FOOD MARKETING INSTITUTE

June 17, 2011

Submitted Electronically

CC:PA:LPD:PR (Notice 2011-36)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20044

RE: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage

On May 3, 2011, the Internal Revenue Service (IRS) published Notice 2011-36, Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (the "Notice"). The Food Marketing Institute (FMI) appreciates the opportunity to respond to the IRS's request for comments and information to inform the process of developing regulatory guidance regarding the shared employer responsibility provisions enacted as part of the Patient Protection and Affordable Care Act ("ACA") in § 4980H of the Internal Revenue Code.

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

FMI is a member of Employers for Flexibility in Health Care ("EFHC"). EFHC submitted comments to the Notice which FMI signed on to. These comments serve to supplement the EFHC comments.

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I. Introduction

We agree with the statement in the Notice that determining full-time employee status on a monthly basis "may cause practical difficulties" including "uncertainty and inability to predictably identify" which employees are considered full-time. FMI strongly supports the look-back/stability period safe harbor approach outlined in the Notice that employers can use to determine which employees are full-time employees for purposes of the shared responsibility mandate.

More generally, we believe that proposed regulations under the shared responsibility requirement and other related ACA provisions should provide employers with the flexibility they need to administer the new ACA rules while providing affordable coverage to employees in the retail food industry.

II. Full-Time Employee Determination

FMI favors a "look-back/stability period safe harbor" as outlined in the Notice, which gives employers flexibility to use a look-back period of 3 to 12 months, as chosen by the employer (the "measurement period"), to determine full-time employee status for a subsequent "stability period" of 6 to 12 months (as chosen by the employer), regardless of the employee's actual hours of service during the stability period, so long as the individual is still employed and performing service during the stability period.

FMI members' workforces generally fluctuate throughout the year with employees terminating employment and new employees being hired. The Notice provides that the look-back/stability period safe harbor may apply "only in limited form" to new and newly promoted employees. Employers with variable workforces like those in the retail food industry should be able to apply the look-back/stability period safe harbor for newly hired employees and employees moving to full-time status during the measurement period. For example, employers could be permitted to apply a shortened look-back period beginning the first of the month after the new employee's date of hire through the remainder of the measurement period to determine full-time employee status for the subsequent "stability period." Alternatively, employers could be permitted to apply the look-back/stability period safe harbor, but also be required to treat as full-time employees for the next stability period those new (or newly promoted) employees who are reasonably expected by the employer to satisfy the full-time employee hours threshold during the stability period.

Regarding the administration of a look-back/stability period, FMI believes:

- Employers should have the flexibility to use either a calendar-based or pay period-based measuring period.

- There should be employer flexibility to determine whether there is an interval between the measurement and stability periods.

- There should be employer flexibility to change measurement and stability periods.

FMI believes employers should be permitted to use different measurement and stability periods for different groups of employees to the extent that bona fide employment-based reasons exist (e.g., based on reasonable employment classifications; based on different business entities within controlled group).

III. Interaction with Waiting Period Limitation

The joint final IRS, DOL and HHS regulations issued by the agencies define the term "waiting period" as "the period that must pass before coverage for an employee or dependent who is *otherwise eligible* to enroll under the terms of a group health plan can become effective." [Emphasis added]. See Treas. Reg. § 54.9801-3(a)(3)(iii); DOL Reg. 29 CFR 701-3(a)(3)(iii); HHS Reg. 45 CFR 146.111(a)(3)(iii).

Proposed regulations provide that the ACA 90-day limitation on waiting periods commences only after an employee is "otherwise eligible" to enroll under the terms of the plan. The waiting period should not be interpreted in such a manner so as to prohibit common employer eligibility and enrollment practices.

For example, the proposed regulations should permit plans to --

- Require part-time employees to satisfy eligibility criteria based on a continuous period of service that is longer than a 90-day period and/or that they work an average of at least a specified number of hours per week (e.g., 35 or 40 hours/week).

- Exclude seasonal and other temporary employees from eligibility to enroll, regardless of whether the seasonal employee satisfies the eligibility requirements for non-seasonal employees.

- Require new employees to complete a service-based probationary period (e.g., 6 months) before becoming eligible to enroll in the plan, with enrollment within 90 days after the completion of the probationary period.

- Use a look-back measurement period to determine if an employee worked at least an average of a specified number of hours per week for such period, and then enroll

eligible employees at the end of a 90-day waiting period during which the plan completes the enrollment process.

