SECTION OF TAXATION
State Bar of Texas

April 9, 2013

VIA U.S. MAIL & FEDERAL eRULEMAKING PORTAL
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CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
POB 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Proposed Regulations Under Section 4980H of the Internal Revenue Code of 1986, as amended, Relating to Shared Responsibility for Employers Regarding Health Coverage

Dear Ladies and Gentlemen:

On behalf of the Section of Taxation of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Internal Revenue Service and the Department of the Treasury for comments concerning the proposed regulations relating to shared responsibility for employers regarding health coverage.

THE COMMENTS AND ACCOMPANYING REQUEST FOR ADDITIONAL GUIDANCE ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS. THIS REQUEST AND THESE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE SECTION OF TAXATION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW. THE REQUEST FOR THE ISSUANCE OF ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT

SUBMISSION OF THE SECTION OF TAXATION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE SECTION OF TAXATION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED FOR THIS REQUEST FOR ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS AND THIS REQUEST AND THESE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE SECTION OF TAXATION WHO PREPARED THEM.

We appreciate the Internal Revenue Service and the Department of the Treasury permitting us to submit these comments and request for additional guidance and being extended the opportunity to participate in this process.

Sincerely,

Tina R. Green
Chair, Section of Taxation
State Bar of Texas

COMMENTS AND REQUEST FOR ADDITIONAL GUIDANCE WITH RESPECT TO PROPOSED REGULATIONS RELATING TO SHARED RESPONSIBILITY FOR EMPLOYERS REGARDING HEALTH COVERAGE

These comments and request for additional guidance with respect to the proposed rules relating to shared responsibility for employers regarding health coverage under section 4980H of the Internal Revenue Code of 1986, as amended ("Code"), that were issued by the Internal Revenue Service (the "Service") and the Department of the Treasury ("Treasury") on December 28, 2012, as published in 78 Federal Register 218 (January 2, 2013) ("Proposed Treasury Regulations"), are presented on behalf of the Section of Taxation of the State Bar of Texas. The principal drafter of these comments was Henry Talavera, Vice-Chair of the Compensation and Employee Benefits Committee of the Section of Taxation of the State Bar of Texas. The Committee on Government Submissions ("COGS") of the Section of Taxation of the State Bar of Texas has approved these comments. Stephanie Schroepfer is the Chair of COGS. Substantive comments were provided by Courtney Vomund, Kirsten Garcia and Susan A. Wetzel. Mark A. Bodron reviewed these comments on behalf of COGS.

Although many of the people who participated in preparing, reviewing, and approving these comments have clients who will be affected by the federal tax law principles addressed by these comments and frequently advise clients on the application of such principles, none of the participants (or the firms or organizations to which such participants belong) has been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the subject matter of these comments.

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Date: April 9, 2013

I. EXECUTIVE SUMMARY

The following submission contains comments and request for additional guidance with respect to the future application of the Proposed Treasury Regulations relating to shared responsibility for employers regarding health coverage under section 4980H of the Code ("4980H")[1], which was added to the Code by section 1513 of the Patient Protection and Affordable Care Act.[2]

The following is a summary of our comments and requests:

A. We respectfully suggest that it is not administratively practicable to determine the full-time status of a Commissioned Employee by any method that requires the actual tracking of hours or equivalencies that are more suitable for salaried employees, because Commissioned Employees typically set their own schedule and work hours. In response to this issue, we respectfully request that the Service and Treasury establish three safe harbors options, any one of which an employer may elect to use, to determine whether an employee who is compensated on a commission or similar basis (and who is not compensated on an hourly rate or a fixed salary basis) ("Commissioned Employee") should be presumed to be a "full-time employee" for purposes of 4980H, as follows:

(i) The Commissioned Employee will be deemed to be a full-time employee if the commissions and other compensation determined consistent with the Proposed Treasury Regulations ("Commissions") earned by the employee equal or exceed the Federal poverty line ("FPL").

