March 18, 2013

Ms. Kathryn Bjornstad  
Internal Revenue Service  
CC:PA:LPD:PR (REG-138006-12)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044


BY ELECTRONIC SUBMISSION VIA http://www.regulations.gov

Dear Ms. Bjornstad:

The Society for Human Resource Management (SHRM) is pleased to provide comments in connection with the notice of proposed rulemaking issued by the Department of the Treasury and the Internal Revenue Service regarding section 4980H of the Internal Revenue Code (“Code”), which addresses employer shared responsibility for employee health coverage, 78 Fed. Reg. 218 (Jan. 2, 2013) (“NPRM”).

SHRM is the world’s largest association devoted to human resource management. Representing more than 260,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. SHRM appreciates the efforts of the IRS and Treasury to provide guidance for determining full-time employees and other aspects of section 4980H in Notices and in proposed regulations. The additional flexibility afforded employers in complying with section 4980H will be crucial as all parties strive to implement the very complicated provisions and interrelated aspects of section 4980H as well as other provisions of the law taking effect in 2014. SHRM supports the reliance provision in the proposed regulations that will allow employers to rely on the proposed regulations through 2014, and additional
transition rules to assist with implementation.

SHRM also recognizes that the IRS and Treasury will remain engaged to further clarify section 4980H as employers and other stakeholders discover operational and other challenges to implementing the employer shared responsibility requirements. We look forward to continuing to provide input in this regard. However, we remain concerned that certain elements of the proposed regulations will impose overly burdensome requirements on our members and thwart economic development and job growth: in particular the rules around new employers, unlimited counting of hours for which employees are paid but perform no services, and lack of exemptions for certain categories of workers. In addition, the proposed rules should be revised to acknowledge some current realities and allow longer transition periods for employers to implement necessary systems and process changes, such as the transition rule for measurement periods in 2013, adding a special rule for mergers and acquisitions, revising the guidance with respect to dependent coverage (to eliminate the requirement to cover foster children), and revising the determination and apportionment of liability and penalties under 4980H on a member by member basis to be permissive rather than required.

As the Administration aims to implement the law fully in 2014 and to encourage the persistence of employer-sponsored health coverage, it should adopt a flexible implementation and enforcement approach for employers already challenged by costs and administrative burdens to continue providing benefits to their employees. SHRM offers the following suggestions to improve implementation and workability of the proposed rule.

1. More flexibility needed for new employers under the 50- Employee threshold to be subject to the shared responsibility provisions

Code section 4980H(c)(2)(C)(ii) provides that for an employer not in existence in the prior calendar year, the determination of applicable large employer status will be based on the average number of full-time employees reasonably expected to be employed on business days in the current calendar year.

The proposed regulations give force to this provision. However, for many new employers, establishing benefits is impossible in the first months of operation, for example, because of insurance underwriting and other administrative barriers. As requested in the preamble to the proposed
regulations (78 FR 222, Jan. 2, 2013) SHRM supports a safe harbor for new employers that would allow a period of at least 6 months before the employer is considered an applicable large employer subject to 4980H. (Alternatively, there could be a presumption that a new employer is not an applicable large employer for the first 6 months following its incorporation, or hiring of 50 or more employees, whichever is later).

Such a safe harbor would not significantly harm employees (who may be subject to a 90 day waiting period under other provisions of ACA), and would be eligible to purchase coverage on health insurance exchanges. In addition, an ongoing employer is not subject to penalties for implementing a 90 day waiting period, or under the Section 4980H rules, offering coverage to a new full-time employee within three calendar months of an employee’s date of hire.

Given the other challenges faced by new employers, a requirement to determine status as an applicable large employer, and to get coverage in place and enroll employees could add significant cost and administrative burdens that would prevent entrepreneurs, lenders, and others involved in job creation, from moving forward, thus hindering economic development and job growth. Concerns over “churning” of individuals between exchanges and employer coverage would not be present in this situation, since once the temporary transition period for new employers is over, coverage would be in place for eligible employees and would not create future churning.

2. **Retain Transition rule for 2014 determination of applicable large employer.**

   SHRM and its members endorse the transition rule for 2014 allowing employers to use a 6-month period for counting full-time equivalent and full-time employees to determine whether the employer has 50 or more full-time equivalent employees and is, therefore, an applicable large employer. Use of this standard should not disadvantage employees and, given the fact that proposed rules were not issued until January 3, 2013, will give employers a more reasonable framework for determining their status as an applicable large employer.

3. **The Hours of Service definition should include a limit on the hours which must be counted that are hours paid when no duties are performed, and should include rules for employees that are not paid on the basis of time worked.**
Section 4980H(c)(4)(2) defines hours of service for purposes of determining whether an employee is to be considered a “full time employee” for purposes of section 4980H: “The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.”

