August 21, 2012

Internal Revenue Service
CC:PA:LPD:PR (REG-131491-10)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

These comments are submitted for the record to the Internal Revenue Service (IRS) on behalf of the National Federation of Independent Business (NFIB) in response to the final regulations relating to the Health Insurance Premium Tax Credits enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended by the Medicare and Medicaid Extenders Act of 2010, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, and the 3% Withholding Repeal and Job Creation Act published in the May 23, 2012, edition of the *Federal Register*.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

NFIB is concerned with the IRS's determination that Health Insurance Premium Tax Credits (Tax Credits) can be distributed through Federally-facilitated Exchanges. IRS' statutory interpretation goes beyond the plain language meaning of Section 36B of the Patient Protection and Affordable Care Act (PPACA). This interpretation may result in new and unintended liabilities for employers. Specifically, we are concerned that the agency's interpretation will be invoked by regulators to justify the imposition of potentially crippling penalties on employers who do not provide qualifying health insurance coverage to employees, or for offering coverage that is otherwise deemed inadequate, in states that have opted against creating their own Exchanges. In addition to contravening the clear language of PPACA, the regulation establishes a dangerous precedent for future rulemaking that runs afoul of the Administrative Procedure Act and exceeds the bounds of authority delegated by Congress.[1]

[1] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The language in Section 36B of PPACA is unambiguous. Section 36B consistently refers to Tax Credit distribution through *Exchanges established by States*. Tax Credits may be provided to certain taxpayers "which were enrolled in an Exchange established by the state under 1311 of the Patient Protection and Affordable Care Act."[2] Later, when defining coverage months, the statute reads, "the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act."[3] A plain language interpretation of the provision means that employer penalties are unenforceable by Federally-facilitated Exchanges.

IRS noted in a request for comment on Shared Responsibility requirements that interaction between the requirement to provide coverage and the Exchanges could create difficulties and uncertainties for Exchanges, employers, and employees. Section 1563 of PPACA defines the term Exchange as an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care Act."[4] Section 1311 provides assistance in the form of grants to *States* in order to establish State-based Exchanges. Further, it instructs, "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange."[5]

Exchanges are intended to facilitate "the purchase of qualified health plans" and provide "for the establishment of Small Business Health Options Program (in this title referred to as a 'SHOP Exchange') that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State."[6] In summary, State Exchanges are intended to assist individuals and small businesses with finding coverage. In contrast, IRS has determined through a broad statutory interpretation that Federally-facilitated Exchanges shall serve as enforcement and penalty mechanisms. But IRS' reading cannot be reconciled with the statute itself. Nowhere in the definitions or relevant sections did Congress authorize Federally-facilitated Exchanges to enforce penalties on employers. Such penalties were to be triggered only in cases where subject employers failed to provide adequate coverage when an employee accepts the benefits of a State Exchange. If Congress had intended to apply these same penalties where employees accepted benefits from a Federally-facilitated Exchange, it would have said so plainly in the text of the statute.

According to the Treasury Inspector General for Tax Administration, PPACA represents the largest set of tax law changes in over twenty years.[7] IRS will be tasked with interpreting many different sections of the law including the Health Insurance Premium Tax Credits, Minimum Value of an Employer-Sponsored Health Plans, and Shared Responsibility requirements. IRS' outreach on these sections and others has been and will continue to be appreciated as the implementation of PPACA proceeds. Even IRS, however, recognizes potential administrative challenges with implementation. Unfortunately, this regulation will only exacerbate these

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[2] P.L. 111-148, Sec. 36B(b)(1)(A)
[3] P.L. 111-148, Sec. 36(c)(2)(A)(i)
[4] P.L. 111-148, Sec. 1563(b)(21)
[5] P.L. 111-148, Sec. 1311(b)(1)
[6] P.L. 111-148, Sec. 1311(b)(1)(A)-(B)
[7] http://www.treasury.gov/tigta/auditreports/2012reports/201243064fr.pdf

challenges. To the extent that IRS' determination, that Tax Credits can be distributed through Federally-facilitated Exchanges, will be viewed as triggering employer penalties or other liabilities, we contend that the regulation constitutes an unauthorized overreach of power, which will come at a steep cost to small employers. NFIB hopes that the IRS will correct this misreading of the statute.

Thank you for the opportunity to provide these comments. If you have any questions concerning this letter, please contact Kevin Kuhlman at (202) 314-2091.