(ii) The Commissioned Employee will be deemed to be a full-time employee if the employee earns Commissions based upon a converted dollar per hour which indicates that he worked 30 hours per week on average, with the dollars per hour for the Commissioned Employee determined as the quotient of "x" divided by "y," where:

x. The numerator equals the Commissioned Employee's total annual Commissions over the applicable period; and

y. The denominator equals

a. the Federal minimum wage (currently $7.25/per hour),

b. the lowest hourly rate of compensation paid to such employee or any other Commissioned Employee during the applicable period with respect to which the Compensation is determined, or

[1] Except as otherwise specified, all section references herein are references to the applicable sections of the Code.

[2] The Patient Protection and Affordable Care Act was enacted March 23, 2010, Public Law 111-148, and amended by section 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Public Law 111-152, and further amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (collectively, the "Affordable Care Act").

c. any other wage per hour paid to the Commissioned Employee at any time during such year or, if none, such wages as are paid to other similarly situated Commissioned Employees reasonably determined by the employer based on an employer's workforce over the applicable period during which the Commissioned Employee worked for the employer and the Commissions are determined.

The resulting dollar per hour quotient would then be used to calculate an average number of hours per week for the Commissioned Employee and if the results equal 30 or more hours per week over the applicable period the employee will be treated as a full-time employee (the same as any other hourly employee).

(iii) The bottom 2.5% of similarly situated Commissioned Employees will deemed to be part-time employees, with the remaining 97.5% of the similarly situated Commissioned Employers deemed to be full-time employees, based on the Commissions earned by such employees. We believe that the Commissioned Employees in the bottom 2.5% would not reasonably be expected to be treated the same as other Commissioned Employees based upon a statistical analysis. For purposes of any such determination, "similarly situated" Commissioned Employees would include any Commissioned Employee who provides the same types of services to a similar client of the employer as would be reasonably and consistently determined by the employer. This standard would allow employers to determine with reasonable confidence the lowest earning, similarly situated, full-time Commissioned Employee, as all full-time employees would be expected to be within a 95% confidence interval of any average or median. For example, a salesperson who sells a certain piece of medical clothing to stores (*e.g.*, scrubs) should be treated the same as any other similarly situated Commissioned Employee selling such medical clothing.

We believe that by adopting the suggested safe harbors described above, the Service and Treasury can reach an appropriate balancing of the need to comply with the requirements of 4980H and the need for employers to have a workable administrative structure that allows them to comply with those requirements for their Commissioned Employees.

Finally, we respectfully suggest that employees who are paid on a Commission basis be treated the same as any other variable or seasonal employee ("variable employee") and that an employer be permitted to use a 12-month look-back measurement period for Commissioned Employees.

B. Regarding the Form W-2 safe harbor for determining whether an employer's coverage satisfies the 9.5% affordability test for purposes of the assessable payment under section 4980H(b), we respectfully suggest that the Form W-2 safe

harbor be determined at the beginning of the calendar year based on the Commissioned Employee's Form W-2 wages from the previous year ("Prior Year Wage Safe Harbor"), as opposed to the Form W-2 safe harbor being determined at the end of a calendar year based on that year's Form W-2 wages.

We respectfully recommend that this Prior Year Wage Safe Harbor be available only if the average "compensation" (as otherwise determined under the Proposed Treasury Regulations) for all continuing employees of an employer who were both employed by the employer during the prior year and who remain employed during the current year is not reasonably expected to decrease during the coming year by more than a marginal amount specified by the Service and Treasury (for example, 10%). Further, such average may not in fact decrease by more than such marginal amount, subject to an extreme business hardship or business necessity which could include a bankruptcy, plant shut down or layoffs involving an employer's business comparable to a substantial business hardship described in section 412(c) ("Business Hardship"). Within a reasonable period from the date a Business Hardship occurs (not to exceed the beginning of the next plan year), the employer would need to use one of the other existing safe harbors for determining affordability at least one year following the year in which the Business Hardship occurs.

C. We respectfully suggest that the definition of "seasonal employee" provide that (i) an employee will be treated as a seasonal employee if the employee is not reasonably expected to work more than six months during the applicable period; (ii) an employee will not be treated as a seasonal employee if the employee is reasonably expected to work more than nine months; and (iii) an employee who is reasonably expected to work more than six months but less than ten months will be treated as a seasonal employee if such treatment is supported by the facts and circumstances.

