a need to classify and report them as full-time or not.

Under this option, the company would provide information upon request of the government or an employee with respect to the coverage of a specific employee or dependent.

C. Plan sponsors should have the ability to report dates of coverage instead of months of coverage.

The proposed regulations to Code section 6055 require plan sponsors to report the months during which the individual was enrolled in coverage and entitled to receive benefits. Companies typically track the actual dates of coverage (i.e., month, day and year), which includes the months of

coverage. These companies would need to incur additional costs to have programming done to translate the dates of coverage in their system into months of coverage and further costs if their data keeps track of coverage by payroll period and not months. Individuals and the IRS should be able to easily understand what months participants were covered if the dates of coverage were provided instead of just the months.

ERIC urges the IRS to give companies the option to report the dates of coverage instead of the months of coverage.

IV. The IRS should provide greater flexibility regarding electronic disclosure options.

The proposed regulations to Code section 6055 and 6056 significantly limit the ability of plan sponsors to electronically provide the information required to enrolled employees and full-time employees. The proposed regulations state that companies must obtain the individual's affirmative consent in order to deliver the Code section 6055 and 6056 information electronically.

The cost and administrative burden for large employers to obtain, store, maintain, and administer 6055 and 6056 electronic consents from tens of thousands of workers, retirees, alternate payees, COBRA beneficiaries and other individuals is enormous.

Furthermore, paper delivery is substantially more expensive than electronic delivery due to printing and postage costs, resulting in increased costs for the plan. As noted above, ERIC members indicate that the ongoing cost to mail paper disclosures, including expenses for paper, envelopes, printing, labor, and postage, would approach $0.87 per individual for a one-page document. Another member expects the annual costs for distributing the disclosures to be around $40,000 - $50,000 for each mailing, while the cost for electronic delivery is virtually nothing.

Electronic materials can be accessible anywhere in the world at any time, while workers must be at the location where they stored the paper materials to later access them. Paper delivery can also be less accessible for participants as the resources to assist them are often only accessible with electronic materials. For example, translation software for persons for whom English is not their primary language, and the ability to increase font size and use software that reads materials aloud for those with vision impairments, are designed to be used with electronic documents.

It is increasingly important for the Treasury Department and U.S. Department of Labor to adopt practical, workable, and consistent electronic disclosure rules, as plan sponsors become burdened with more and more disclosure obligations. As the Treasury Department noted in the preamble to its electronic disclosure regulation:

> This exemption [from the participant consent requirement] is based on the judgment that, if the consumer consent method were the only method available to satisfy the requirements for providing an applicable notice through the use of an electronic medium, it would impose a substantial burden on electronic commerce with respect to . . . employee benefit arrangements . . . , and that the requirements and safeguards in the

2000 regulations provide a less burdensome method without increasing the material risk of harm to recipients.[4]

The proposed regulations should allow plan sponsors to electronically deliver the disclosures under Code sections 6055 and 6056 consistently with other health plan documents. ERIC urges the IRS to allow plan sponsors to have the option to provide these disclosures in accordance with Treasury Regulation § 1.401(a)-21. Furthermore, if an individual has already provided consent to electronic delivery, the plan sponsor should not be required to obtain their consent again for Code section 6055 and 6056 purposes.

V. Companies should not be required to track dependents' information.

Code section 6055 generally requires companies to report 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". The Code § 6055 proposed regulations interpret this requirement as applying to self-insured as well as fully insured plans.

Code section 6721 provides that a penalty may apply to companies that fail to include all of the required information on a return. The preamble to the Code § 6055 proposed regulations states that this penalty will not apply to companies if they make reasonable efforts to collect TINs (i.e., social security numbers) for their employees' dependents.[5] The preamble states that a company will be deemed to have acted reasonably if the employer requests the social security number three times and reports the date of birth if the social security number is not available.

Employees are in the best position to track their dependents' information. Many companies do not have TINs for their employees' dependents and do not have systems designed to track this information. Obtaining this data is particularly problematic for foreign nationals and infants who do not have social security numbers. For example, an infant born at the end of December may not receive a TIN until after the reporting deadline.

Additionally, companies are concerned about the security issues involved. Some companies have determined that they do not have a legitimate business need for requesting social security numbers from non-employees and are worried about the potential liability for security breaches when they store and transmit that information.

ERIC recommends that employees be responsible for tracking and maintaining any required information about their dependents, including their social security numbers. Many employers currently do not track dependents' information, nor do they want to begin doing so. Thus, there should be no requirement for employers to assume this burden.

---

[4] Treasury Dep't, *Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents*, 71 Fed. Reg. 61877, 61881 (Oct. 20, 2006).
[5] 78 Fed. Reg. at 54990.

VI. Companies should not be required to update reporting under Code sections 6055 and 6056 if the information was accurate at the time reported.

Code section 6721 imposes a penalty for "any failure to include all of the information required to be shown on the return or the inclusion of incorrect information." Code section 6722 also imposes a penalty for the failure to provide an accurate statement to individuals. Although Code section 6724 provides an abatement of information return penalties for reasonable cause, companies should not be required to depend on this relief if the information was accurate at the time filed.

