COMMENTS

of

TAX EXECUTIVES INSTITUTE, INC.

on

REG-132455-11 and REG-136630-12

relating to

Information Reporting on Minimum Essential Coverage and Information Reporting by Large Employers on Health Insurance Coverage

submitted to

The Internal Revenue Service

November 13, 2013

On September 6, 2013, the Internal Revenue Service (IRS) and Treasury Department released two sets of proposed regulations in respect of information reporting requirements under sections 6055[1] and 6056[2] of the Internal Revenue Code as enacted by the *Patient Protection and Affordable Care Act of 2010* (PPACA).[3] Under section 6055 all providers of "minimum essential coverage" (MEC) must file a return with the IRS to report certain information about the extent to which individuals are covered by MEC during the preceding taxable year. Providers include health insurance issuers and employer plan sponsors (hereinafter collectively referred to as "information reporting entities"). In addition, all information reporting entities must furnish a

[1] REG-132455-11 was published in the September 9, 2013, issue of the Federal Register (78 Fed. Reg. 54986).

[2] REG-136630-12 was published in the September 9, 2013, issue of the Federal Register (78 Fed. Reg. 54996) and is published in the Internal Revenue Bulletin, 2013-40 I.R.B. 303 (Sept. 30, 2013).

[3] Pub. L. No. 111-148 (2010), together with the *Health Care and Education Reconciliation Act* of 2010, Pub. L.111-152 (2010), collectively the *Affordable Care Act*.

written statement to each individual listed on the return and show the information reported to the IRS. Section 6056 requires "applicable large employers" (ALEs) to file an information return with the IRS reporting the terms and conditions of the health care coverage provided to their employees during the preceding year. In addition, ALEs must furnish a written statement of the coverage information required to be reported to each full-time employee whose information was reported to the IRS.

Tax Executives Institute

Tax Executives Institute is the preeminent association of business tax executives in North America. Our approximately 7,000 members represent 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to developing and effectively implementing sound tax policy, to promoting the uniform and equitable enforcement of the tax laws, and to reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike. As a professional association, TEI is firmly committed to maintaining a tax system that works — one that is administrable and with which taxpayers can comply in a cost-efficient manner.

Members of TEI are responsible for managing the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises, including information reporting under various provisions of the Internal Revenue Code. We believe that the diversity and professional training of our members enable us to bring a balanced and practical perspective to the issues raised by the information reporting requirements of sections 6055 and 6056.

Background

Section 6055 was added to the Code to help the IRS administer the individual mandate of the PPACA. Under section 6055 all providers of "minimum essential coverage" (MEC) must

file a return with the IRS to report certain information to ascertain whether the individuals are covered by MEC during one or more months of the preceding taxable year. In addition, all information reporting entities must furnish a written statement to each individual listed on the return and show the information reported to the IRS. That information will enable individuals to complete their tax returns and indicate whether they have coverage during one or more months or are subject to the individual shared responsibility payment under section 5000A. Prop. Reg. § 1.6055-1(c)(1)(i) states that the reporting entity for MEC for all *insured* coverage is the health insurance carrier. Prop. Reg. § 1.6055-1(c)(1)(ii) states that that plan sponsor (*i.e.*, generally an employer) is the reporting entity for MEC for self-insured employee group health coverage. In addition, where a self-insured group health plan covers employees of related corporations, each employer within the group of related corporations must report for its employees. One member of the group, however, may file returns and furnish statements on behalf of all members.

Section 6056 was added to the Code to assist the IRS in determining whether an employer may be subject to the excise tax (or shared responsibility payment) imposed by section 4980H for failing to offer affordable, minimum value health insurance coverage to full-time employees and dependents. The information will also be used to administer the premium tax credits under section 36B. Section 6056 requires "applicable large employers" (generally employers with 50 or more full-time employees) to file an information return with the IRS reporting the terms and conditions of the health care coverage provided to their employees during the preceding year. An applicable large employer that reports to the IRS must also furnish a written statement of the coverage information required to be reported to the IRS to each full-time employee whose information was reported to the IRS.

Under the PPACA, both reporting requirements were to be effective for periods after December 31, 2013. Thus, the first returns and information statements were to be filed in 2015

for the 2014 calendar year. In Notice 2013-45, the IRS delayed the mandatory reporting for one year but encouraged employers to track the information to prepare for implementation.[4]

TEI commends the IRS for issuing the proposed regulations and for its efforts to simplify the burdensome reporting obligations of large employers and insurance providers imposed by the PPACA. For example, under Prop Reg. § 1.6055-1(g), reporting entities are required to furnish information reports only to the responsible individual (generally the primary insured) at each address and are not required to furnish information reports to each covered dependent or spouse. In addition, under Prop. Reg. § 301.6056-1(g)(2), the Taxpayer Identification Number (TIN) of the employee (and others in the report) may be truncated in the information statement furnished by the employer thereby affording a measure of privacy and identity protection for the millions of statements that will be issued.