D. We respectfully request that the Service and Treasury expressly permit or clarify that a measurement period for variable employees with respect to plan years beginning on or after January 1, 2014, can begin in 2012. For example, a measurement period should be able to begin on October 15, 2012, and end on October 14, 2013, with a corresponding administrative period which ends on January 1, 2014.

Further, we suggest that employers should be expressly permitted to retroactively establish tracking systems to determine whether an employee has on average worked 30 hours per week during a 12-month measurement period. Finally, we would ask the Service and Treasury expressly specify when amendments may be necessary or otherwise due with respect to a medical plan to establish measurement or stability periods.

E. We respectfully request that the Service and Treasury expressly confirm that an employer may provide mandatory coverage if (i) the employer is exempt from the automatic enrollment requirements set forth in Section 18A of the Fair Labor

Standards Act; (ii) such mandatory coverage is part of the terms and conditions of employment and is "affordable" and provides "minimum value," as such terms are defined for purposes of 4980H; and (iii) the employer complies with any applicable state laws which require an employee's consent to withhold any amounts from an employee's paycheck with respect to such mandatory coverage.

II. BACKGROUND

A. Full-Time Status of Commissioned Employees

For purposes of 4980H, a full-time employee is an employee who was employed on average at least 30 hours per week (130 hours per month).[3] The Service and Treasury, in consultation with the Department of Labor ("DOL"), is authorized to prescribe guidance for employees who are not compensated on an hourly basis, such as Commissioned Employees.[4] The term "hours of service" includes not only hours when work is performed but also hours for which an employee is paid or entitled to payment even when no work is performed.[5] The Proposed Treasury Regulations provide general guidance for calculating hours of service and determining how to identify an employee as a full-time employee.

In the Proposed Treasury Regulations, the Service and Treasury recognize the concerns of requiring a full-time employee to be determined based on the numbers of hours worked. The Service and Treasury noted that commentators requested special rules for employees whose compensation is not based primarily on hours.[6] The Proposed Treasury Regulations provide that until further guidance is issued, employers of Commissioned Employees must use a "reasonable method for crediting hours of service that is consistent with the purposes of 4980H."[7] The Proposed Treasury Regulations specify that a method of crediting hours would not be reasonable if it took into account only some of an employee's hours of service to avoid classifying an employee as working full-time. For example, it would not be reasonable to fail to take into account travel time for a travelling salesperson who is a Commissioned Employee.

In Section III.A. below we provide our suggestions concerning appropriate standards for determining whether a Commissioned Employee constitutes a full-time employee.

B. Form W-2 Safe Harbor Calculation Period

Liability under 4980H may arise if an employer provides coverage that is unaffordable within the meaning of section 36B(c)(2)(C)(i). Coverage for an employee under an employer-sponsored plan is affordable if an employee's required contribution (within the meaning of section 5000A(e)(1)(B)) for self-only coverage does not exceed 9.5% of the employee's household income for the taxable year.[8] The Form W-2 safe harbor was proposed as an affordability safe harbor in Notice 2011-73. Comments were favorable on the proposed Form

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[3] Section 4980H(c)(4); Proposed Treasury Regulation section 54.4980H-3(b).
[4] Section 4980H(c)(4)(B).
[5] Proposed Treasury Regulation section 54.4980H-3(b).
[6] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 225.
[7] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 225.
[8] Section 36B(c)(2)(C)(i), Section 36B(d)(2).

W-2 safe harbor and, accordingly, the Proposed Treasury Regulations include the Form W-2 safe harbor, as well as two other safe harbor tests for affordability.[9]

The employee's eligibility for a premium tax credit under section 36B is based on the cost of employer-sponsored coverage relative to an employee's household income. Accordingly, the effect of the safe harbor may be to treat an employer's offer of coverage to an employee as affordable, based on such employee's Form W-2 wages for purposes of determining whether the employer is subject to an assessable payment under section 4980H(b), while the same offer of coverage could be treated as unaffordable (based on household income) for purposes of determining whether the employee is eligible for a premium tax credit under section 36B.[10]

