



July 31, 2017

The Honorable Steven T. Mnuchin  
Secretary of the Treasury  
c/o Heidi Cohen  
Office of the General Counsel  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Dear Mr. Secretary:

RE: Comments in Response to the Department of the Treasury Request for Information on “Review of Regulations”, 82 *Fed. Reg.* 27217 (June 14, 2017)

The National Federation of Independent Business (NFIB) submits these comments in response to the Department of the Treasury (“Treasury”) Request of Information on “Review of Regulations” (RFI) published in the *Federal Register* on June 14, 2017. These comments contain recommendations for adjustments in Treasury regulations that implement the Patient Protection and Affordable Care Act (ACA or “Act”)<sup>1</sup> to decrease the burden of that Act, for as long as that Act remains in force, on small and independent businesses.

NFIB emphasizes that it remains committed to securing the repeal of the ACA and its replacement by patient-centered, market-based healthcare that meets of the needs of America’s small and independent businesses. No amount of regulatory changes under the ACA can solve the problems with the Act itself.

NFIB is the nation’s leading small business advocacy association, representing small and independent businesses in Washington, DC, and all 50 state capitals. A nonprofit, nonpartisan organization founded in 1943, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The burdens imposed by Federal health care laws on small and independent businesses are a major concern of such businesses.

The RFI, issued by the Treasury to implement Executive Orders 13771 on “Reducing Regulation and Controlling Regulatory Costs”<sup>2</sup> on “Enforcing the Regulatory Reform Agenda,”<sup>3</sup> sought “recommendations for Treasury Department regulations that can be eliminated, modified, or streamlined in order to reduce burdens.” To reduce the

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<sup>1</sup> Public Law No: 111-148.

<sup>2</sup> [82 Fed. Reg. 9339.](#)

<sup>3</sup> [82 Fed. Reg. 12285.](#)

burdens they impose on small and independent businesses, NFIB recommends modification of the following four Internal Revenue Service regulations that implement the ACA:

1. Shared Responsibility for Employers Regarding Health Coverage, 79 *Fed. Reg.* 8544 (February 12, 2014)
2. Information Reporting for Minimum Essential Coverage, 79 *Fed. Reg.* 13220 (March 10, 2014)
3. Tax Credit for Employee Health Insurance Expenses of Small Employers, 79 *Fed. Reg.* 36640 (June 30, 2014)
4. Net Investment Income Tax, 78 *Fed. Reg.* 72394 (December 2, 2013).

To reiterate, the ACA is a problem for small and independent businesses that no mere regulation can solve. But the Department of the Treasury should strive to minimize some of the adverse impact of the ACA on small and independent businesses by adopting the NFIB recommendations.

### 1. Recommendations on “Shared Responsibility for Employers Regarding Health Coverage” Regulations

Section 1513 of the ACA added section 4980H to the Internal Revenue Code (IRC), captioned “Shared Responsibility for Employers Regarding Health Coverage.” In the preamble to its final rule implementing section 4980H, Treasury noted that section 4980H subjects a business that is an “applicable large employer” (ALE) to an assessable payment if either:

*(1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan and any full-time employee is certified to the employer as having received an applicable premium tax credit or costsharing reduction (section 4980H(a) liability), or*

*(2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan and one or more fulltime employees is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction (section 4980H(b) liability).*

Under section 4980H an “ALE” is an employer who employed an average of at least 50 full time (30 hours per week) employees on business days during the preceding calendar year. Thus, under section 4980H, an ALE must offer minimum essential coverage to its full time employees or face a penalty.

Many small and independent businesses fall within the definition of ALE. The U.S. Small Business Administration (SBA) typically recognizes a business as “small” if it employs 500 employees for most manufacturing and mining industries and if it generates \$7.5 million in average annual receipts for many nonmanufacturing industries.

The decision to offer minimum essential coverage or pay the assessed fee to the IRS is a difficult one for many small business owners. In many cases small business employers covered by section 4980H may not be able to afford to offer their employees minimum essential coverage and they also may not be able to afford to pay the ACA-imposed penalty for failure to provide such coverage.

According to NFIB Research Foundation’s latest survey-based *Small Business Problems and Priorities* publication,<sup>4</sup> the “cost of health insurance” continues to rank at the top of the list of problems for small businesses, a position it has held for 30 years. ACA failed to alleviate the problem, as evidenced by the lack of change from 2012 (pre-ACA implementation) to 2016 (post-ACA implementation) in the percentage (52%) of small business owner survey respondents who cited “cost of health insurance” as critical.

