Statement of the
E-FLEX COALITION

on the

Patient Protection and Affordable Care Act

By

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Before the

United States House of Representatives

Energy & Commerce Committee
Subcommittee on Health

PPACA Pulse Check: Part 2

September 10, 2013

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Summary of Major Points

- Employers with high employee turnover rates and fluctuating work schedules face unique challenges in complying with the Affordable Care Act; this requires unique solutions to avoid disruption of their work forces and the labor markets.

- The ACA's definition of "full time" as 30 hours of service per week is below what most employers consider full-time and is creating perverse economic incentives to reduce employee hours. Congress should act to bring the definition in line with current work force practices.

- The ACA defines "large employer" as 50 or more full-time employees, including "full-time equivalents." Including "full-time equivalents" will stifle smaller employers' ability to manage their workforces and could discourage business expansion and offering of health coverage.

- Proposed regulations would allow a "look-back measurement period" to determine the full-time status of "variable hour" employees for purposes of the employer mandate—but other issues integrally related to the mandate, including employer reporting rules, have not been resolved.

- The just-issued proposed employer reporting rules fail to take a holistic view of employers' obligations under the law. Employers thus face major uncertainty regarding the software and other systems they must develop and implement *now* to be ready for 2015.

- The ACA provision requiring large employers to auto-enroll full-time employees into coverage is inappropriate; it would impose a major administrative burden on employers and result in unexpected payroll deductions for many employees who do not want or need coverage.

About E-FLEX

Employers for Flexibility in Health Care ("E-FLEX") is a coalition of leading trade associations and businesses representing retail, restaurant, hospitality, construction, temporary staffing, supermarket, and other service-related industries, as well as employer-sponsored health plans insuring millions of American workers. Coalition members strongly support employer-sponsored coverage—the backbone of the U.S. health care system—and have been working to ensure that such coverage remains a vibrant and competitive option under the PPACA ("ACA").

E-FLEX coalition members collectively employ a significant percentage of the U.S. work force each year—upwards of 30 million people. The jobs we create offer employees flexible work opportunities and are a leading contributor to the nation's economic job recovery. But those jobs are also characterized by high turnover rates and fluctuating work schedules. Therefore, a primary coalition goal is to ensure our members' ability to offer ACA-compliant health insurance coverage to our "variable hour" employees without unnecessary operational complexity that could disrupt our work forces or the labor markets.[1]

The Administration has addressed one major issue of concern to E-FLEX members that addresses the challenges presented in offering health coverage to variable hour employees—by allowing a "look-back measurement period" to determine the full-time status of those employees for purposes of the employer shared responsibility provisions under IRC §4980H. But many other issues affecting employers integrally related to those provisions have not been resolved—including the procedures for determining employee eligibility for premium tax

[1] Temporary staffing firms offer a striking example of the "variable hour" nature of the work forces of E-FLEX coalition members. In 2012, staffing firms employed an average of almost 3 million temporary and contract workers on any given day. But over the course of the year, they employed 11.5 million people— an annual turnover rate of almost 300%.

assistance, and the employer reporting requirements under IRC §§6055 and 6056. For that reason, E-FLEX members supported the Administration's one-year delay in enforcement of IRC §4980H.

Key Issues of Concern to E-FLEX Members

Definition of Full-Time Employee: The ACA's definition of "full time" as 30 hours of service per week is significantly below what most employers consider to be full-time and is creating perverse economic incentives to reduce employee hours. The E-FLEX coalition supports increasing the weekly hours required for full-time status. This would significantly benefit employees and employers by:

- Increasing employee take-home pay
- Allowing employers to offer more generous and affordable health coverage,
- Giving lower-income employees access to more affordable coverage options,[2] and
- Allowing for more flexible employee work schedules.

Because the law requires employers to measure their workforces in 2014 to comply in 2015, the 30-hour definition is already having an adverse impact. Once the labor market shifts, employees won't be able to recapture lost wages, flexible hours, or more generous benefits. The E-FLEX coalition strongly encourages Congress to act now to bring the definition more line with current workforce practices.

Definition of "Large Employer": The definition of a large employer under the ACA is based on whether an employer has 50 or more full-time employees. In making this calculation, employers must include "full-time equivalent" employees, thus significantly expanding the scope of the law to cover many smaller employers with large numbers of variable hour

[2]For example, in states that don't expand Medicaid, a single employee working 30 hours per week at the federal minimum wage would fall below 100% of the federal poverty level and thus be ineligible for either Medicaid or premium tax credits under ACA. But at 35 or 40 hours, the employee's income would exceed 100% of FPL which would qualify for tax credits. Increasing the hours also would benefit employees by reducing the top hourly wage rate at which they would be eligible for credits. For example, at 30 hours, an employee earning $29.46 per hour (400% of FPL) would be eligible. But at 35 or 40 hours, the top wage would drop to $25.25 (35 hours) and $22.10 (40 hours). The lowest hourly wage, of course, could not fall below the federal minimum wage of $7.25 per hour.

employees whose connection with the workplace, or with the employer, is tenuous or intermittent. The E-FLEX coalition is concerned that including "full-time equivalents" in the definition of large employer will stifle the ability of smaller employers to manage their workforces and, in some cases, may discourage them from expanding their businesses or offering health coverage.