We also commend the IRS for considering ways to streamline the reporting to eliminate potentially duplicative reporting under sections 6055 and 6056. The five alternatives for simplified reporting outlined in the Preamble to the proposed section 6056 regulations represent a good start and each has merit under different circumstances. Finally, TEI applauds the decision to issue Notice 2013-45 affording a one-year delay in the mandatory section 6055 and 6056 reporting requirements thereby giving plan sponsors and health insurance issuers an opportunity to develop, implement, and test system changes and procedures for the collection of data and required information reporting.

Regrettably, the proposed regulations do not yet adopt any simplified reporting methods and more important they remain too narrow to afford broad relief. Absent prompt release of careful regulatory guidance and additional simplified methods, the information reporting requirements will substantially increase large employer and health insurance issuer compliance

[4] 2013-31 I.R.B. 1160 (July 29, 2013).

burdens while also burdening the IRS with a tremendous amount of data that may not be useful in the administration of the individual or employer shared responsibility payments or in reviewing the availability of subsidized premium tax credits for individuals. More detailed comments on the various provisions follow.

Summary of TEI Recommendations

The Institute urges the IRS and Treasury Department to adopt the following recommendations to clarify the proposed regulations and minimize undue administrative burdens and potential information reporting penalties on reporting entities:

1. Expand the TIN matching system to include the health care reporting requirements under sections 6055 and 6056 and permit simplified TIN solicitations. As an alternative to TIN matching, adopt a rebuttable presumption of correctness of TIN information supplied by employees and by employers to insurance companies or third-party administrators.

2. Clarify the application of the section 6721 and 6722 penalties to controlled groups of applicable large employers to eliminate stacking of penalties for duplicate information erroneously furnished under both sections 6055 and 6056. Clarify the return preparer rules so that employees of one ALE member of an ALE group can prepare the information returns for other ALE members without being subject to the preparer rules.

3. Permit reporting entities to use electronic means as the *default* method to furnish statements to recipients unless the recipient elects out. In other words, reverse the presumption in the proposed regulations that favor furnishing paper statements to recipients. To reduce compliance and administrative costs, employees should opt out of electronic receipt of statements rather than opt in.

4. Announce a delay in the imposition of information reporting penalties under sections 6721 and 6722 for good faith compliance with the section 6055 and 6056 reporting requirements during the first two years of mandatory reporting.

5. Adopt proposed guidance simplifying and coordinating the reporting requirements under sections 6055 and 6056 as soon as possible to minimize the number of system changes reporting entities must make.

6. Clarify that the statute of limitations for an employer's shared responsibility payment under section 4980H begins to run from the date the information return required under section 6056 is filed with the IRS and further clarify the statute of limitations applicable to information reporting penalties under sections 6721 and 6722 in respect of information returns filed under sections 6055 and 6056 also begins with the filing of the information return with the IRS.

In addition, we have other minor recommendations to improve the clarity, operation, and utility of the proposed regulations and enable compliance.

TIN Matching System

A. *TIN System Matching Should be Expanded to Include Health Care Reporting.* The IRS's TIN matching system permits a reporting entity to verify the identity of payees based on data on file with IRS. The system is currently used to implement and enforce the backup withholding rules under section 3406. The proposed information reporting rules under section 6055 and 6056 seemingly do not contemplate TIN matching. Although large employers will likely have social security numbers on file for employees, they will not necessarily have them for spouses or dependents.[5] Presumably, large employers will be able to secure such information during enrollment or re-enrollment periods, but that may not always be the case, especially for non-custodial dependents. As important, health insurance issuers must rely on information provided by the insureds or by the large employers' employees where the insurance company (or others) serves as a plan administrator. Without an alternative means of ensuring the accuracy of TINs and addresses, health insurers — whether acting in their capacity as an insurer or as an administrator of a large employer's self-insured plan — may file erroneous returns with the IRS (whether on their own behalf or on behalf of their large employer customers) and furnish incorrect statements to insureds or employees enrolled in self-insured group health plans.