The Form W-2 safe harbor set forth in the Proposed Treasury Regulations provides that an employer may determine affordability for purposes of section 4980H(b) liability by referring to the total amount of wages reported in Box 1 of Form W-2. For the Form W-2 safe harbor to apply, the employer must offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, and the required employee contribution toward the self-only premium for the employer's lowest cost coverage that provides minimum value may not exceed 9.5% of the employee's Form W-2 wages.[11] This safe harbor is applied after the end of the calendar year and on an employee-by-employee basis. Accordingly, at the end of the year, the employer must review an employee's actual wages and determine whether the employee contribution amount that was set at the beginning of the year is 9.5% or less of the employee's wages. The Proposed Treasury Regulations acknowledge that an employer could use the safe harbor prospectively to set the employee contribution level, but if the contribution level ultimately exceeds 9.5% of the employee's Form W-2 wages, the employer will not be permitted to apply this safe harbor.[12]

In Section III.B. below we provide an additional alternative safe harbor for consideration by the Service and Treasury.

C. Seasonal Employee Definition

The Proposed Treasury Regulations define "seasonal worker" but have reserved a section of the regulations for the definition of "seasonal employee." Section 4980H(c)(2)(B)(ii) defines a seasonal worker as one who performs labor or services on a seasonal basis, as defined by the Secretary of Labor, including workers who are covered by 29 C.F.R. section 500.20(s)(1) and retail workers who are employed exclusively during holiday seasons. The DOL regulations provide, in relevant part, that:

> "(l)abor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a

[9] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 233.
[10] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 233.
[11] Proposed Treasury Regulation section 54.4980H-5(e)(2)(ii).
[12] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 234.

seasonal basis even through he may continue to be employed during a major portion of the year."[13]

The Service and Treasury have determined that the term seasonal worker is not limited to agricultural or retail workers.[14]

Until a definition of seasonal employee is established, employers are permitted to use a reasonable, good faith interpretation of the term seasonable employee for purposes of 4980H.[15] The preamble to the Proposed Treasury Regulations states that the final Treasury Regulations may add to the definition of seasonal employee a specific time limit in the form of a defined period.

In Section III.C. below we provide what we believe is a reasonable limit of the period after which an employee should not be permitted to be treated as a seasonal employee.

D. Measurement Periods for Stability Periods Starting in 2014

The preamble of the Proposed Treasury Regulations provides that a six-month look-back may be applicable for measurement periods which begin in 2013, as follows:

> Section 4980H is effective for months beginning after December 31, 2013. Employers that intend to utilize the look-back measurement method for determining full-time status for 2014 will need to begin their measurement periods in 2013 to have corresponding stability periods for 2014. Treasury Department and the IRS recognize, however, that employers intending to adopt a 12-month measurement period, and in turn a 12-month stability period, will face time constraints in doing so. Consequently, solely for purposes of stability periods beginning in 2014, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2013 and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2014 (90 days being the maximum permissible administrative period).[16]

In Section III.D. below we ask the Service and Treasury for additional clarification that a 12-month measurement period for variable employees may commence in 2012.[17]

Further, we believe that employers should also expressly be permitted to retroactively establish tracking systems to determine whether an employee has on average worked 30 hours

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[13] 29 C.F.R. section 500.20(s)(1) (emphasis added).
[14] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 222.
[15] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 227.
[16] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 237.
[17] Notice 2012-58 ("This reliance covers a measurement period that begins in 2013 or 2014 and the associated stability period (which may extend into 2014, 2015 or 2016). For example, the use of a 12-month measurement period in accordance with this notice beginning on July 1, 2013 and ending on June 30, 2014 might be used to classify employees for a stability period that runs from July 1, 2014 through June 30, 2015.").

per week during a 12-month measurement period. There has been some confusion over whether tracking systems can only be prospectively established or determined.[18]

E. Mandatory Coverage

In its rationale behind the "offer of coverage" requirement, the preamble of the Proposed Regulations provides, in part, that:

> The employee must also have an effective opportunity to decline an offer of coverage that is not minimum value coverage or that is not affordable. Thus, an employer may not render an employee ineligible for a premium tax credit by providing an employee with mandatory coverage (that is, coverage which the employee is not offered an effective opportunity to decline) that does not meet minimum value.[19]

As drafted, this language suggests that an employer could require mandatory coverage as long as such coverage is both "affordable" and provides "minimum value." However, the offer of coverage requirement in the Proposed Treasury Regulations does not appear to incorporate that rationale.[20] Instead it appears to directly contradict the language in the preamble by requiring that all employees be given the opportunity to decline coverage, even if such coverage is affordable and provides minimum value.