Absence of Final Employer Reporting Rules

Also of pressing concern to E-FLEX members is the absence of definitive guidance on the employer information reporting requirements under IRC §§6055 and 6056. The one-year delay of the §4980H requirements means employers will not have penalty exposure until 2015. But they still must have their information technology and human resources systems in place by Jan. 1, 2014 in order to track employees' hours of service in 2014 and comply with their ACA coverage obligations on Jan. 1, 2015.

Without clear guidance on what IRC §§6055 and 6056 require, employers face major uncertainty regarding the software and other systems they must develop and implement now. The employer reporting rules were issued in proposed form just last week (Sept. 5) and contain substantial new reporting obligations that include data elements beyond those prescribed in statute. The proposed rules are narrowly focused on the IRS's role in verifying compliance with the individual and employer mandates and fail to take a holistic view of the role that employers play in providing coverage to individuals and the myriad reporting requirements they are already subject to.

To address the reporting issues holistically, the E-FLEX coalition has, since 2011, been urging a number of approaches to mitigate the recordkeeping and reporting burdens on employers. These recommendations were most recently detailed in an Aug. 5 letter to the Secretaries of Treasury, Health and Human Services, and Labor, a copy of which is attached to this statement for inclusion in the record. The key recommendations can be summarized as follows:

- Enhance the accuracy of determinations of eligibility for premium assistance tax credits by giving employers flexibility to provide information to employees and health exchanges regarding the employer health coverage offered *on a prospective basis*. This would have the major benefits of reducing the number of retroactive "claw-backs" of tax credits previously granted to individuals and allowing employers to more accurately determine their potential exposure to penalties.
- Simplify end-of-year employer reporting for purposes of verifying compliance and assessing tax penalties—for example, by minimizing the number of reporting fields and allowing "safe harbor" exceptions for employers that meet certain *prima facie* compliance criteria or that have a *de minimis* number of employees receiving tax credits.

Auto-enrollment: The ACA requires large employers to enroll full-time employees into coverage automatically if an employee does not make an election. The E-FLEX coalition believes that enrolling employees in coverage they did not select, and may not want or need, is inappropriate. It would impose a major administrative burden on employers and result in unexpected (and undesired) payroll deductions for many employees.

We greatly appreciate the opportunity to present the views of the E-FLEX coalition and look forward to continuing to work with the Administration and Congress to resolve the many outstanding issues that remain to be addressed.

For more information contact:

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Employers for Flexibility in Health Care

August 5, 2013

The Honorable Jacob J. Lew
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Thomas E. Perez
Secretary
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretaries Lew, Sebelius and Perez:

We are writing on behalf of the Employers for Flexibility in Health Care (E-FLEX) Coalition to express our sincere appreciation for the Administration's decision to provide a year of transition relief to employers for information reporting requirements under IRC §§6055 and 6056 and excise taxes under IRC §4980H under the Affordable Care Act. This critical recognition by the Administration that employers need more time to implement complex new rules brings much-needed relief to employers across the nation and acknowledges the inextricable link among the employer coverage requirements, the information reporting requirements and other employer provisions of the law.

The E-FLEX Coalition is a group of leading trade associations and businesses in the retail, restaurant, supermarket, hospitality, health care, construction, temporary staffing and other service-related industries, that provide employer-sponsored plans insuring millions of American workers. Members of E-FLEX are strong supporters of employer-sponsored coverage and have appreciated the opportunity to work closely with the Administration to ensure that employer-sponsored coverage remains a competitive option for all employees, whether full-time, part-time, temporary or seasonal.

For the past two years, the E-FLEX Coalition has urged the Administration to provide transition relief to allow employers sufficient time to plan, budget and implement these new rules, especially those related to information reporting. The Administration's willingness to act upon the concerns of employers is the kind of flexibility we need in the implementation of a complex law to ensure that employers can continue to offer affordable coverage to their workers. Many members of the

E-FLEX Coalition will use the 2014 transition period as a "practice year" to build their tracking and compliance systems while working to voluntarily comply with the law's employer requirements.

We will continue to work with the Administration to develop the rules on reporting requirements under IRC §§6055 and 6056. We welcome an opportunity to review the recommendations we have submitted on streamlining and improving information reporting processes, including our comments in response to Notices 2012-31, 2012-32 and 2012-33 and the HHS Bulletin on Verification of Access to Employer-Sponsored Coverage.

In addition, we would like to call attention to several issues that have arisen as a result of Notice 2013-45, which provided official notice of the transition period in 2014.

Application of Transition Rules in 2015. Notice 2013-45 raises additional questions about how transitional rules that were provided for 2014 as part of the Treasury Department's proposed rule under IRC §4980H will operate in 2015. Given that 2015 will now be the first year in which employers could face excise taxes under IRC §4980H, employers need clarification regarding whether such transition relief will be extended into 2015. We urge the Administration to issue further guidance about the status of several transitional policies, including:

- Transition rules for non-calendar year plans that begin during the 2015 calendar year;
- Measurement periods for stability periods that start in 2015; and
- Minimum number of months an employer may use to determine applicable large employer status in 2015 and applicability of the coverage provisions under IRC §4980H.