Filing incorrect information with the IRS may subject the reporting entity to a penalty of $100 per occurrence (to a maximum of $1.5 million) under section 6721. Furnishing incorrect statements to recipients also may subject the reporting entity to a penalty of $100 per occurrence

[5] Although large employers can likely compel employees to provide social security numbers as a condition for coverage, just as they can compel disclosure for payment of wages, it is not so clear that they can compel disclosure of social security numbers for purposes of providing coverage to spouses or dependents. Some states have enacted strict rules on the use of social security numbers. Moreover, because of the guaranteed issue and renewability provisions of the Public Health Insurance Act 42 U.S.C. §§ 300gg-1 and 300gg-2), health insurance issuers may be unable to decline coverage or renew coverage for an individual refusing to supply a social security number. Finally, employers may not have the TINs of employees' adult children and employers will be unable to provide them.

(to a maximum of $1.5 million) under section 6722. Without a mechanism to confirm TINs, employers, third-party administrators, and health insurers face a significant risk of information reporting penalties. Moreover, the issuance of incorrect statements by the insurance company as the administrator of a self-insured group health plan to employees of an applicable large employer will likely result in a barrage of inquiries and complaints to corporate human resource departments. TEI recommends that the IRS expand its TIN matching program to minimize mismatched information reports. Adoption of a TIN matching system will reduce the number of times that employers or insurers must approach the insured to solicit a TIN and may be one of the most efficient ways to increase the utility and clarity of the information provided to the IRS and to statement recipients.

B. *Simplified TIN Solicitation Process*. Section 6724 and the regulations thereunder refer to the "payee" whose TIN must be reported on the information return filed by a reporting entity. Under sections 6055 and 6056 there is no "payee" *per se*. Rather the information reporting entity must report the TIN for the "responsible individual" or employee and other individuals covered under the policy. To simplify the TIN solicitation requirement, the employer, insurance issuer, or third-party administrator should only be required to solicit TINs for all covered individuals under the plan from the "responsible individual" under section 6055 or the employee under section 6056. The responsible individual or employee will generally have access to the required information and there should be no requirement that employers or insurers solicit the TIN from each covered individual in order to satisfy the reasonable cause requirements of section 6724. In addition, any employer required form, including an application for employment, an application for health insurance enrollment, an application for life or disability insurance, pension or 401(k) beneficiary form, that solicits the required TINs should be

considered an acceptable TIN solicitation by an employer for purposes of sections 6055 and 6056.

Finally, employers and insurers should be permitted to obtain TINs in the simplest, most cost-effective manner, including email or telephone requests, rather than requiring the use of the current Form W-9 *(Request for Taxpayer Identification Number and Certification).* The Form has grown extremely complex with its use in myriad reporting contexts.

C. *Simplified W-9H*. In the event that the IRS does not accept TEI's recommendation that employers and insurers should be permitted to accept email or telephone solicitations to obtain TINs, or to demonstrate due diligence in soliciting TINs, the IRS should consider providing a simplified form for reporting entities to gather requisite TIN data. We recommend a simplified Form W-9H be issued that includes only the name, address, TIN, and a certification statement for the covered individual. In addition, as noted above, the responsible individual (or primary insured) who enrolls one or more individuals (such as a spouse or dependent) in minimum essential coverage should be permitted to use that form to provide and certify a TIN for other covered individuals for whom the person is the "responsible individual."

D. *Nonresidents*. The IRS should also clarify an employer's or health insurance issuer's obligations to solicit and report TINs or ITINs for nonresidents, including especially spouses and dependent children of nonresidents, who may (or may not) be covered under an employer's health plan. For example, a nonresident temporarily employed in the United States may have a spouse or dependent child in the United States on an H-4 visa that may not otherwise be required to obtain a TIN or ITIN. In other cases, the spouse or dependent child may reside outside the United States for the duration of the nonresident's temporary employment in the United States. In either case, what documentation is the employer (or health insurance insurer) required to maintain to show reasonable cause and avoid the penalty for failing to report a TIN or ITIN?

Rebuttable Presumption of Correctness —
Alternative to an Expanded TIN Matching Program

In the event the IRS is unwilling to expand the TIN matching program, the IRS should consider affording a rebuttable presumption of correctness to the information obtained during employee enrollments and transmitted to the IRS directly by the employer or by the employer through a third-party administrator (including health insurance issuers). The TIN and address supplied by the employee to an employer for W-2 purposes is presumed correct and so the TINs and address supplied by an employee (the responsible individual) to an employer (or insurer) and then to an insurer as an administrator of the self-insured plan should similarly be presumed to be correct. Applicable large employers, health insurance issuers, and third-party administrators should not be liable for information reporting penalties for erroneous information that comes directly from an employee.

