February 11, 2013

VIA ELECTRONIC SUBMISSION

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224
www.regulations.gov

Re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12)

Dear Mr. Wilkins:

The Office of Advocacy (Advocacy) offers the following comment in response to the above-referenced notice of proposed rulemaking (NPRM) published by the Internal Revenue Service (IRS) on December 28, 2012.[1] The NPRM sets forth guidance on "large employers"' shared responsibility for employee health insurance coverage under Internal Revenue Code (Code) section 4980H. The IRS states that the NPRM does not impose a collection of information on small entities and that the Regulatory Flexibility Act (RFA) does not apply. However, Advocacy disagrees with this assertion, and recommends that the IRS subject the NPRM to an RFA analysis, and that the IRS publish for public comment either a supplemental RFA assessment or an Initial Regulatory Flexibility Analysis (IRFA).

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. In addition, section 241 of SBREFA specifically applies the RFA to all IRS interpretative rules that impose on small entities a collection of information requirement.

[1] 78 Fed. Reg. 218.
[2] 5 U.S.C. § 601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

The NPRM implements Code section 4980H which was added to the Code by section 1513 of the Patient Protection and Affordable Care Act, enacted March 23, 2010, Public Law No. 111-148, and amended by section 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Public Law No. 111- 152. Code section 4980H was further amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (125 Stat. 38, (2011)), (collectively, the Affordable Care Act (ACA)). Section 4980H is effective after December 31, 2013.

The ACA requires applicable large employers to either offer affordable health coverage to their full-time employees and their dependents, or pay a penalty if the employer fails to provide affordable health coverage and at least one full-time employee receives a premium tax credit to help purchase coverage through an Affordable Insurance Exchange. The NRPM implementing this portion of the ACA is expansive and offers a wide array of guidance for employers to comply with section 4980H.

The NPRM is generally divided into three areas of guidance for employers: (1) defining applicable large employers; (2) calculating full-time employees; and (3) determining shared responsibility payments. The NPRM defines applicable large employers generally as those employers that employ 50 or more full-time employees, including full-time equivalent employees.

RFA Responsibilities for Proposed Rules

When an agency is developing a proposed regulation, it must first determine whether the RFA applies. In this case, in the "Special Analyses" portion of the NPRM, the IRS states that "because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply." For this reason, the IRS did not perform an RFA analysis of the impact of the NPRM on small business.

As described above, section 241 of SBREFA makes the RFA applicable to all IRS interpretative rules that impose on small entities a collection of information requirement. The RFA defines a recordkeeping requirement as a "requirement imposed by an agency on persons to maintain specified records."[5] Some examples of a collection of information requirement include: a rule that provides a requirement that a taxpayer must submit a form or records to comply with the Code; a rule that provides a requirement that a taxpayer must maintain records after engaging in certain transaction; and a rule that provides a requirement that a taxpayer must submit a form or records to receive a benefit.

The NPRM sets forth guidelines that requires employers to maintain records for a number of calculations and determinations on whether the employers are subject to section 4980H, including but not limited to calculating full-time employees and FTEs, calculating affordability, and the Form W-2 safe harbor.

[4] Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[5] 5 U.S.C. 601(7) and (8)

Therefore, the NPRM imposes a collection of information requirement and the RFA applies to the NPRM. Because the IRS did not conduct an RFA analysis, the NPRM does not provide small businesses with sufficient data to assess the amount of paperwork burden that may be generated by the proposed rule.

Once it is determined that the RFA applies to a proposed regulation, the agency must next determine whether a certification of the rule is appropriate or whether an initial regulatory flexibility analysis (IRFA) is required. When an agency certifies under the RFA, the agency states that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA an agency must provide a factual basis in support of the certification. At a minimum the factual basis should include: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.[6]

Alternatively, if an agency cannot properly certify the proposed rule, then an IRFA must be developed and published in the *Federal Register* with a period for notice and comment. An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.[7]

Advocacy Recommendations

Advocacy urges the IRS to remedy this situation by applying the RFA to the NPRM. To comply with the RFA, the IRS can do one of two things. First, the IRS may publish a supplemental RFA assessment and provide an opportunity for small business to comment. If the IRS is able to properly certify that the NPRM will not have a significant economic impact on a substantial number of small entities, the supplemental RFA assessment should provide a factual basis that includes the following elements: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA. Second, if the IRS is not able to properly certify the proposed rule, then an IRFA must be developed and published in the *Federal Register*.

Conclusion

Publishing for comment either a supplemental RFA assessment or an IRFA will provide small businesses with data to assess the amount of paperwork burden that may be generated by the proposed. Moreover, the IRS will gain valuable insight into the effects of the NPRM by publishing for comment either a supplemental RFA assessment or an IRFA.

[6] 5 USC § 605(b)
[7] 5 USC § 603

Advocacy is committed to helping the IRS comply with the RFA in the development of the NPRM. Accordingly, Advocacy stands ready to assist the IRS in the completion of a supplemental RFA analysis, or in the completion of an IRFA.

Advocacy looks forward to working with the IRS. If you have any questions or require additional information please contact me or Assistant Chief Counsel Dillon Taylor at (202) 401-9787 or by email at Dillon.Taylor@sba.gov.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Dillon Taylor
Assistant Chief Counsel Advocacy