



The
ERISA
Industry
Committee

October 14, 2014

U.S. Treasury Department
1500 Pennsylvania Ave., NW
Washington, DC 20220-0001

RE: Draft Forms 1094-C and 1095-C and Corresponding Instructions

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is writing in response to the request of the U.S. Treasury Department and the Internal Revenue Service (collectively, the “Treasury”) for comments regarding the draft Forms 1094-C and 1095-C and corresponding instructions, which report information under Internal Revenue Code (“Code”) sections 6055 and 6056.

ERIC’S INTEREST IN THE ACA REPORTING REQUIREMENTS

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America’s largest employers. ERIC’s members sponsor some of the largest private group health plans in the country. These plans provide health care to millions of workers and their families.

ERIC’s members devote considerable time and resources to their benefit plans. However, they must balance the desire to provide high quality, affordable health care with the need to contain the costs for these programs. Any additional burdens placed on plans could adversely affect the ability of these employers to continue to provide generous benefits and could result in increased costs for participants.

DETAILED COMMENTS

ERIC makes the following recommendations with respect to the draft Forms 1094-C and 1095-C and corresponding instructions:

General Comments

Insufficient time to prepare for new responsibilities

- **Simplified reporting and/or additional time should be provided for large companies to gather and report the information on Forms 1094-C and 1095-C.** The forms were not issued until July 24, 2014, and draft instructions were not released until August 28, 2014. Companies who need to report the required information were generally unable to develop the necessary systems to do so prior to publication of the draft forms and instructions. The Treasury has also not yet issued Publication 5165, Affordable Care Act (ACA) Information Returns (AIR) Guide for Software Developers and Transmitters, which the Treasury has

indicated will outline the communication procedures, transmission formats, business rules and validation procedures for returns filed electronically through the AIR system. And, as is evident from the comments presented in this letter, many basic questions concerning completion of the form have yet to be clarified.

In addition to the challenges of creating the infrastructure necessary to track and report the required information, many companies face other obstacles:

- Companies are having difficulty identifying vendors who will assist them with the reporting as this reporting does not fall cleanly within the purview of either benefits administration or tax reporting, the two areas of service offered by most current vendors.
- Many find that the “simplification” methods created by the final regulations are not available to them. For instance, many ERIC members find that they fall short of being able to use the 98% Offer Method for all twelve months of the calendar year even though they offer coverage to the vast majority of their workers. The problem is that often employers with even a small number of interns or seasonal employees cannot achieve the necessary degree of confidence to establish that they have satisfied the 98% test.
- Companies generally will need to develop systems (unless they can rely on one of the alternative methods) that will enable them to identify which employees are full-time employees as defined by the ACA. This is not a task that employers currently perform, and many will need to develop a sophisticated model to determine which employees with coverage are considered full-time employees under the ACA’s 30 hours/week rule. This will represent a special challenge for those employers who will not need to calculate hours for shared responsibility purposes for either their entire workforce or certain groups of workers.

Given the delay in issuing the forms and instructions and the other obstacles facing most, if not all large employers, the approximately three months provided (i.e., prior to commencement of the first year, 2015, for which reporting is required) will be insufficient to create the significant reporting infrastructure necessitated by these rules, especially one that is capable of capturing data starting in 2015 and reporting the information in early 2016. As a result, Treasury should provide a very simplified approach for reporting for 2015.

As described in ERIC’s November 14, 2013 comment letter, the simplified reporting we request for 2015 would require companies only to: (1) certify to the Internal Revenue Service (“IRS”) that they provide minimum essential coverage to 95% of their full-time employees and dependents (or a lower percentage for 2015 as discussed below) in fulfillment of their reporting responsibilities under Code section 6056; and (2) post a notice on the company’s website that employees can obtain the information required by Code sections 6055 and 6056 upon request.¹ The generally very small number of workers who have questions regarding

¹ ERISA Industry Committee Comment Letter, RIN 1545-BL26 (*Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans*) and RIN 1545-BL31 (*Information Reporting*

eligibility and coverage can go through the website or contact the company to obtain necessary information. This approach would satisfy the information requirements of the vast majority of the nation's workers without burdening either employers or their employees.

Alternatively, the reporting deadline should be delayed a year to allow companies time to analyze the government's forms, instructions, and regulations and then develop their systems to be able to capture and report the relevant data.