Application of Certain Rules to Applicable Large Employer Groups

A. *Information Reporting Penalties.* Prop. Reg. § 301.6056-1 imposes on each member of the controlled group that has employees a requirement to file information returns and statements. The Preamble to the proposed regulations explains that

> . . . if an applicable large employer (ALE) is comprised of a parent corporation and 10 wholly-owned subsidiary corporations, there are 11 ALE members (the parent corporation and each of the 10 subsidiary corporations). Under the proposed regulations, each ALE member with full-time employees, rather than the group of entities that comprise the applicable large employer, is the entity responsible for filing and furnishing statements with respect to its full-time employees under section 6056.[6]

Prop. Reg. §§ 1.6055-1(h)(1) and (2) apply the sections 6721 and 6722 penalties to a person (*i.e.*, any reporting entity) that fails to include correct information or includes incorrect information in the return or information statements. In addition, under Prop. Reg. § 301.6056-1(j) an applicable large employer that fails to file the returns or information statements is also subject to the section

[6] *See, Preamble,* 2013-40 I.R.B. 303 (Sept. 30, 2013), at 307.

6721 and 6722 penalty provisions. As a result, the penalty limitations of $1.5 million under each of sections 6721 and 6722 may apply to each member of the group. Hence, each ALE member within applicable large employer group may be subject to penalties of up to $3 million per year.

Because of the duplicative reporting requirements of sections 6055 and 6056, we urge the IRS to clarify that, where the same erroneous information is reported under both provisions, penalties will be imposed only under one such section. This will be especially important where the IRS affords, and employers use, simplified reporting options to minimize duplicate reporting under sections 6055 and 6056. There should be no stacking the section 6721/6722 penalties where a single statement with duplicative information is furnished that is intended to satisfy both sections 6055 and 6056.

B. *Return preparer rules.* Within large employer groups the payroll, human resources, and corporate tax department functions may be centralized within one entity and the returns and information statements prepared for all other members of the ALE group. The IRS should clarify that returns and information statements prepared by employees of one member of the ALE group on behalf of other members of the group does not cause the person or preparing member to be subject to the return preparer requirements. Specifically, the section 7701(a)(36)(B)(ii) and (iii) exceptions from the definition of tax return preparer for individuals who prepare tax returns or claims for refund of (i) their "employer" (*i.e.*, the Employer Exception) or (ii) entities for which their employer serves as a fiduciary (*i.e.*, the Fiduciary Exception) should be clarified to include information returns and statements filed by one or more "applicable large employer(s)" on behalf of other ALE members of the group.

Permit Statements to Responsible Individuals and Employees to be Furnished Electronically Unless They Opt Out

Prop. Reg. § 1.6055-2 and Prop. Reg. § 301.6056-2 set forth the requirements for furnishing electronic statements to responsible individuals and employees under sections 6055

and 6056, respectively. Both proposed regulations default to a requirement that the reporting entity use paper reporting for furnishing statements to recipients. To deliver statements electronically, reporting entities must obtain consent from the recipients for receipt of electronic statements and comply with a host of other requirements.

TEI recommends that the Treasury and IRS reverse the default method and presumption favoring the issuance of paper statement to recipients. Instead, reporting entities should be permitted to furnish statements electronically unless the recipient opts out. Most information recipients, especially those employed by large employers, have access to computers at work or at home. Indeed, computers and smartphones are nearly universal appliances. Hence, the information required to be supplied to the recipients under sections 6055 and 6056 can most effectively, efficiently, and reliably be delivered by email notices or by having the employees check a website maintained by the employer (or third party) where the information is made available by the employer, insurer, or third-party administrator. If no computer is available to the employee, they can opt out of electronic reporting.

In addition, the requirement in Prop. Reg. § 1.6055-2(a)(2)(iii) and Prop. Reg. § 301.6056-2(a)(2)(iii) to obtain a new consent from recipients whenever there is a material change to the electronic system imposes an onerous requirement impeding the increasing use of electronic filing and delivery of information statements. Again, most employees will be able to use home or employer-provided computers to obtain the information statements electronically (or print the statements as needed). Consequently, we urge the IRS and Treasury Department to drop the requirement to obtain a new consent and otherwise ease the requirements in the proposed regulations for electronic delivery. Paper documents should be required to be issued to recipients only where they affirmatively elect in writing to receive statements in that manner. As noted below, the section 6055 and 6056 requirements represent an exponential increase in the

volume of information reporting and more needs to be done to reduce the burden on reporting entities and to ensure that the IRS receives accurate return information from responsible individuals and employees.

Administrative Tolerance or Grace Period on Information Reporting Penalties

Prop. Reg. § 1.6055-1(h) states that the penalties under sections 6721 and 6722 may be imposed on reporting entities that fail to file the information returns required under section 6055. Similarly, Prop. Reg. § 301.6056-1(j) states that an applicable large employer member that fails to comply with the filing and statement requirements under section 6056 is subject to the penalties under sections 6721 (failure to file correct information returns) and 6722 (failure to furnish correct payee statement). The waiver and special rules under section 6724, and the applicable regulations also apply.