To address the adverse impact on small businesses of Treasury regulations on “Shared Responsibility for Employers Regarding Health Coverage,” NFIB recommends that the Department of the Treasury revise its regulations to define the term “employee” (which section 4980H does not define) to exclude owners of the business, family members of owners of the business, and others similarly situated. Inclusion of those individuals as “employees” inflates number of full time employees of a business for purposes of section 4980H and therefore increases the number of small businesses captured by section 4980H. Treasury should exclude by regulation from the term employee the owners, family, members, and similarly-situated others that IRS regulations exclude from the definition of employee that the IRS applies in determining business size in implementing the small business health insurance tax credit.<sup>5</sup>

## 2. Recommendations on “Information Reporting for Minimum Essential Coverage” Regulations

Section 1514 of the ACA added sections 6055 and 6056 to the Internal Revenue Code. Sections 6055 and 6056 require certain small businesses and ALEs to track multiple

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<sup>4</sup> Wade, Holly. [Small Business Problems and Priorities](#). NFIB Research Foundation. August 2016.

<sup>5</sup> [79 Fed. Reg. 36647](#). “(iii) *Certain individuals excluded*. The term *employee* does not include independent contractors (including sole proprietors), partners in a partnership, shareholders owning more than two percent of an S corporation, and any owners of more than five percent of other businesses. The term *employee* also does not include family members of these owners and partners including the employee-spouse of a shareholder owning more than two percent of the stock of an S corporation, the employee-spouse of an owner of more than five percent of a business, the employee-spouse of a partner owning more than a five percent interest in a partnership, and the employee-spouse of a sole proprietor.”

sources of information regarding employees and employees' health insurance coverage on a monthly basis and requires retroactive reporting of this information to the IRS on an annual basis. Section 6055 requires self-funded employers – including small businesses with fewer than 50 full time employees – to file information returns to the IRS and provide each covered individual with a statement of coverage. Section 6056 requires ALEs to file returns with the IRS and provide each covered full time employee with a statement of coverage.

The paperwork imposed by sections 6055 and 6056 consumes substantial amounts of the time, labor, and money of small business owners, diverting time, labor, and money from more productive activities and investment. NFIB recommends that the IRS modify its regulations to mitigate this burden to the extent possible.

First, the IRS should create by regulation a voluntary prospective reporting system that would allow small businesses and ALEs to provide information about their health insurance coverage up front. This recommendation would improve the accuracy of eligibility determinations for advanced premium tax credits for employees and reduce retroactive compliance burdens for employers.

Secondly, the IRS should have its Tax Products Coordinating Committee interview tax preparers, accountants, and businesses to determine the estimated average time needed to complete and file the forms that implement sections 6055 and 6056 (Forms 1094-C and 1095-C). The IRS previously estimated that time as 4 hours and 12 minutes.<sup>6</sup> This estimated average time figure grossly underestimates the time needed to collect information and complete the forms. Once the IRS determines the actual average time needed, it should report that time to the tax-writing committees of Congress and take whatever regulatory action it can to reduce that time by streamlining the forms and information required to the extent permitted by law.

### 3. Recommendations on “Tax Credit for Employee Health Insurance Expenses of Small Employers” Regulations

Section 1421 of the ACA added section 45R to the Internal Revenue Code. Section 45R offers a “small employer health insurance credit” to certain small employers that provide insured health coverage to their employees. It is one of the few provisions in the ACA that attempted to lower costs for small businesses that offered health insurance coverage to employees and create an incentive for such businesses to offer such coverage. NFIB recommends that the IRS amend its regulations implementing section 45R so as to reduce costs more effectively and create a more effective incentive for such coverage.

First, the IRS should modify its regulations by using the flexibility Congress left to the IRS to reduce the impact of the additive nature of the tax credit. Certain small

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<sup>6</sup> Internal Revenue Service. [Instructions for form 1094-C and 1095-C](#). 2016.

businesses that fit the eligibility parameters of the credit (fewer than 25 full time equivalent employees with average salaries below \$50,000) found their businesses ineligible due to the additive nature of the credit (because average wages and number of employees are added together to determine whether the credit phases out).

For example, as the United States Treasury Department's "Greenbook" for Fiscal Year 2014 illustrated, "an employer with 18 full time equivalent employees and an average annual wage of \$37,500 would have its credit reduced first by slightly more than half for the phase-out based on the number of employees and then by an additional half for the phase-out based on the average wage, thereby eliminating the entire credit."<sup>7</sup> The additive nature of the credit can significantly reduce the value of the credit in some cases. This complicates decisions to hire new employees or increase wages, and further discourages employers from taking advantage of the credit.

NFIB recommends using a formula that is multiplicative, rather than additive, to provide a more gradual combined phase-out. A multiplicative formula will ensure that small employers who fit the multiple eligibility criteria will be eligible for the credit, even if they are near the phase-out thresholds.

