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March 15, 2013

CC: PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
Submitted via the Federal Rulemaking Portal: http://www.regulations.gov

**Re: Proposed Rule for Shared Responsibility for Employers Regarding Health Coverage (IRS REG-138006-12)**

To Whom It May Concern:

On behalf of the 1.1 million members of the National Association of REALTORS® (NAR), I submit the following comments in response to the Proposed Rule to provide guidance under section 4980H of the Internal Revenue Code (Code) with respect to the shared responsibility for employers regarding employee health coverage. This proposed rule was published in the Federal Register on January 2, 2013.

The National Association of REALTORS® is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

NAR's members include individual real estate agents, real estate brokers and realty firm broker/owners. The overwhelming majority of real estate agents are not employees of the realty offices with which they are affiliated. Rather, they are independent contractors, a separate legal business entity from the real estate office.

Since its effective date of January 1, 1983, section 3508 of the Internal Revenue Code (enacted by section 269(e) of Public Law 97-248 – The Tax Equity and Fiscal Responsibility Act of 1982) has provided that for all purposes of Title 26 (the Internal Revenue Code), "in the case of services provided as a qualified real estate agent or as a direct seller, the individual performing such services shall not be treated as an employee, and the person for whom such services are performed shall not be treated as an employer."

Given the make-up of our membership, and the statutory definition of qualified real estate agents as non-employees (or independent contractors), these comments are focused solely on the definition of "employee" in the proposed rule.

Specifically, I respectfully urge that before it is finalized, the regulation be modified to reflect and acknowledge the existence of the section 3508 designation of qualified real estate agents as statutory non-employees, and that it be clarified to indicate that the common law standard, as outlined in the proposed rule, should not and need not be interpreted to include the services of individuals who meet the definitions in section 3508.

**Rationale and Non-Applicability of Definition of Employee in Proposed Rule to REALTORS®**
Section 4980H of the Code generally provides that applicable large employers are subject to an assessable payment under certain circumstances. Section 4980H(c)(2)(A) defines "applicable large employers" as those "who employed an average of at least 50 full-time employees on business days during the preceding calendar year." Accordingly, a key definition for purposes of interpreting the statute is that of what constitutes an "employee."

The proposed rule adopts the definition of "employee" outlined in guidance provided by Notice 2011-36. This definition provides that an "employee" is an individual who is an employee under the common law standard. Although not fully described in the proposed rule, the common law standard has been generally administered by the Internal Revenue Service (IRS) pursuant to regulations issued under section 3401, which defines terms for purposes of an employer's Federal income tax withholding obligation with respect to wages paid to an employee. These regulations incorporate the common law test and provide that an employer-employee relationship generally exists if the service recipient has the right to control not only the result of the services, but also the means by which that result is accomplished. Under the regulations, it is not necessary that the employer actually control the manner in which the services are performed, rather it is sufficient that the employer have a right to control. Whether the requisite control exists is determined based on all the relevant facts and circumstances.

On a case-by-case basis, the courts have, over the years, identified factors that are relevant in determining whether a common law employer-employee relationship exists. The IRS in 1987 developed a list of 20 factors to be used in considering whether such a relationship exists. By its nature, this list of factors and indeed the entire determination of the common law employment standard is extremely subjective.

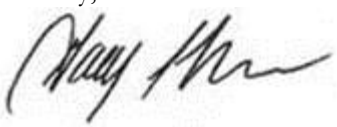
For employers subject to or potentially subject to the provisions of section 4980H, the need for a definition of an "employee" is clear. Determining when an employer meets the definition of an "applicable large employer" is crucial to the interpretation of the statute. For most situations, the proposed rule's use of the common law standard in determining who constitutes an employee seems to be entirely appropriate. After all, the proper classification as an employee or a non-employee of a very large percentage of workers in America is determined under the common law standard, as refined and applied by the 20-factor test.

However, this is not the case for all workers. As mentioned above, Congress saw fit in 1982 to designate qualified real estate agents and direct sellers as non-employees (or in other words, statutory independent contractors), for <u>all</u> purposes of Title 26. Therefore, the determination of the proper classification of such individuals is not subject to the common law standard, and no reference to the 20-factor test, nor to any other guidance to help determine whether requisite control over a service provider by a service recipient exists, is necessary. For such individuals, meeting the definitions of section 3508 is sufficient to determine whether they are statutory non-employees (independent contractors) or not. If the definitions are met, the service provider is considered to be a non-employee for all purposes of the Code.

**Conclusion**
Because the statutory language of section 3508 supersedes interpretive regulations, we believe that any question as to whether qualified real estate agents and direct sellers might be considered as "employees" under the common law standard set forth by the proposed rule would ultimately be decided by the IRS and the courts as a definitive no. However, because this is a new area of law and questions of proper worker classification can be confusing to taxpayer and tax administrator alike, and because of the subjective nature of the common law standard, we believe it would be far preferable for the regulations interpreting section 4980H to specifically provide that individuals qualifying for non-employee treatment under section 3508 are not subject to the common law standard.

Thank you for the opportunity to comment on the proposed rule. Should you have any questions about this letter, please feel free to contact Evan Liddiard, Senior Policy Representative for Federal Taxation, in our Government Affairs Division, at 202-383-1083.

Sincerely,



Gary Thomas
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