The new information reporting requirements required to be implemented by the PPACA may be the single, largest one-time expansion of the information reporting system, perhaps more so than the initial adoption of employee wage reporting. Indeed, such a large expansion of the pool of information reporters and information recipients poses a significant risk of unwarranted annual information reporting penalties being imposed on reporting entities under sections 6721 and 6722. Moreover, many affected information reporting entities are implementing the separate and equally significant reporting requirements under the *Foreign Account Taxpayer Compliance Act*.

Reporting entities will need time to solicit and secure names, addresses, and TINs (or, alternatively, birthdates in some cases) in order to improve their internal databases for information reporting purposes. As a result, we urge the IRS to consider a "soft touch" in respect of the enforcement of the section 6055 and 6056 reporting requirements, especially the penalties under sections 6721 and 6722, for *at least* the first two mandatory reporting years following

finalization of the regulations. Such a grace period will afford information reporting entities' systems to become "seasoned" with correct data, thereby minimizing the risk of penalties for misreported data. TEI's recommendation for two years of transitional penalty relief is supported by IRS precedent, including most recently the extension of transitional relief for the new information reporting requirements of Form 1099-K under Code section 6050W.[7]

Consider Delaying the Effective Date of Mandatory Reporting under Sections 6055 and 6056 by an Additional Year

The statutes are effective for reporting of MEC and other information beginning on or after January 1, 2014. Under Notice 2013-45, mandatory information reporting was delayed until years beginning on or after January 1, 2015. Thus, the first information reports under the expanded reporting requirement will be due to employees by January 31, 2016, and to the IRS by February 28, 2016 (or March 31, 2016 if filed electronically).

The IRS will need considerable lead time in order to implement the PPACA's far-reaching changes. Similarly, once final regulations, forms, and instructions are promulgated, insurers and large employers will need ample time to make the system changes required by the rules, to train their employees to understand and apply the new rules, and to obtain and enter the TINs (and addresses) for dependents and spouses. We respectfully submit that information reporters will need *at least* one year following promulgation of final regulations (and forms, instructions, and supplemental guidance) in order to implement the required changes. Unless the IRS issues final regulations before January 1, 2014 (which would provide the requisite minimum one-year lead time for reporting entities to implement the system changes necessary to comply with the January 1, 2015, effective date for the section 6055 and 6056 changes), TEI urges the IRS to again delay the effective date of the expanded reporting requirements until years

[7] See Notice 2011-89, 2011-46 I.R.B. 748 (Nov. 14, 2011) and Notice 2013-56, 2013-39 I.R.B. 262 (Sept. 23, 2013).

beginning on or after January 1, 2016 (with the first returns filed and information statements furnished in 2017).

We understand that in issuing Notice 2013-45 the IRS encouraged information reporters to implement system changes and begin voluntary compliance in 2014. Given the substantial requirements imposed by the statutes, the absence of official guidance on simplified reporting methods, and the need to issue forms, instructions and additional guidance on some data elements, we submit that most information reporting entities still do not have sufficient knowledge about the reporting requirements and will not have sufficient information to comply voluntarily until final regulations, forms, and instructions are issued. Even if the mandatory reporting date is not deferred, any delay in issuing final rules should be taken into account in determining the end of a good faith compliance period during which information reporting penalties should not be levied. Again, we recommend that the IRS afford information reporting entities a grace period for good faith compliance with the information reporting rules and refrain from imposing penalties under sections 6721 or 6722 for a minimum of the first two years of mandatory reporting under sections 6055 and 6056.

Options to Simplify and Streamline Reporting

A. *Combined Reporting under Section 6056 and 6051 (W-2) or 6055.*

The Preamble to the section 6056 proposed regulations explains that comments in response to Notices 2012-32[8] and 2012-33[9] recommended that the regulations permit combined reporting by large employers under 6055 and 6056.[10] Other comments recommended permitting combined reporting of 6055 and 6056 information on W-2s under authority of section 6051. The

[8] 2012-20 I.R.B. 910 (May 14, 2012).

[9] 2012-20 I.R.B. 912 (May 14, 2012).

[10] 2013-40 I.R.B. 303, at 311.

Preamble to the section 6056 proposed regulations explains that the government rejected those options because not all employers would be subject to each of the three requirements, the reported information under each provision is different, and the reporting entity may be different under section 6055 and 6056. As a result, independent reporting options would still be required. In addition, the Preamble continues, each permutation of combined reporting would require IRS to develop a separate form, instructions, and requirements thereby creating confusion and complexity for employers and employees.