Employers face challenges in determining coverage dates for employees and dependents as coverage may have terminated or been reinstated after the reporting date for periods that occurred before the reporting date.[6] Plans frequently provide grace periods for required payments and time for reporting qualifying events. For example, a former employee may be reported as having coverage for a particular month during his or her COBRA grace period, but may have that coverage cancelled retroactively if he or she fails to make the required payment.

The IRS provided in Notice 2012-9 that adjustments do not need to be made to the Form W-2 for any election or notification that is made or provided in a subsequent calendar year that has a retroactive effect on coverage in the earlier year. ERIC urges the IRS to adopt a similar approach with respect to reporting under Code sections 6055 and 6056. Companies should not be required to develop procedures to update information that was accurate at the time it was provided to the IRS. ERIC urges the IRS to clarify that employers are not required to file any corrections for information that is accurate at the time reported. In the event that the IRS is unwilling to provide this relief, ERIC urges the IRS to limit the correction or updating of information previously provided for a year to those corrections or updates that are discovered during the period of 31 days following the end of the calendar year.

VII. Members of controlled groups should have the option to file one report for the entire controlled group.

The proposed regulations provide that the Code section 6056 requirements apply separately to each member of a controlled group. However, the IRS states in the preamble that the proposed regulations do not prohibit a company that is a member of a controlled group from using the services of third parties, including other members of its controlled group, in the preparation of the filings under Code section 6056.[7]

Members of a controlled group may want to structure their businesses in such a way that one (or more) entity/entities has responsibility for filing the reports under Code section 6056. Furthermore, many benefit enrollment systems do not track which member of the controlled group the employee works for or that member's EIN. As a result, for these employers, systems would need to be created, data would need to be stored, and additional reports would need to be run solely for the purpose of reporting this information to the government.

---

[6] *Id.*
[7] *Id*. at 55008.

This approach would not disadvantage participants and could help to reduce the administrative burden imposed by application of these reporting requirements. The current rule could remain as the default for controlled groups that do not affirm a different allocation of liability.

This approach would be particularly helpful to companies that use third party administrators ("TPAs") to assist them with the administration of their health plans for some or all of the members of the controlled group as these TPAs currently may not distinguish among members of the controlled group in performing their services.

ERIC recommends that, as long as the reporting requirements are satisfied, the members of a controlled group may allocate their duties among themselves in the way that is most appropriate for the controlled group. We would specifically recommend that employers be given three options for reporting: (1) reporting by the individual plan sponsor, using the EIN of that employer, (2) having a member of the employer's controlled group report file reports for some or all employers in the controlled group, tracking employees by each employer's EIN, and (3) consolidated reporting by one member of the controlled group, using just one EIN for the reporting plan sponsor and some or all other employers within the controlled group.

VIII. The IRS should allow companies to design their own statements in the final regulations.

Code sections 6055 and 6056 allow the Treasury Department to prescribe the form that companies must use to provide the required information. The proposed regulations seem to suggest that large employers may be able to design their own statements (referred to as a substitute form or statement) to provide the information to the IRS and required under Code section 6055 to enrolled employees and Code section 6056 to full-time employees.[8]

We support the concept of permitting employers to design the forms and statements used to communicate the required information under Code sections 6055 and 6056 (as described and modified above) to their employees. ERIC encourages the IRS to allow companies to tailor their communications to their employees. Some companies have a particular style of communication to their employees that they are accustomed to and understand. A form created by the government may be confusing to employees and difficult to program. While some employers may wish to adhere closely to a government-designed form, ERIC encourages the IRS to give plan sponsors the option to create their own disclosures. ERIC further requests that the IRS provide employers and service-providers with the opportunity to comment on any draft forms before the forms are finalized.

IX. Companies should not be required to report the length of any waiting period, the months in which coverage was available, the employer's share of costs in each of the enrollment categories, and the months during which dependents were covered by the plan.

Code section 6056 states that large companies that offer full-time employees and their dependents the opportunity to enroll in minimum essential coverage must report: (1) the length of any waiting period, (2) the months during which coverage was available, (3) the monthly premium for the lowest cost option in each of the enrollment categories under the plan, and (4) the employer's share of the total costs of benefits provided under the plan.

[8] *Id*. at 55001-02.

The preamble to the Code § 6056 proposed regulations indicates that employers would not be required to provide this information.[9] The IRS explains that "As part of the effort to minimize the cost and administrative steps associated with the reporting requirements, Treasury and the IRS have sought to identify any information that would not be relevant to individual taxpayers or the IRS for purposes of administering the premium tax credit and employer shared responsibility provisions or that is already provided at the same time through other means."

ERIC agrees with the IRS that minimizing the amount of information reported will reduce costs and the administrative burdens associated with compliance. ERIC applauds the IRS's decision to minimize the information required to be reported.

X. Companies should not be required to report additional or supplemental coverage.

The IRS indicates in the Code § 6055 proposed regulations that it plans to limit the amount of information reported and the persons to whom disclosures should be made.