In Section III.E. below we request that the Service and Treasury expressly confirm the availability of mandatory coverage that meets certain requirements.

III. REQUEST FOR ADDITIONAL GUIDANCE

A. We Respectfully Request that the Service and Treasury Consider Three Safe Harbor Options for Determining the Full-Time Status of Employees Compensated on a Commission Basis

We respectfully suggest that it is not administratively practicable to determine the full-time status of a Commissioned Employee by any method that requires the actual tracking of hours or equivalencies more applicable to salaried employees, because Commissioned Employees typically set their own schedule and work hours. In light of this issue and in accordance with the invitation for further comment on how best to determine the full-time status of employees who are compensated on a commission basis, rather than on the basis of hours worked, we respectfully suggest three safe harbor options that employers could use for evaluating such employees. Our suggested methods avoid basing the determination of full-time status on any attempt to track the actual hours worked by these employees. Our rationale is two-fold. First, the hours worked by Commissioned Employees are often difficult, if not impossible, to verify and track accurately, particularly if the employees do not work at the employer's

[18] *See* Florence Olsen, Variable-Hour Worker Count Must Start Soon for Some Employers, Speaker Says, Bloomberg BNA Daily Tax Report (March 8, 2013).
[19] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 232.
[20] Proposed Treasury Regulation sections 54.4980H-4(b) & -5(b).

building or office. Second, hours worked by a Commissioned Employee do not have any direct correlation to the amount of compensation earned by the Commissioned Employee.

The first proposed safe harbor option for evaluating Commissioned Employees is to create a floor under which a Commissioned Employee should not be considered a full-time employee. We respectfully submit that the threshold amount could be tied to the FPL (similar to the FPL safe harbor established by the Proposed Treasury Regulations for purposes of determining the 9.5% premium threshold).[21] For example, if the wages reported on the employee's Form W-2 for the measurement period was at least the FPL, the employee will be considered a full-time employee for the stability period.

We respectfully suggest that the FPL expressly takes into account Commissioned Employees to provide that a Commissioned Employee is not a full-time employee if such employee earned less than the FPL, because an employee who earns less than the FPL should be Medicaid eligible in states which have opted into Medicaid (and we suggest that such employee should not otherwise count against an employer under 4980H, particularly with respect to Commissioned Employees for whom hours are not readily available).

A second proposed safe harbor option for evaluating Commissioned Employees is to calculate a projected number of hours by dividing the employee's total annual compensation by a certain hourly or monthly wage. We respectfully submit that the wage could be the Federal minimum wage, or a reasonable wage based upon the lowest hourly rate of compensation paid to such Commissioned Employee or any other Commissioned Employee. This would be consistent with how non-hourly employees would be determined under the DOL's regulations that are applicable to retirement plans.[22]

We also respectfully ask that the Service and Treasury permit an employer to use any hourly rate paid to the Commissioned Employee for such year (based upon hours worked or salary paid to an employee for a period of hours worked during such year). If no such hourly rate was paid to the Commissioned Employee, we suggest that the employer be permitted to establish any other wage per hour reasonably determined by the employer for similarly situated Commissioned Employees based on an employer's workforce over the applicable period during which the Commissioned Employee worked for the employer as a Commissioned Employee. Of course, an employer would need to be reasonable and set an appropriate wage which is not so unreasonably high that more than 5% of all full-time Commissioned Employees would likely be excluded (we selected 5% because the Service and Treasury permit 5% of all employees to be excluded without being subject to penalties under 4980H).[23] For example, an employer should arguably be permitted to select the average wage of all other employees to determine the appropriate hourly wage for the Commissioned Employees, because the average of the wages for all other employees of the employer would arguably establish an average market wage for all employees of such employer, including, arguably the Commissioned Employees.