Notwithstanding the rejection of combined reporting discussed in the Preamble, the IRS and Treasury are considering whether employers sponsoring self-insured group health plans can fulfill their obligations to furnish employee statements under both sections 6055 and 6056 through the use of a single substitute statement. We urge the IRS and Treasury Department use the one-year delay in the reporting rules to develop one or more revenue procedures or other published guidance to permit large employers to issue a single substitute statement to their employees combining the information under sections 6055 and 6056. Section 6056(d) was enacted specifically for this purpose. A combined statement would minimize employer costs to prepare, issue, and mail[11] statements to employees and also minimize potential employee confusion about the contents of two different but similar statements relating to and explaining their health care coverage.

B. *Simplified Reporting under Section 6056*. The Preamble to the section 6056 proposed regulations explains that the Treasury and IRS have sought to develop simplified reporting methods that will minimize the cost and administrative burdens for employers. Five specific simplified reporting methods are described, plus a sixth alternative would permit the use of

[11] TEI recommends that the IRS to permit broader use of electronic reporting for furnishing employee statements. *See below.*

multiple simplified reporting methods where the employees in the different reporting groups do not overlap.[12] The simplified methods are not included in the proposed regulations, but the Preamble describes them and invites comments.

TEI encourages the IRS to develop and adopt all five simplified reporting methods as well as combinations of those methods. Under the first simplified method described in subsection A of Section XI of the section 6056 Preamble, employers would be permitted to eliminate section 6056 employee statements in favor of Form W-2 reporting using an existing box on the W-2 to provide the monthly dollar amount of the required employee contribution for the lowest cost minimum value self-only coverage and a letter code to describe the offer of coverage. This approach could be used for any employee employed for the entire year where the offer and the employee contribution for the lowest-cost option for self-only coverage remained the same throughout the year.[13] Under subsection B of the section 6056 Preamble, an employer would be permitted to certify that all employees to whom it did not offer minimum coverage during the calendar year were not full-time employees (or were otherwise not eligible for coverage because they were in a permitted waiting period during the year). Under subsection C of section XI of the Preamble, employers that provide mandatory minimum value coverage under a self-insured group health plan to an employee, employee's spouse, and employee's dependents with no employee contribution would only be required to report the months in which such coverage was provided to the IRS and furnish the information to the employee by way of a code on Form W-2.

We believe that many large employers will be able to take advantage of one or more of the streamlined reporting methods in subsections A, B, or C, of section XI of the Preamble to the

[12] *See*, Section XI, Preamble to REG-136630-12, 2013-40 I.R.B. 303 (Sept. 30, 2013), at 312-315.

[13] The letter codes would be used to indicate to whom the minimum value coverage was offered, *e.g.*, (1) employee, spouse and dependents; (2) employee and dependents but not the spouse; (3) employee and spouse but not dependents; *etc*. *Id.* at 312-313.

section 6056 proposed regulations and recommend they be adopted. (The simplified reporting in subsection A is likely to be the method most commonly used but some employers may be able to use subsections B and C). Having said that, we encourage the IRS to continue to explore the streamlined methods in subsection D (Voluntary Reporting of Section 6056 Elements During or Prior to the Year of Coverage) and subsection E (Reporting for Employees Potentially Ineligible for the Premium Tax Credit) of section XI of the Preamble to the section 6056 regulations. We also encourage the IRS to permit the use of combinations of simplified reporting methods as described in subsection F of section XI of the Preamble.

Finally, we encourage the IRS and Treasury to continue exploring the development of alternative simplified reporting methods. Section 6056(d) was enacted specifically to minimize duplicate reporting. Issuing additional simplified methods will minimize employer burdens and streamline IRS system requirements for administration of the information reporting, shared responsibility payments, and premium tax credits.

Forms, Instructions, and Other Guidance

The proposed regulations state that the return required under section 6055 may be made on Form 1094-B (transmittal) and Form 1095-B (statement) or on a substitute form the IRS designates. The proposed regulations under section 6056 provide that the return required under that section may be made by filing Form 1094-C (transmittal) and Form 1095-C (employee statements) or other forms designated by the IRS. None of the proposed forms or instructions has been released.

To the extent the forms, instructions, and other guidance impose additional information reporting requirements or otherwise revise the standardized reporting and data elements prescribed by the proposed regulations, ALEs, third-party administrators, and health insurers will need time to modify their systems to produce the information returns and statements. The

Preamble to the section 6056 reporting, in particular, enumerates many additional data elements that may be required to be reported by ALEs.[14] As a result, we urge the IRS to issue the forms, instructions, and additional guidance as soon as possible. As important, we urge the IRS to use the date of the release of the *last* set of implementing guidance into account in determining the end of TEI's recommended two-year grace period for refraining from imposing information reporting penalties.