Secondly, the IRS should use its regulatory authority to minimize the adverse impact on small businesses of the limited availability of the small business tax credit. The small business tax credit is only available in the Small Business Health Options Program exchange marketplaces (SHOPs).

Small businesses that had purchased coverage from the private insurance market outside the SHOPs had to change their health insurance plans so as to become or remain eligible for the credit. Many health insurers chose not to participate in SHOPs, or were not permitted to participate in SHOPs by insurance commissioners or state exchange boards, and therefore could not qualify for the tax credit. Further, the federal Center for Medicare and Medicaid Services recently announced the cancellation of online enrollment in SHOPs for 2018, requiring small businesses to purchase health insurance directly through agents, brokers, or insurers.

For all intents and purposes, small businesses will not know whether they are purchasing health insurance on- or off-SHOPs. Additionally, for certain states and geographic areas within states do not have access to any SHOP exchange plans, IRS made exceptions to allow affected small businesses access to the tax credit.<sup>8</sup> NFIB encourages the IRS to exercise its discretion, to the extent permissible by ACA, to

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<sup>7</sup> Department of Treasury. [General Explanations of the Administration's Fiscal Year 2014 Revenue Proposals](#). April 2013.

<sup>8</sup> Internal Revenue Service. [Notice 2015-8](#). "On December 17, 2013, the Treasury Department and the IRS issued Notice 2014-6, 2014-2 I.R.B. 279, which provided transition relief for employers in certain counties in Washington and Wisconsin with no SHOP coverage available in 2014. The Treasury Department and the IRS have determined that similar relief, described in section III of this notice, is appropriate for employers in certain counties in Iowa with no SHOP coverage available in 2015. Nothing in this notice is intended to modify or otherwise affect the relief provided in Notice 2014-6."

modify the regulations to make it easier for small businesses to obtain tax credits, and to address the SHOP availability and accessibility limitations.

Thirdly, the IRS should publish state-by-state weighted average premium statistics for 2014-2016 and for future years, in addition to the county statistics currently published. The small business health insurance tax credit has an average premium cap limitation. Because of this limitation, the IRS must publish average premium figures annually in the Form 8941 Instructions. From 2010-2013, IRS published average state premium figures. Beginning in 2014, IRS published average county premium figures. Publishing the weighted average state premium figures will allow small businesses to compare premium increases on a year-to-year basis for each state and help them determine how the major insurance requirements that began in 2014 impacted their premiums.

#### 4. Recommendations on “Net Investment Income Tax” Regulations

Section 1402(a)(1) of the Health Care and Education Reconciliation Act<sup>9</sup> added section 1411 to the Internal Revenue Code. Section 1411 imposed a 3.8% tax on certain net investment income. IRS regulations provide guidance on the general application of the Net Investment Income Tax and the computation of Net Investment Income.

The regulations state that a trade or business is defined by reference to the rules under section 162, which allows a deduction for all ordinary and necessary expenses incurred in operating a trade or business. The proposed regulations further state that common law controls to determine what constitutes a trade or business. While existing common law provides guidance to taxpayers for this determination, NFIB is concerned that the need to consult existing common law on a business-by-business basis may add to the already high compliance burden faced by small and independent businesses.

Requiring small business owners to consult statutory and common law precedent only adds to tax compliance costs because additional consultation with a tax professional may be required to determine whether the trade or business exception applies to a specific business or transaction. According to NFIB research, 84 percent of small business owners rely on paid accountants to prepare their taxes.<sup>10</sup> In the most recent edition of NFIB’s *Small Business Problems and Priorities*, “tax complexity” was reported by NFIB members to be the fifth most important problem facing their company.<sup>11</sup>

While it is logical to use case law and administrative guidance as the overall basis for the trade or business definition, the IRS should aid small business tax preparation by incorporating several bright-line examples. These examples do not need to be exhaustive or exclusive of standards under the common law, but they would provide clarity and simplify tax preparation for many small and independent businesses.

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<sup>9</sup> Public Law No. 111–152.

<sup>10</sup> Wade, Holly. [NFIB National Small Business Poll: Tax Complexity and the IRS](#). NFIB Research Foundation. 2017.

<sup>11</sup> Wade, Holly. [Small Business Problems and Priorities](#). NFIB Research Foundation. August 2016.

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NFIB appreciates the opportunity to submit comments regarding the request for information on the Review of Regulations.

Sincerely,

Handwritten signature of Daniel Bosch in black ink.

Daniel Bosch  
Senior Manager, Regulatory Policy

Handwritten signature of Kevin Kuhlman in black ink.

Kevin Kuhlman  
Director, Government Relations