

**MEMORANDUM**

**To:** N.G.A.  
**From:** Epstein Becker & Green  
**Date:** September 22, 2011  
**Re:** Affordability of Employer-Sponsored Coverage

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**Introduction**

On September 13, 2011, the Department of the Treasury and the Internal Revenue Service (collectively “IRS”) released a sub-regulatory “Request for Comment” (“RFC”) in connection with the “affordability test” of the employer mandate.<sup>1</sup> In general, this RFC builds upon a previously proposed safe harbor<sup>2</sup> whereby the “affordability” of an employer’s coverage for purposes of determining whether a penalty should be assessed would be based on an employee’s wages as reported on the Form W-2. This memorandum provides an overview of the proposed safe harbor and identifies the specific requests for comment solicited by the IRS. Comments to the RFC are due by December 13, 2011.

**Overview**

In general, Section 4980H of the Internal Revenue Code (“Code”) subjects an applicable large employer to a penalty if one or more of its full-time employees is certified to receive a premium tax credit or cost-sharing reduction through an exchange and the employer does not offer its full-time employees the opportunity to enroll in “Minimum Essential Coverage” or if it offers its full-time employees the opportunity to enroll in “Minimum Essential Coverage” but the coverage is either “unaffordable” or “insufficient.”<sup>3</sup>

PPACA provides that coverage under an employer-sponsored plan is affordable to a particular employee if the employee’s required contribution to the plan does not exceed 9.5 percent of the

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<sup>1</sup> IRS Notice 2011-73.

<sup>2</sup> See IRS Notice 2011-36

<sup>3</sup> PPACA § 1513, adding § 4980H to the Code. Under section 4980H(b), an employer who offers its full-time employees the opportunity to enroll in “Minimum Essential Coverage” but such coverage is “unaffordable” is subject to a \$3,000 per full-time employee penalty. The penalty is applicable to full-time employees who receive a premium tax credit or cost-sharing reduction to purchase coverage through the Exchange, and is determined on a monthly basis.

employee's household income for the taxable year. The IRS has previously acknowledged and reiterates in the RFC that PPACA's formulation of the "affordability" test based on household income is unworkable, "because household income is determined by reference to variables that are generally unknown to an employer (i.e., the modified adjusted gross income of the employee and the employee's spouse and dependents)."<sup>4</sup>

### **Proposed Safe Harbor**

In light of the problems associated with calculating affordability under PPACA, the RFC proposes a "safe harbor" to address these concerns and provide employers with a more workable option for determining the affordability of their health coverage.<sup>5</sup> The proposal contemplates the "safe harbor" would, for purposes of the penalty provision, measure affordability by reference to an employee's wages as reported in Box 1 of Form-W-2.

To take advantage of the "safe harbor" an employer must meet certain articulated requirements, including: "(1) that the employer must offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, and (2) that the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value (the employee contribution) must not exceed 9.5 percent of the employee's W-2 wages."<sup>6</sup>

According to the IRS, if an employer meets the above requirements, "the employer would not be subject to an assessable payment under § 4980H(b) with respect to that particular employee, even if that employee receives a premium tax credit or cost-sharing reduction."

Under the proposal, the application of the "safe harbor" would be determined after the end of the calendar year and on an employee-by-employee basis, taking into account the W-2 wages and the employee contribution.

### **Request for Comment**

The IRS expects that the above described "safe harbor" will be included in future regulations implementing the Employer Mandate provision. To help inform that guidance, the IRS is specifically seeking comment on the following issues:

- 1) "Whether or how wages and employee contribution amounts would need to be determined for employees who are employed by an employer for less than a full year,

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<sup>4</sup> RFC at 3.

<sup>5</sup> RFC at 3.

<sup>6</sup> RFC at 4.

employees who move between full-time and part-time status, situations in which the plan year is not a calendar year, and other similar special circumstances.”<sup>7</sup>

- 2) “Whether there are other possible safe harbor methods for determining the affordability of coverage under an employer-sponsored plan for purposes of calculating an employer’s potential payment under § 4980H(b).”<sup>8</sup>
- 3) “How to coordinate any affordability safe harbor with the full-time employee look-back/stability safe harbor described in Notice 2011-36.”<sup>9</sup>

***Impact on N.G.A. Members***

*Developing a solution to the problems associated with calculating the affordability of employer-sponsored coverage under PPACA has been a priority for the N.G.A. In theory, the safe harbor proposed in the RFC provides a workable solution. However, because N.G.A. members are not traditional employers, the resolution of the issues identified by the IRS in the above section (“Request for Comment”) will be of critical importance.*

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<sup>7</sup> RFC at 6.

<sup>8</sup> RFC at 6.

<sup>9</sup> RFC at 6.