Timely clarification around the application of these and other transition rules in 2015 will minimize confusion for employers working towards compliance with the law in 2014 and 2015.

Reliance on existing guidance and proposed rules in 2015. Notice 2012-58, which outlined guidance on determining full-time employees, provided much-needed flexibility for employers with variable hour workforces, including the look-back measurement/stability period and affordability safe harbors. The Notice provided employers certainty that they could rely on the guidance through at least the end of 2014. Similarly, proposed rules on IRC §4980H noted that employers may rely on the proposed regulations for guidance "pending the issuance of final regulations or other applicable guidance." Given the voluntary compliance approach the Administration has decided to take for 2014 with respect to reporting requirements and employer penalties, we urge the Administration to consider extending through 2015 the certainty with which employers can rely on guidance in Notice 2012-58 and the proposed rules in IRC §4980H. As many of our members will use 2014 as a practice year to voluntarily comply with the law, we will continue to work with the Administration to make refinements to the proposed rules as we learn about their practical applicability in 2014.

Information reporting under IRC §§6055 and 6056. The E-FLEX Coalition looks forward to working with the Administration as it develops rules on reporting requirements under IRC §§6055 and 6056. In light of the time needed to implement the necessary reporting systems, we urge the Administration to issue proposed rules on IRC §§6055 and 6056 as soon as possible so that employers can build and implement the necessary systems.

Since 2011, members of the E-FLEX Coalition have taken a holistic view of the law, having recognized that the employer requirements under the law are inextricably linked. How the reporting process is structured among employers, insurance Exchanges, and the federal agencies – and the timing and frequency of these interactions – will have a major impact on our business decisions about how to implement the law and our administrative processes and costs.

Minimizing the number of inaccurate determinations of individual eligibility for premium assistance tax credits to purchase Exchange coverage is a major priority of the E-FLEX Coalition. It is in all of our interests to avoid our employees having to repay tax credits when employer-sponsored coverage that meets the law's affordability and minimum value standards is available to them. As such, we are exploring the options the Administration has provided for employers to communicate with employees about the coverage they offer via the Department of Labor's model notice to employees about Exchanges under the Fair Labor Standards Act and the Department of Health and Human Services' employer pre-enrollment template as part of the model application for Exchange coverage.

The E-FLEX Coalition hopes to work with the Administration to find ways that employers can certify to IRS prospectively certain data elements under IRC §6056 about coverage available to employees to improve the accuracy of Exchanges' determinations of eligibility for advance payment of premium tax credits. This stands as the best path forward given that -- as HHS recognized in its July 5 final rule that addressed Exchange eligibility processes and other issues -- there currently is no comprehensive data source of eligibility for employer-sponsored coverage. In addition, given that HHS has confirmed that data from IRS, the Social Security Administration and the Department of Homeland Security "should be available every day" via the data hub (*See* CMS-2234-F), the Administration would not need to develop a separate data source of eligibility for employer-sponsored coverage if it can collaborate with the employer community to develop flexible options for reporting under IRC §§6055 and 6056 throughout the year.

The E-FLEX Coalition is committed to working with the Administration to simplify and streamline the employer information reporting requirements under the law in part by continuing to offer employers of different sizes and structures flexibility and options to comply with the law's requirements. In order to assist with the upfront determination of individual eligibility for tax credits and the availability of employer-sponsored coverage, we continue to explore options under the employer reporting requirements that would allow employers to report prospectively to the IRS general information about the coverage offered to employees (e.g., availability of minimum value plans and affordability based on employee wage bands). By giving employers the flexibility to report required data elements to the IRS on timeframes that coordinate with the

enrollment process, the Administration could use the federal data hub to provide Exchanges with access to more timely information about individuals' access to employer-sponsored coverage. In addition, we are exploring options to streamline end of year reporting for purposes of certifying compliance with the law and assessing tax penalties such as minimizing reporting fields, exceptions-based reporting based on limited number of employees receiving tax credits, and safe harbors for employers who are able to demonstrate compliance with the law.

We would like to thank you again for the opportunity to share our comments with the Administration on provisions of the ACA that affect employers, and we appreciate the constructive way in which the Administration has engaged with the employer community in developing regulatory guidance. The E-FLEX Coalition looks forward to working with the Administration to address issues that preserve employer-sponsored coverage and smooth the implementation process for employers and employees.

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416, on behalf of the Employers for Flexibility in Health Care Coalition.

Sincerely,

Employers for Flexibility in Health Care

Enclosure

cc: The Honorable Max Baucus
The Honorable Orrin Hatch
The Honorable Tom Harkin
The Honorable Lamar Alexander
The Honorable Dave Camp
The Honorable Sander Levin
The Honorable Fred Upton
The Honorable Henry Waxman
The Honorable John Kline
The Honorable George Miller