Filing

- **Treasury should avoid making non-substantive changes to the forms or instructions for future years.** Companies will be required to use substantial resources in order to comply with the Department's reporting requirements. ERIC members have estimated that the cost to implement this reporting requirement and the annual fees thereafter will be significant. One very large employer has estimated that the implementation fee will approach \$1.47 million in the first year. ERIC urges Treasury to avoid, to the extent possible, making non-substantive changes to the forms for years in which no substantive changes are made, as this often results in real additional costs for companies and could become a significant source of confusion for employees as well.
- **The period for which corrected forms are required should be limited.** As described in ERIC's November 14, 2013 comment letter cited above, employers face challenges in determining coverage dates for employees and dependents as coverage may have terminated or been reinstated after the reporting date for periods that occurred before the reporting date. ERIC urges the Treasury to provide that employers are not required to file any corrections for information that is accurate at the time reported. In the event that the IRS is unwilling to provide this relief, ERIC urges the IRS to limit the correction or updating of information previously provided for a year to those corrections or updates that are discovered during the period of 31 days following the end of the calendar year.

Definition and reporting of "employees" and others

- **The instructions should clarify that employers are not required to complete Forms 1094-B and 1095-B.** The instructions for Forms 1094-C and 1095-C state that an employer who offers coverage to non-employees must complete Forms 1094-B and 1095-B, such as with respect to non-employee directors. However, the instructions also state that an employer that sponsors a self-insured health plan must complete Form 1095-C for any "individual (including any full-time employee, non-full-time employee, employee family members, and others) who enrolled in the self-insured health plan." As discussed in greater detail below, the instructions are also unclear regarding which parts of the form must be completed for active employees, former employees, retirees, surviving spouses, and alternate employees. Many employers will already use the Form 1095-C for self-insured plans and would need to create additional systems if they also needed to file Form 1095-B. Treasury should provide that

companies need to complete only the Form 1095-C. The instructions should also clarify which types of individuals are considered non-employees.

- **Treasury should clarify when the company is required to report covered individuals, employees, and/or non-employees.** For example, page 1 of the instructions states that an employer that provides a self-insured health plan must complete Form 1095-C, Part III for “any individual (including any full-time employee, non-full-time employee, employee family members, and others) who enrolled in the self-insured health plan.” However, the instructions for Form 1095-C, Part III on page 8 states “This part must be completed by an employer offering self-insured health coverage for any employee who enrolled in the coverage, regardless of whether the employee is a full-time employee.” The Treasury should clarify to which persons the Instructions are referring (e.g., covered individuals, employees, non-employees, etc.).
- **Treasury should clarify that employees in the initial measurement period (and related administrative period) should not be included in the reporting.** The instructions indicate that Code 2D should be used for line 16 of Part II of the Form 1095-C to reflect that an individual is in a limited non-assessment period. However, these employees are not treated as full-time employees, nor are they offered coverage during that time. Therefore the instructions should clarify that this code should only be used for persons who are full-time employees for the time period during which it was unclear whether they would become full-time employees (and not for non-full-time employees).
- **Clarification is needed regarding same-sex spouses.** The term “spouse” is defined for federal tax purposes to include same-sex spouses. Employer-sponsored group health plans, however, are not required to offer benefit coverage to same-sex spouses. Clarification is needed regarding the manner in which the Treasury defines “spouse” for purposes of Form 1095-C (including with respect to the indicator codes for Part II, Line 14).
- **Treasury should not require companies to provide information about their total number of employees.** This information is neither required by the regulations nor relevant for purposes of the individual or employer shared responsibility mandates. As a result, this requirement creates an additional burden on employers without a corresponding benefit. If Treasury continues to require that this information be provided, employers should be permitted to use any reasonable method rather than the prescriptive method specified in the instructions.
- **Employers should be given the option to include Medicare retirees in the Code section 6055 reporting.** Reporting is not required under Code section 6055 for Medicare retirees because Medicare is considered minimum essential coverage. However, employers often do not know which individuals are enrolled in Medicare Parts A and B. As a result, companies should have the option whether to include Medicare retirees in the Code section 6055 reporting.

Use of separate forms and statements

- **Treasury should include additional information in the instructions about the ability to use separate forms and statements for the 6055 and for the 6056 reporting.** The regulations under Code sections 6055 and 6056 indicate that substitute forms and statements may be used. The instructions to the Form 1095-C briefly mention the use of a substitute form, but do not include any additional information. ERIC encourages Treasury to include additional information in the instructions to Form 1095-C to state explicitly when, in what format, and under what conditions, substitute forms may be used, and whether the decision to use a substitute form may be made independently for 6055 and 6056 reporting.