By adopting the basic structure of Department of Labor rules for counting hours of service for retirement plan purposes, yet not following rules of convenience (such as elapsed time or caps on hours paid when no duties are performed), the proposed regulations overlay a complicated system that has potentially significant tax consequences and does not account for variations in hours tracking and recordkeeping, and fails to accommodate employers that don’t compensate employees on the basis of time worked. Further, by requiring employers to count hours of service for which an individual is paid or entitled to payment on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence, the proposed regulations overstate the employment relationship between employers and certain employees, and create virtually open-ended commitments to offer health coverage to certain individuals or face penalties.

Specifically with respect to hours when no duties are performed due to illness, incapacity or leave of absence, employers that choose to provide paid leave, or access to health care, will be discouraged from doing so when they can legally opt not to. For example, employers have in the past offered continued access to health coverage to individuals receiving long term disability payments, due to the unavailability of market-based coverage for such individuals. However, if employers might trigger significant potential tax penalties by failing to assure that coverage is affordable to such individuals, or by failing to offer coverage to this group which has never been considered an “active” employee group employers might stop offering coverage (to avoid “affordability” issues) or stop providing disability income benefits. Neither of these alternatives would benefit disabled individuals. If final regulations were to instead adhere to the approach taken in Notice 2011-36 which would have limited the number of hours that must be counted during a single, continuous period when an employee was paid or entitled to payment but performed no duties, the likelihood of harm to these individuals would decrease.
The preamble to the proposed regulations notes the potential negative impact of limiting the numbers counted under this approach of employees on longer paid leaves, such as maternity or paternity leave. But individuals on maternity or paternity leave may have their rights to continued group health coverage protected under separate laws, such as federal or state family and medical leave laws, and so do not actually need additional protections under Section 4980H. The proposed regulations appear to acknowledge that an open-ended crediting of this type of hours can create hardships for employers, and so include a special rule allowing educational institutions to limit the hours credited for the non-performance of duties; this rule should be incorporated into the provisions of 54.4980H-3 and made applicable to all employers.

4. **Measurement periods should be delayed.**

The IRS and Treasury have responded to needs of employers with certain workforce characteristics, or in certain industries, by establishing a lookback/stability approach to the determination of full-time employee, and SHRM members appreciate the flexibility created in this approach. However, employer recordkeeping systems may not accommodate this approach, and employers may not have budgeted for the expense of needed programming or outsourcing of this function. Therefore, we recommend that employers be able to use a measurement period beginning in 2014, rather than beginning no later than July of 2013. Even this transition rule would be a major hurdle for many employers, and so additional administrative accommodations would be appropriate.

5. **Certain categories of employees should be excluded from the definition of employee.**

SHRM reiterates the comments it made in response to Notice 2011-36 that certain categories of employees should be excluded from the definition of employee:

- Minor dependents under age 18. These individuals will likely never be eligible for premium subsidies and employers should not incur penalties for not offering coverage to these individuals, as they would likely have access to coverage through their parents.

- Employees covered under health plans of another family member, through a student health plan or through another employer. Employers choosing not to offer coverage and therefore
subject to penalties under 4980H(a) should not incur penalties for employees who choose to obtain coverage through another family member, through a student health plan or who have coverage through another employer.

- Student employees. Student employees under the Fair Labor Standards Act should be excluded if the individual’s primary purpose for affiliation with the organization is as a student rather than an employee – and their employment is incidental to their role as a student.

6. **Requirement to offer coverage to children of full-time employees should exclude foster children, and the transition rule should be broadened.**

   We appreciate the transition that will give employers needed time to comply with the requirement to offer coverage to children of full-time employees, and the position that 4980H does not require employers to offer coverage to spouses. However, we are concerned with the breadth of the requirement to cover any individual who might be considered a child under IRC Section 152(f). 152(f) is a permissive section allowing certain categories of individuals to be considered a child for whom a taxpayer may take a deduction on the tax return. Not all individuals will necessarily take a deduction for every child who could be considered a section 152 (f) dependent. Furthermore, the Code allows an employer group health plan to cover such individuals on a tax-free basis but does not mandate that a plan do so.

   Particularly troublesome is the requirement to offer coverage to foster children and step children. Foster children are often placed with a family for a short time period, and providing coverage to these individuals up to age 26 is inconsistent with some state laws and practices that no longer consider individuals foster children once they attain age a particular age (for example, in California children can be in foster care until age 21). In addition, in many states, foster children are provided medical coverage under the state Medicaid or CHIPRA programs, leading to burdensome administrative challenges to coordinate benefits if foster parents were to enrol these children in an employer plan. In addition, once a foster child was removed from a family, and no longer eligible for coverage under the employer plan, the employer would be required to offer COBRA. In many situations, the employer would have no way to know what entity or person to contact with a COBRA notice or other required communications. We also urge you to broaden the transition rule for employers that do not offer coverage to children of
full-time employees to employers that do not offer coverage to certain categories of dependent children (e.g., foster children).