A third proposed safe harbor suggests an alternative for Commissioned Employees based upon the lowest 2.5% paid similarly situated Commissioned Employees of an employer. If the

[21] Proposed Treasury Regulation section 54.4980H-5(e)(2)(iv).
[22] 29 C.F.R. section 200b-2(b)(2)(C).
[23] Preamble to the Proposed Treasury Regulations, 78 Federal Register 1 at 232-33.

average of all Commissions for similarly situated Commissioned Employees falls within two standard deviations (or a margin of error) from an average or median amount of Commissions earned by all such similarly situated Commissioned Employees over the applicable period, this should be permissible. The employer would need to have a reasonable basis for treating each group of similarly situated Commissioned Employees as one group for this purpose (e.g., the same type of salesman for the same product line should be treated the same as any other salesman under that product line).

The two standard deviation measurement is commonly known as the "confidence interval." This would allow employers to determine with reasonable confidence the lowest earning full-time Commissioned Employee, as all full-time employees would be expected to be within a 95% confidence interval of any average or median. This would basically mean that the bottom 2.5% of similarly situated Commissioned Employees (half of the 5% outside of the two (2) standard deviations) would be excluded as part-time employees, because those Commissioned Employees would not reasonably be expected with confidence to be treated the same as other Commissioned Employees, as those employees would be outliers from a statistical standpoint. We suggest that it is reasonable to assume that the lowest 2.5% of similarly Commissioned Employees are not working remotely as hard as the other 97.5% of such Commissioned Employees if they underperform in this manner. Typically, such under-performers would lose their job.

The only other reasonable explanation would be that such Commissioned Employees were not working even close to full-time and were working on a part-time basis. While this is not a perfect solution, it allows employers to exclude the lowest paid Commissioned Employees, but on the whole we would assert that it should be statistically and mathematically permissible to treat all similarly situated Commissioned Employees the same by excluding those lowest paid Commissioned Employees.

Because of the variable nature of Commissioned Employees' compensation, we also respectfully suggest that Commissioned Employees be treated the same as any other variable employee and that an employer be permitted to use a 12-month look-back measurement period for those Commissioned Employees.

We believe that the safe harbor options described above provide a workable administrative structure for use by employers to comply with the requirements of 4980H, and avoid the assessable payment under 4980H(b).

B. <u>We Respectfully Request that the Service Reconsider Having the Form W-2 Safe Harbor be Determined at the End of a Calendar Year</u>

We commend the Service and Treasury for creating three affordability safe harbors to determine whether an employer's coverage satisfies the 9.5% affordability test for purposes of the assessable payment under 4980H(b). However, we believe that it will be difficult for an employer to comply with a safe harbor that requires the employer to calculate the employee contribution to the employer-sponsored health plan based on compensation that has not yet been earned during such plan year. Accordingly, we respectfully suggest that the Form W-2 Safe Harbor could be applied by using the wages reported on Form W-2 for the previous calendar

year. In order to be considered "affordable," the employer contribution could not exceed 9.5% of the employee's Form W-2 wages for the immediately prior year. We suggest that this is appropriate, because an employer has no direct control over Commissions earned by employees and Commissions are generally earned over random periods.

For example, we suggest that an employer would calculate the employee contribution to its health plan for 2014 by reviewing the Form W-2 wages of employees on the 2013 Form W-2. We suggest that employers will have increased success in providing affordable coverage if they are able to calculate the 9.5% standard based on known compensation. We suggest that the safe harbor would not apply if the employer on average significantly decreased employees' compensation during the subsequent year.

We respectfully submit that a change of 5% could be considered a "significant" change. Further, such average could not in fact decrease by more than that such significant amount, subject to a Business Hardship. Within a reasonable period from the date an employer reasonably establishes a Business Hardship (not to exceed the beginning of the next plan year) the employer would need to use one of the other existing safe harbors for determining affordability for at least one year following the year in which the Business Hardship occurs.