Relief options

- **Treasury should provide a form of transitional relief for the “98% offer option” for 2015.** The alternative “98% offer option” requires that an employer offer coverage to 98% of all employees and their dependents for whom it is filing a Form 1095-C employee statement if the employer wishes to avoid identifying full-time employees on these forms. As discussed above, while many large employers would like to take advantage of this alternative, it sets too high a bar for the first year of application in 2015. We suggest that transitional relief be available for this option much the way that the 95% shared responsibility threshold was reduced to 70% for 2015. For instance, for the 2015 coverage year, the “98% offer option” could be correspondingly scaled back to an 80% offer option.
- **Additional guidance is needed regarding the “Qualifying Offer” Method.** The regulations under Code section 6056 provide that an applicable large employer that satisfies specific requirements (the “Qualifying Offer Method”) can certify that it offered certain coverage to one or more of its full-time employees and to report simplified section 6056 return information with respect to those employees. However, the instructions for Forms 1094-C and 1095-C indicate that an employer with a self-insured health plan still must complete portions of the form. Requiring an employer with a self-insured health plan to still complete part of the Form 1095-C eliminates the usefulness of the Qualifying Offer Method. The Treasury should clarify the reporting to the IRS and disclosures to individuals that will be required for a company with a self-insured health plan that satisfies the requirements for the Qualifying Offer Method, including whether reporting to the individual on the Form 1095-C is still required for Code section 6055 purposes if a company is using the Qualifying Offer Method.

Employers with insured plans

- **The instructions should include rules for employees who switch between an insured plan and a self-funded plan during a month.** The instructions are unclear regarding the manner in which this information is reported. ERIC encourages Treasury to provide that this information will be reported as of the first day of the month (or a comparable option) and not a more burdensome method (such as the time the individual is covered under each plan).

Aggregated “Applicable Large Employer” (ALE) Groups

- **Treasury should not require companies to identify all of the members of an Aggregated ALE Group.** Companies must use resources to provide and confirm the accuracy of any information required to be provided to the government. Information about the employees of an Aggregated ALE Group is not readily available and can be difficult, if not almost impossible, to collect, especially for those Aggregated ALE Groups with a significant foreign presence. Furthermore, the statute does not require the Treasury to collect this information. Large companies often include numerous entities in their controlled group, and the members of the controlled group may regularly change as a result of mergers and acquisitions. Additionally, one ALE member may not have access to information about the existence and EIN of another member of the Aggregated ALE Group. Given the significant obstacles to collecting and compiling this information, and the limited purpose that the reporting would serve, we recommend that Treasury modify the form and instructions to eliminate these requirements and merely continue to require that box 21 be checked to indicate whether the employer is a member of an Aggregated ALE Group.
- **Treasury should not require companies to rank the members of an Aggregated ALE Group by size.** The instructions indicate that the employer must identify up to 30 other Aggregated ALE Group members that have the highest monthly average number of full-time employees. Controlled groups often include numerous members, which can change frequently as a result of mergers and acquisitions. Additionally, one ALE member may not have access to information about another member of the Aggregated ALE Group. The collection of this information would create a significant burden for many companies without a corresponding benefit for the government. This information provides little to no value to the government unless it also has other types of information (which are not requested on the form). As a result, it would be more appropriate if this information were only requested during an audit when the government is requesting additional information that it could use to determine if the ACA’s requirements have been satisfied.
- **The rules for reporting employees working for more than one ALE within an Aggregated ALE Group should be simplified.** Where an employee has worked for two or more members of an Aggregated ALE Group during a month, an employer should be allowed to choose which member of an Aggregated ALE Group for whom the employee has worked will include the employee for that month or alternatively, the reporting should be based on employment as of a specific date in the month. The instructions provide that the employee is generally treated as an employee of the employer for whom the employee has the greatest number of hours of service for the calendar month. This approach creates an unnecessary burden that employers should not be required to expend, especially for employees for whom hours are not otherwise counted (e.g., full-time employees to whom coverage is automatically offered).
- **Members of Aggregated ALE Groups should have the option to file one report for the entire group.** Members of an Aggregated ALE Group may want to structure their businesses in such a way that one (or more) entity/entities retain responsibility for filing the reports under

Code section 6056. ERIC recommends that, as long as the reporting requirements are satisfied, the members of an Aggregated ALE Group may allocate their duties among themselves in the way that is most appropriate for the group.