The 90-day waiting period should apply based on continuous service with the employee maintaining his eligibility throughout the period.

The proposed regulations also should clarify that a permissible waiting period could be followed by a reasonable administrative period during which enrollment could be completed.

IV. Employer Shared Responsibility Penalties

The "Shared Responsibility" penalties should not apply during any permissible waiting period. Eligible employees who have not yet satisfied any waiting period (up to 90 days) should be excluded from the determination of full-time employees who have not been offered the opportunity to enroll in minimum essential coverage.

Seasonal employees and other temporary employees should not be taken into account in applying the Shared Responsibility tax penalties.

For purposes of this exclusion and for purposes of the special ACA seasonal employee rule for determining whether an employer is a "large employer" (i.e., at least 50 full-time equivalent employees) subject to the Shared Responsibility penalty, the definition of seasonal employee should include all employees who are employed only during particular periods during the year – not merely those categories cited in Notice 2011-36 (i.e., certain agricultural workers and retail workers employed exclusively during holiday seasons).

FMI agrees on the need for a safe harbor like that described in the Notice under which an employer offering coverage to "all, or substantially all, of its full-time employees" would not be subject to the $2,000 annual penalty for each full-time employee (minus 30), if any full-time employee gets a federal tax credit for exchange coverage.

If employers make good faith efforts to provide coverage in compliance with the Shared Responsibility provisions but make an inadvertent error regarding a particular employee, employers should be given the opportunity to offer coverage to that employee rather than being required to pay a penalty.

V. Multiemployer Issues

The proposed regulations should take into account the fact that some employers in the retail food industry provide health benefits to employees through multiemployer plans based on the terms of

collective bargaining agreements entered into with the unions representing those employees. In many cases, these agreements run for multiple-year periods that may extend beyond the effective date of the new shared responsibility requirements and ACA coverage mandates.

In the case of employees covered by a collective bargaining agreement who become eligible for coverage under a multiemployer plan, the 90-day waiting period limit should begin to apply only after the employees are "otherwise eligible" to enroll under the terms of the plan. For example, the plan should be permitted to –

- Require that employees satisfy a service-based eligibility requirement before the 90-day waiting period limit commences.

- Require new employees complete a service-based probationary period specified in the collective bargaining agreement before becoming eligible to enroll in the plan, with any 90-day waiting period commencing after the completion of the probationary period.

- Provide an employee coverage for a period (e.g., a quarter) based on the employee completing a specified number of hours during a look-back period (e.g., the previous quarter or second previous quarter).

Employers contributing to a multiemployer plan generally should be exempt from the auto-enrollment requirement, and coverage provided under a collective bargaining agreement and plan terms should be treated as satisfying the auto-enrollment requirement.

VI. Additional Issues

As noted by the Notice, a number of provisions in ACA rely upon the transfer of information among employers, employees, the Exchanges, the Department of Health and Human Services, the IRS, and other agencies. Notably, the applicability and amount of the shared responsibility penalty taxes depend upon whether and, in the case of the $3,000 penalty, the extent to which, employees are eligible for premium assistance tax credits or cost-sharing subsidies through an Exchange.

Our members have numerous questions about how (and even whether) the information reporting and penalty structure contemplated by ACA will work among employers, individuals, Exchanges, Treasury, Internal Revenue Service (IRS), HHS and other agencies. They also are concerned about being subject to administratively burdensome and duplicative reporting requirements with respect to various state and federal agencies.

In addition, our members are extremely concerned about how the affordability test (i.e., whether an employee's required contributions for coverage would exceed 9.5% of the employee's household income) will be applied.

Employers do not have access to employees' household income, which is confidential taxpayer information. Therefore, employers would not have the necessary information to assess whether the shared responsibility provisions might apply and whether changes in coverage would be necessary to avoid a penalty. And employers would have no way of substantiating household income reported by an employee to an exchange.

Employees seeking an advance premium assistance tax credit for Exchange coverage would typically be doing so based on tax return data from two years before the current, enrollment year.

The proposed regulations should provide a safe harbor under which an employer may determine whether the coverage it is offering is "affordable" in advance – not after-the-fact – and based on the information the employer does have: the compensation it pays the employee and the cost of self-only coverage under its plan.

FMI appreciates the opportunity to comment on this important matter and looks forward to working with the Department of the Treasury as it implements the ACA. Please contact me at 202-220-0614 or elieberman@fmi.org with any questions.

Sincerely,

Erik R. Lieberman
Regulatory Counsel