Code section 6055 generally requires employers to report information relating to plans that provide minimum essential coverage. The Code § 6055 proposed regulations state that companies that provide minimum essential coverage do not need to provide information about arrangements that provide benefits in addition to, or as a supplement to, a health plan that provides minimum essential coverage.[10] Providing information about additional or supplemental coverage would have created a burden on companies without any corresponding benefit to the government. For example, an employer should not be required to report information about an employee assistance program that is considered to provide minimum essential coverage when it is already providing information on its major medical plan.

ERIC urges the IRS to retain this rule in the final regulations.

XI. The IRS should contact companies prior to assessing any penalties.

The determination of whether an employer is subject to a shared responsibility penalty under Code section 4980H is triggered only when an employee receives subsidized coverage through an Exchange. Assembling the necessary information to determine the employer's liability in this context is a complicated task that will require communication among all parties, including the government, the employee, and the employer. Reaching a conclusion with respect to liability is a process subject to many different kinds of errors.

Thus, we highly recommend that no employer liability be assessed before an employer has been notified by the government that a determination has been made that a penalty is warranted, and the employer is given the opportunity to respond to this finding. Companies should not be required to participate in an appeals process to address a penalty that could have easily been avoided through prior communications between the government and the plan sponsor.

ERIC urges the IRS to contact employers with any questions about coverage prior to assessing any penalties.

---

[9] *Id*. at 55001.
[10] *Id*. at 54990, 54993.

XII. Flexibility should be provided for non-calendar year plans.

The reporting required under Code sections 6055 and 6056 appears to anticipate that the plan operates on a calendar year basis. For example, the disclosures are required to be made one month after the end of a calendar plan year. This methodology may be more problematic for a plan that operates on a fiscal year. For example, the cost of the lowest self-only minimum essential coverage is likely to change from year to year. For a calendar year plan, the cost would normally be the same for the entire year. However, a calendar year covers two years of a fiscal year plan and, as a result, there would likely be two amounts for lowest self-only minimum essential coverage to be reported.

ERIC requests that the IRS provide flexibility for non-calendar year plans and permit use of a methodology that would allow non-calendar year plans to satisfy their reporting obligations without unnecessary complications.

XIII. Companies should be required to deliver disclosures only to those employees who are enrolled in their plans.

The Code § 6055 proposed regulations provide that companies need to make disclosures only to employees who enroll themselves and/or their spouses and dependents in the company's health plan. The IRS requests comments on whether the regulations should require companies to make disclosures to an employee's spouse and dependents.

Employees are in the best position to provide the disclosures to their spouses and dependents. Spouses and dependents typically reside with the employee and, if not, the employee is most likely to have their current address. Addresses of dependents are not information that an employer typically is able to track. For example, an employee's adult children who are covered by the plan may move every few months if they are attending college or working at short-term jobs. Employees generally will keep track of the addresses of their adult children or other dependents, while the plan, which must rely on the employee to provide current information, is unlikely to have up-to-date information on a consistent basis.

ERIC urges the IRS to maintain the approach adopted in the proposed regulations that would require only one statement to be provided per employee as the employee is in the best position to provide this information to the people they enroll in the plan.

XIV. Plan sponsors should not have to report exempt individuals.

The proposed regulations provide that Code § 6055 reporting would be required for employees who enroll in coverage.

Under Treasury Regulation § 5000A-1, nonexempt individuals must have minimum essential coverage or pay the shared responsibility penalty (i.e., the individual mandate). Treasury Regulation § 5000A-3 provides that certain individuals who are not U.S. citizens or U.S. nationals are exempt from the individual mandate.

Large companies often have employees that come to work in the United States from other countries, such as Canadians, who are not U.S. citizens or U.S. nationals and frequently have health benefits in their home country.

ERIC urges the IRS to provide that plan sponsors should not be required to provide disclosures for any nonresident aliens and other employees who are exempt from the individual mandate.

XV. Companies should be given additional time to comply with the reporting and disclosure requirements.

The preamble to the Code § 6056 proposed regulations notes that the Treasury Department and the IRS are considering whether to extend transition relief to 2015 and that this issue will be addressed in future guidance under Code § 4980H.[11]

ERIC encourages the IRS to provide relief and issue guidance on these reporting and disclosure requirements quickly. Companies will need significant amounts of time to create, test and implement these systems. They cannot begin this process in earnest until final guidance and forms are issued; to do otherwise would be to incur the additional time and expense of creating one system and then modifying this system to comply with the final regulations. Some ERIC members estimate that it will take around 8,000 hours to perform the programming and testing.

Once the systems are created, members will need to begin tracking the data. Some members will need to capture this data each month.

As a result, ERIC urges the IRS to quickly issue final regulations and provide plan sponsors with at least one year after regulations are finalized to create systems before they will need to start capturing the data that needs to be reported. For example, if the regulations were finalized in December 2014, companies could revise their systems in 2015, collect enrollment and other data in 2016, and report that information to the government in 2017. ERIC encourages the IRS to provide good faith compliance standards until then.

ERIC appreciates the opportunity to provide comments on the proposed regulations. If the IRS has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Scott J. Macey
President & CEO

Gretchen K. Young
Senior Vice President, Health Policy

[11] *Id*. at 55002, fn 7.