**COMMITTEE ON EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION**

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By first-class mail and electronic delivery
[*Notice.comments@irscounsel.treas.gov*]

Internal Revenue Service
CC:PA:LPD:PR (Notice 2011-73)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2011-73 - Request for Comments on Safe Harbor for Determining Affordability of Coverage for Purposes of Internal Revenue Code Section 4980H(b)

Ladies and Gentlemen:

The Employee Benefits and Executive Compensation Committee of the New York City Bar Association (the "Committee") is pleased to respond to the request of the Internal Revenue Service (the "Service") and the Department of the Treasury for comments regarding a proposed safe harbor for determining the affordability of employer-sponsored health coverage for purposes of the shared employer responsibility provisions of the Patient Protection and Affordable Care Act ("ACA").[1]

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[1] This letter was prepared by a working group of a subcommittee of the Committee on Employee Benefits and Executive Compensation of the New York City Bar Association chaired by J. Stewart Borrow. The other members of the working group were Kathleen Drapeau, Elise Jaffe and Jill Weintraub. Subcommittee and working group member Kathleen Drapeau was the primary author of this letter. The Committee on Employee Benefits and

The Committee agrees with the agencies that it is desirable to provide for a safe harbor allowing employers potentially subject to the excise tax under § 4980H of the Internal Revenue Code, as amended ("IRC") to apply information they already maintain in assessing whether they are providing their employees with affordable health coverage, as determined under ACA. The Committee believes, however, that the safe harbor could be improved by allowing employers to make the affordability determination in advance of the plan year, thereby providing them with certainty in advance of open enrollment, whether their health coverage can be considered affordable as applied to a particular employee.

**Comments on Proposed Safe Harbor**

Under ACA, IRC § 4980H generally subjects an "applicable large employer" to a surcharge if the employer does not provide "affordable" essential health coverage to any full-time employee, and the employee seeks a tax benefit to secure essential health coverage directly.[2]

Notice 2011-73 proposes a safe harbor for determining whether a large employer has provided affordable coverage as required under IRC § 4980H with respect to an employee based on the employee's wages as defined in IRC § 3401(a) ("W-2 wages") and required contribution for health care coverage (within the meaning of IRC § 5000A(e)(1)(B)) for a year determined after the end of the coverage year, instead of by reference to an employee's household income for the year and the required contribution. The safe harbor is intended to address practical difficulties involved in calculating whether the coverage that employers potentially subject to the excise tax are offering is deemed affordable for purposes of determining whether these employers will be subject to an assessable payment under IRC § 4980H(b), and provide a "workable option" for determining affordability of coverage.

The safe harbor should permit employers to determine before the beginning of a plan year whether their plan coverage is deemed affordable for that year. This would be accomplished if employers are allowed to rely on the W-2 wages of their employees for the prior year in determining affordability for a coverage year. Accordingly, the safe harbor should require that the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value does not exceed 9.5 percent (as adjusted after 2014) of the wages as reported on the Form W-2 that was most recently issued to the employee. If the safe harbor is satisfied, an employer would not be subject to an assessable payment under IRC § 4980H(b) with respect to a particular employee even if the employee receives a premium tax credit or cost sharing reduction. For example, an employer with a calendar year plan year would determine whether it met the affordability safe harbor during open enrollment in November 2013 for the

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Executive Compensation gratefully acknowledges the review and suggestions of the Committee on Health Law of the New York City Bar Association, chaired by Ron Lebow. This letter is presented by the Committee on Employee Benefits and Executive Compensation on behalf of the New York City Bar Association, and represents its views as a committee; it does not necessarily represent the views of any individual members of the Committee on Employee Benefits and Executive Compensation, the Committee on Health Law or the Association, or their respective law firms or employer organizations.

[2] IRC § 4980H(a)(1)-(2).

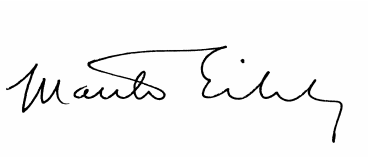
2014 plan year by taking an employee's W-2 wages for 2012 and comparing 9.5 percent of that amount to the employee's 2014 required contribution. A safe harbor based on this look-back determination for W-2 information would provide employers with certainty in advance of the calendar year to which the coverage relates as to their plan's affordability under ACA for the plan year,[3] whereas a safe harbor determination made after the end of a calendar year would create uncertainty. The safe harbor, as currently proposed, could also result in added administrative complexity if adjustments to payroll withholding were necessary during a coverage year due to assumptions about current year W-2 wages required to be made at the beginning of the coverage year.

This look-back methodology for calendar year plans would apply in the same manner to non-calendar year plans. For example, an employer with a July 1 – June 30 plan year would determine whether it met the affordability safe harbor during open enrollment in May 2014 for the July 1, 2014 – June 30, 2015 plan year by taking an employee's W-2 wages for 2013 and comparing 9.5 percent of that amount to the employee's 2014 plan year required contribution.

For new hires, W-2 wages would be assumed to be the wages fixed at date of hire. The affordability calculation should only take into account an employee's W-2 wages during the period of full time employment in a year.

Members of the Committee would be pleased to answer any questions you might have regarding our comments and to meet with the Service if that would assist your efforts.

Respectfully submitted,



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[3] Although it could be argued that the use of a look-back approach would effectively decouple the relationship between the plan year in which the health coverage is provided from the plan year for which W-2 wages are determined, it is not uncommon to use the look-back approach in the rules dealing with the tax treatment of employee benefits. See, e.g., IRC § 414(q)(1)(B) (to determine whether an employee is a highly compensated employee ("HCE") based on the amount of compensation paid to him or her in the preceding year); Treas. Reg. § 1.401(k)-2(a)(2)(ii) (permitting actual deferral percentage to be calculated for the group of eligible non-highly compensated employees ("NHCEs") utilizing the elective deferrals and certain other contributions allocated to the NHCEs' accounts for the plan year preceding the plan year for which the test is being run and the amount of compensation received by the NHCEs during such plan year).

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