Clarify the Statute of Limitations

The information reported by employers under section 6056 is *the* critical first step in the PPACA regime because it permits the IRS to determine, assess, and bill the employer for any shared responsibility payment due under section 4980H.[15] Under section 4980H(d)(1), any assessable payment from the employer is due on notice and demand from the IRS. The assessable payment is unusual because — unlike other income and excise taxes levied under the Internal Revenue Code — the employer will not file a form and self-assess the tax. As a result, it

[14] *See* 2013-40 I.R.B. 303, 309. Under the general method of section 6056 reporting, the following information is expected to be requested, through the use of indicator codes for some information, as part of the section 6056 return (as well as an indication of how many individual employee statements are being submitted): (1) information as to whether the coverage offered to employees and their dependents under an employer-sponsored plan meets minimum value and whether the employee had the opportunity to enroll his or her spouse in the coverage; (2) the total number of employees, by calendar month; (3) whether an employee's effective date of coverage was affected by a waiting period; (4) if the ALE member was not conducting business during any particular month, by month; (5) if the ALE member expects that it will not be an ALE member the following year; (6) information regarding whether the ALE member is a person that is a member of an aggregated group, determined under section 414(b), 414(c), 414(m), or 414(o), and, if applicable, the name and EIN of each employer member of the aggregated group constituting the applicable large employer on any day of the calendar year for which the information is reported; (7) if an appropriately designated entity is reporting on behalf of an ALE member that is a governmental unit or any agency or instrumentality thereof for purposes of section 6056, the name, address, and identification number of the appropriately designated person; (8) if an ALE member is a contributing employer to a multiemployer plan, whether a full-time employee is treated as eligible to participate in a multiemployer plan due to the employer's contributions to the multiemployer plan; and (9) if the administrator of a multiemployer plan is reporting on behalf of the ALE member with respect to the ALE member's full-time employees who are eligible for coverage under the multiemployer plan, the name, address, and identification number of the administrator of the multiemployer plan (in addition to the name, address, and EIN of the ALE member already required under the proposed regulations).

[15] In addition, the information will be used to determine whether an employee is eligible to claim a premium tax credit.

is unclear when the statute of limitations in respect of an employer's section 4980H liability begins to run.

TEI recommends that the IRS clarify that a three-year statute of limitations for the liability under section 4980H begins to run on the date the employer files its Forms 1094-C (and related Form 1095-C employee information statements) with the IRS. Employers need certainty and finality about their assessable payments under section 4980H as much as they need certainty and finality about income and employment tax liabilities. Inaction by the IRS in respect of the information supplied by employers pursuant to section 6056 should *not* keep the statute of limitations open indefinitely. Moreover, the statute of limitations should be consistent for all taxpayers and, thus, should not be based on the date of a section 4980H assessment by the IRS. We believe that three years from the date of an employer's filing the information return (generally March 31 of a particular year for electronic filers) should afford the IRS sufficient time to match the employer-supplied information with employee return data, determine the assessable payment due, and issue the notice and demand.[16]

In addition, given the potential exposure to information reporting penalties that health insurance issuers and ALEs face under sections 6721 and 6722, we also recommend that the IRS clarify the statute of limitations for purposes of assessing penalties under those sections for returns filed and statements furnished to recipients under sections 6055 and 6056. We recommend that the statute of limitations on information reporting penalties expire three years after Form 1094-B (and 1095-B) or Form 1094-C (and 1095-C), as applicable, is filed with the IRS. Finally, assuming the final regulations afford the use of simplified reporting methods —

[16] We note that the rules relating to the administration and assessment of assessable payments under section 4980H are reserved. *See* Prop. Reg. § 54.4980H-6 (REG–138006–12, reproduced at 78 *Fed Reg.* 218)). The IRS may intend to address the statute of limitations issue in that section, but we believe the trigger for the statute should be the employer information reports under section 6056.

including a code or check box on Form W-2 for combined reporting under sections 6055 and 6056 or to implement one or more simplified reporting methods under section 6056 — we recommend that the IRS clarify the statute of limitations on the section 4980H assessable payment and the reporting penalties where combined or simplified reporting is used. Again, we recommend that the statute expire three years from the date the required information forms are filed with the IRS.