Additional issues

- **Treasury should provide guidance regarding the reporting of health reimbursement arrangements (HRAs).** The regulations under Code section 6055 require plan sponsors to report information about group health plans that offer minimum essential health coverage (MEC). Some companies provide HRAs for retirees who are no longer eligible for the company's major medical plan. It is unclear whether the HRA would need to be reported for Medicare retirees (where it is coverage that is supplemental to Medicare) as well as for pre-Medicare retirees. Guidance is also needed regarding the manner in which participation in an HRA by retirees for whom HRA funds are no longer accumulating should be reported if the individual's HRA funds are expended so that there effectively is no longer coverage. Additionally, Treasury should clarify that any required reporting with respect to an HRA should relate only to the employee and not to any dependents of the employee.
- **Employers should be given the option of checking, or not checking, the "All 12 Months" box on both Forms 1094-C and 1095-C even if the data for a particular individual are the same for all 12 months.** The instructions require an employer to provide information in boxes labeled "All 12 Months" if certain factors apply for all 12 months of the year. This approach requires employers to evaluate the data and compare it in order to determine whether the box should be checked. ERIC urges the Treasury to instead allow companies to have the option of filling in the information for each month instead of being required to use the "All 12 Months boxes". Companies would be able to pull data from their systems each month, and not have to perform a comparison against 12 months' worth of data, which could result in lower costs and help reduce the administrative burden.
- **Companies should have the option to report dates of birth regardless of whether they have the Taxpayer Identification Number (TIN) for dependents.** The regulations provide that employers should report a date of birth if a TIN is not available for an individual after requesting the TIN multiple times. However, this approach will require more complex systems (at additional cost) to track whether a TIN has been provided as well as the number of times the TIN was requested. As a result, the company should be able to design its system to provide a date of birth (both during and after the time it is requesting the TIN) as well as any TINs that have been provided.
- **Individuals should be allowed to respond to requests for TINs in the same manner they make their health care elections.** The preamble to the regulations under Code section 6055 indicates that companies should solicit TINs in accordance with Treasury Regulation § 301.6724(e). This regulation specifies that solicitations should generally be made by mail or telephone. This regulation also indicates that if the arrangement is established by mail, telephone, or other electronic means, the TIN may be requested through such communications. With respect to health plans, many employees elect coverage through a variety of methods. For example, large employers may allow workers to elect coverage

through a phone call or on an electronic enrollment system. Companies should be able to send a letter to the participant requesting TINs for their dependents and ask the participant to go online or call the benefits center to provide the TIN in the same manner available to them to enroll in the plan. Any other process would increase cost and actually delay processing of the TINs being received.

Comments on Specific Line Items on Form 1094-C

- **The final version of the Instructions should update a cross-reference.** The Instructions for lines 23-35, column (e) indicate that the employer should enter code A if the employer certifies by selecting box D on line 22. On line 22, box C refers to this relief rather than box D (which applies for employers using the 98% Offer Method).

Comments on Specific Line Items on Form 1095-C

- **The instructions do not clearly indicate the manner in which to report that an employer does not offer coverage to all required dependents.** The instructions state that a code must be entered for each calendar month; the options, however, do not appear to include situations where coverage is offered to some, but not all, dependents and/or spouses.
- **The instructions should indicate that a Taxpayer Identification Number should be used instead of a Social Security Number in certain circumstances.** In some circumstances, such as when a covered individual or his/her spouse is not a U.S. citizen, the individual may have a Taxpayer Identification Numbers (“TIN”) instead of a Social Security Number. The instructions should reflect that a TIN should be used instead of a Social Security Number when the individual is not required to obtain a Social Security Number but does have a TIN.
- **Additional information is needed on the manner in which the forms should be completed when the employee is deceased but surviving dependents are covered and where only dependent(s) are covered under COBRA continuation coverage.** For example, it is unclear what information would be provided in Parts I and II of Form 1095-C if the employee is deceased or if the covered individual is a dependent who is covered under COBRA continuation coverage (but the employee or former employee did not elect COBRA).
- **The instructions should also clarify the process for reporting the following situations.**
 - **Employees with more than six covered individuals** - The instructions state “If there are more than 6 covered individuals, complete one or more additional Forms 1095-C, Part III.” The instructions should clarify whether the employee is listed again in Part III on the second (and subsequent) forms as well as whether there is a requirement to indicate that there is more than one form for that employee.
 - **Months in which individuals are not employed or are expatriates** - Line 14 of Part II of the Form 1095-C requires indicator codes to be used to identify the type of health coverage offered by the employer. The instructions are unclear as to whether the box should be left blank for any month in which coverage was not offered. For example, an individual may not be an employee during some months or may have been an

expatriate working outside of the U.S. (and not covered under a U.S.-based plan) during the month. Additional information on the treatment of expatriates for these purposes would also be helpful.

- ***Employees who are full-time employees for part of the year*** - The instructions provide on page 1 that Parts I and III of the Form 1095-C should be used for any employee who enrolls in health coverage. It also states that the employer must also complete Part II if the employee is a full-time employee for any month in the calendar year. However, the instructions indicate that Code 2B should be used for Line 16 of Part II to indicate that the employee is not a full-time employee. Additionally, page 1 of the instructions provide that Code 1G must be used on line 14 of Part II if the employee is not a full-time employee for all 12 months of the calendar year. ERIC anticipates that these codes would be used for an employee who is full-time for part, but not all, of the year. ERIC encourages Treasury to clarify that Part II should only be used if the employee was a full-time employee at some point in the year. Treasury should also indicate whether lines 15 and 16 need to be completed during the months in which the individual is a part-time employee.

ERIC appreciates the opportunity to provide comments on the draft forms and instructions. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

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cc: Mr. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary (Retirement and Health Policy)