7. **The provision that penalties apply on an entity by entity basis should be permissive, and should apply to noncorporate entities within a controlled group.**

   We support the provision in Proposed Reg. Section 54.4980H-5 that would apply assessable payments to an applicable large employer member that was the employer of the employee for a particular calendar month. However, we believe that this provision should be permissive, so that an applicable large employer with more than one applicable large employer member could elect to determine and apply liability under Section 4980H for the applicable large employer. Some employers with more than one applicable large employer member could face significant administrative burdens if they had to allocate full-time employee status and liability among members rather than at the applicable large employer level. For example, some employers may not have systems that track hours for a member separately, so breaking this out to determine a pro rata allocation of liability could be impossible.

   Some organizations include unincorporated separate operating units that have separate budgets. These organizations should not be penalized because they choose to avoid the expense of establishing separate legal entities. Thus, we request that the definition of applicable large employer member be expanded to include separate units that need not be separate corporate entities.

   Finally, we request that guidance under Code section 105(h) confirm that the determination of liability for and assessment of employer shared responsibility penalties will be permitted in all instances.

8. **Transition rules needed for mergers, acquisitions and spinoffs.**

   The rule in 54.4980H-4 governing assessable payments under section 4980H(a) provides needed clarity around the scope of the offer of coverage needed to satisfy the requirement, and is consistent with the position in Notice 2011-36 stating that an offer of coverage to substantially all employees would be sufficient. In general, we think that offering
coverage to 95% of full-time employees is a reasonable standard. However, there are certain situations where adherence to this rule, on a monthly basis, may be challenging and exceptions should be available. For example, many companies engage in mergers or acquisitions, and cannot necessarily predict or control the size of the full-time employee population for a given month. Therefore, we request that applicable large employers who have been involved in a merger or acquisition have 6 months to comply with section 4980H(a) to provide ample time to understand a new employee population, determine full-time employees, and put in place and offer coverage to appropriate individuals.

If employers are concerned about inadvertently triggering significant penalties when acquiring new populations, corporate business activity could be adversely affected, thereby hampering economic development and job creation. In addition, we also would request clarification that the 95% is applied to the individuals treated as full-time employees pursuant to section 4980H.

9. **Confirm that employers will not need to go through an appeals process with the exchange or HHS for employees in an initial measurement period.**

We are concerned about the disconnect between the 1411 Certification (or a notice of eligibility for premium tax credit from an exchange or HHS pursuant) and satisfaction of 4980H using the measurement-lookback/stability approach proposed in 54.4980H-3. For example, an employee may apply to the exchange for income-based assistance and affirm that they have no coverage available, and the exchange may notify the employer that it may be liable for penalties. However, if the employer is using the lookback/stability method, there should be no penalties during the lookback period (and any associated administrative period). In the initial years of implementing this approach, we anticipate that our members, as well as vendors they work with, will have challenges and may need extra time, particularly to respond to Section 1411 certifications.

We are also concerned that without a centralized data source or process for confirming employment status, coverage eligibility or cost, there will be significant confusion around the verification process for employees applying for premium tax credits. And, until processes are better established, we anticipate that there may even be initial confusion over the identity of
the employer, its address and contact information. (For example, in connection with the Medicare Secondary Payer program administered by CMS, notices were sent to individual store or office locations that had no HR or other staff to respond, and it was not uncommon to take weeks or months for these notices to find the correct department or person to respond). Therefore, we request that as a transition matter extra time be allowed for employers to request an appeal, and that the agencies as quickly as possible establish a central data hub or a template that employers could provide to exchanges and/or employees with needed information to minimize the burdens associated with multiple inquiries from multiple exchanges.

10. **Additional safe harbors for income needed for employees not compensated on hourly or rate of pay basis.**

SHRM appreciates the additional safe harbors for affordability created under the proposed regulations. Many employers will have no idea of W-2 pay parameters until the end of the year, and the additional safe harbors can provide needed certainty around affordable contributions. However, they do not address issues for employees who are compensated on a commission or project basis, and we encourage the agencies to continue to dialogue with representatives of employers in industries that tend to have such employment arrangements to create additional safe harbors.

Again, SHRM appreciates the opportunity to comment on this proposed survey. Please feel free to contact us if you have any questions about our comments.

Sincerely,

Michael P. Aitken
Vice President
Government Affairs