Miscellaneous

1. *Reasonable Cause Penalty Waivers — Two Additional TIN Solicitations.* According to the Preamble to the section 6055 regulations, "a reporting entity acts responsibly in attempting to solicit a TIN if after the initial, unsuccessful request for a TIN (for example, at enrollment), the reporting entity makes two consecutive annual TIN solicitations after the initial attempt."[17] Accordingly, the Preamble continues, "section 6055 reporting entities will not be unduly penalized."[18] Although TEI appreciates the reasonable cause penalty relief contemplated by the Preamble and regulations, we note that the rules do not explain or take into account pre-existing data or "old and cold" accounts. Under the proposed rules, health insurance issuers especially would seemingly be required to solicit TINs for longstanding accounts and the recipients of the requests may be unwilling to supply their social security numbers. We recommend that the IRS clarify the reasonable cause exceptions under section 6724 by including several new examples explaining their application to insurers and ALEs.

In addition, since the reporting rules are contemplated to apply in 2015, employers and insurers would, under the "two consecutive year's TIN solicitation" requirement, seemingly be required to solicit TINs for all covered individuals (responsible individuals, spouses, and

[17] *See* 78 Fed. Reg. 54986 (Sept. 9, 2013), at 54990.

[18] *Id.*

dependents) for 2013 and 2014 to avoid penalties for failing to report missing information on Form 1095-B in 2015. Since the mandatory reporting requirements were delayed by Notice 2013-45, few ALEs or insurers likely have procedures in place for 2013 to demonstrate that that they have attempted to solicit TINs for two consecutive years and thus satisfy reasonable cause threshold. At a minimum, the "two consecutive annual TIN solicitation" requirement for satisfying reasonable cause under section 6724 should be waived for the first two years of mandatory reporting.

2. *Contact Person and Phone Number*. Prop. Reg. § 1.6055-1(g)(1)(i) and Prop. Reg. § 301.6056-1(d) require reporting entities to supply the name and telephone number of a contact person in respect of the information furnished to the responsible individual or employee, respectively. In essence, the proposed rules mirror the statutory requirements of sections 6055(c)(1)(A) and 6056(c)(1)(A). The statutes and proposed regulations, however, do not specify the duties of the contact person or explain what information the person is required to provide to callers apart from verifying the information furnished in the statements. Indeed, it would seem more efficacious to direct individuals seeking additional information about the statements to a Frequently Asked Questions (FAQ) website or similar written FAQ letter. The telephone number and contact person should likely be used primarily to permit the caller to question incorrectly reported information. Even this redress or error correction function should and could be automated to address frequently recurring questions. Consequently, we urge the IRS to permit employers and insurance issuers to automate their telephone response so long as a person is ultimately available. In addition, without guidance on the nature of the person's duties, employers, insurers, and third-party administrators will likely be inundated with requests for tax advice or other requests for what to do with the information, how to complete tax forms, or how

to compute shared responsibility payments under section 5000A. Hence, the IRS should consider clarifying that the telephone contact person is or is not required to provide.

3. *Birth date in lieu of TINs.* Prop. Reg.§§ 1.6055-1(d)(ii) and (iii) permit a reporting entity to report a birth date in lieu of a TIN where a TIN is not available. The Preamble explains that —

> . . . as a backstop to reporting a TIN, the proposed regulations allow reporting entities to report date of birth if a TIN is not available. This alternative should not be used, however, unless the reporting entity has made *reasonable efforts* to obtain the information by requesting that a covered individual provide the TIN.[19]

Although there may be other uses for the birthdate backstop, the most common use of a birth date in lieu of a TIN will likely be to report MEC for infants born during the year where no TIN is available at the time the required information return and statements are due.[20] In any case, it is unclear what would constitute "reasonable efforts" to obtain a TIN from the covered individual. We recommend that the IRS provide such guidance on "reasonable efforts." For example, in the case of an infant, it should be sufficient to contact the responsible individual by email or phone by some date, say November 30 of the coverage reporting year, and inquire whether a TIN is available. Reporting entities should not be required to wait until December 31 of the coverage year to determine whether a TIN is available. Reporting entities need time at year end to complete the input, test their system, and review the correctness of the reports for recipients.

Conclusion

Tax Executives Institute appreciates this opportunity to present its views on REG-132455-11 and REG-136630-12 relating to proposed regulations for information reporting to implement the PPACA. If you have any questions, please do not hesitate to call Gary P.

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[19] *Id. Emphasis supplied.*

[20] The TIN may be obtained after the information return is filed but before a return is filed claiming the child as a dependent.

Hickman, chair of TEI's Federal Tax Committee, at (770) 677-2337 or gary.hickman@oldcastle.com; or David E. Sherwood, chair of TEI's Employee Benefits and Payroll Taxes Subcommittee at (425) 706-4146 or davesher@microsoft.com; or Jeffery P. Rasmussen of the Institute's professional staff at 202.638.5601 or jrasmussen@tei.org.

Respectfully submitted,

TAX EXECUTIVES INSTITUTE, INC.

Terilea J. Wielenga
International President