C. We Respectfully Request that the Service Add a Definite Period of Time to the Definition of "Seasonal Employee"

We respectfully suggest that it is appropriate to include a definite time period in the definition of "seasonal employee." The Proposed Treasury Regulations indicate that the Service and Treasury is contemplating adding a time frame to the definition of seasonal employee. We respectfully suggest that adding a time frame to these definitions will create a clear standard that will be useful for employers in applying the rules set forth in the Proposed Treasury Regulations to seasonal employees. We respectfully submit that the current standard in the definition of "seasonal employee" is difficult to apply and may invite abuse of the rules by employers with employees who do not work a full twelve months during a year. An identical standard should also apply with respect to a "seasonal worker" under the Proposed Treasury Regulations.

We respectfully suggest a definition of seasonal employee that provides that during a plan year (or an applicable measurement period lasts one year, as appropriate) (i) an employee will be treated as a seasonal employee if the employee is not reasonably expected to work more than six months; (ii) an employee will not be treated as a seasonal employee if the employee is reasonably expected to work more than nine months; and (iii) an employee who is reasonably expected to work more than six months but less than ten months will be treated as a seasonal employee if such treatment is supported by the facts and circumstances. We respectfully submit that under the suggested approach employees that work more than six months during such year would generally not be considered seasonal employees absent unusual circumstances to be determined by an employer and then only for a period that is less than ten months. We believe that proportional adjustments would be appropriate for measurement periods of less than one year.

D. We Respectfully Request that the Measurement Periods for Stability Periods Starting in 2014 Can Begin in 2012

The language highlighted above indicates that a measurement period for 2014 must begin in 2013 in all circumstances. We respectfully request that the Service and Treasury provide that measurement periods can begin in 2012 (*i.e.*, a measurement period beginning on October 15, 2012, should be permitted to end on October 14, 2013). We suggest that it would be arbitrary to limit measurement periods only for periods beginning in 2012, as it does not appear that measurement periods will be limited for any subsequent years.

Further, employers should also expressly be permitted to retroactively establish tracking systems to determine whether an employee has on average worked 30 hours per week during a 12-month measurement period. There has been some confusion over whether tracking systems can only be prospectively established or determined by employers. Finally, it is not clear when amendments may be due in a medical plan to establish measurement or stability periods. We believe that guidance regarding this issue would be appreciated.

E. We Respectfully Request Confirmation of the Availability of Mandatory Coverage

The discussion in the preamble to the Proposed Treasury Regulations regarding mandatory coverage focuses on situations where an employer may use such coverage to prevent an employee from being eligible for the premium tax credit when such coverage is either unaffordable or fails to provide minimum value. Otherwise, the preamble indicates that the Service and Treasury would not object to an employer having mandatory coverage if such coverage is affordable and provides minimum value.

However, Proposed Treasury Regulation sections 54.4980H-4(b) and 54.4980H-5(b) seem to indicate that mandatory coverage is not available even if such coverage is affordable and provides minimum value.[24] We respectfully request that, consistent with the preamble, the Proposed Treasury Regulations be revised to make clear that mandatory coverage is permitted if (i) the employer is exempt from the automatic enrollment requirements set forth in Section 18A of the Fair Labor Standards Act (*i.e.*, relatively small employers);[25] (ii) such mandatory coverage is part of the terms and conditions of employment and is "affordable" and provides "minimum value," as such terms are defined for purposes of 4980H; and (iii) the employer complies with any applicable state laws which require an employee's consent to withhold any amounts from an employee's paycheck with respect to such mandatory coverage.

One important reason for permitting an employer to make coverage a mandatory condition of employment is that the employer may need to require mandatory coverage in order to satisfy an insurer's minimum participation requirements. With the expansion in eligibility and

[24] *See* Proposed Treasury Regulation section 54.4980H-4(b) ("An applicable large employer member will not be treated as having made an offer of coverage to a full-time employee for a plan year if the employee does not have an effective opportunity to elect to enroll (or decline to enroll) in the coverage no less than once during the plan year.").

[25] As added by section 1511 of the Affordable Care Act.

probability that many of the newly eligible employees will not enroll, an employer may need mandatory coverage in order to obtain insurance coverage. Insurers generally require a minimum percentage of an employer's employees to enroll in coverage. This proposed limited exception would help relatively small employers ensure they have adequate enrollment in their plans in order to meet any insurer's minimum participation requirements.