May 30, 2018

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Hon. David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury, and
Acting Commissioner,
Internal Revenue Service
1111Constitution Avenue, NW
NW Washington, DC 20220

The Hon. Seema Verma
Administrator
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE: Enforcement of the Employer Mandate Under the Affordable Care Act

Dear Mssrs. Mnuchin, Azar, and Kautter, and Ms. Verma,

The undersigned organizations represent a broad coalition of employers, large and small, across the entire spectrum of American business. We are writing to express our deep concern regarding the unlawful and deeply flawed process by which the Administration has begun assessing tax penalties under the employer shared responsibility provisions of the Affordable Care Act ("ACA"), better known as the "employer mandate."

The IRS's issuance of so-called "226J" letters notifying employers of potential assessments for calendar year 2015 does not comply with the clear and comprehensive requirements the ACA laid out for employer mandate notification and enforcement. According to testimony before the House Oversight and Government Reform Committee April 17, 2018, the IRS has identified over 30,000 employers who are potentially liable for assessments totaling $4.3 billion—and at least 10,000 assessment letters had already been sent. The fact that most of the assessments issued have been reconciled according to the testimony makes clear that the IRS is operating on incomplete and incorrect information and assumptions—a disturbing result that could have been avoided if the law had been followed.

As we explain below, the Administration's enforcement efforts violate the ACA's express guarantee that employers be given "two bites of the apple" before tax penalties can be assessed. This unlawful denial of employers' due process rights—and the ongoing cost, complexity, and confusion surrounding compliance with the employer mandate, especially for smaller businesses—warrants suspension of further 226J letters. Until the mandate can be fully repealed,

such suspension is a necessary and appropriate step in compliance with the President's January 2017 Executive Order to minimize the economic and regulatory burdens of the ACA.

Employer Mandate Assessments Are Expressly Conditioned on Timely Receipt by the Employer of a Notice of Certification from an Exchange Created Under the ACA

The Internal Revenue Code ("Code"), the ACA, and implementing regulations expressly provide that, before the employer mandate assessment process can begin, employers must have received, within a reasonable timeframe, notice from an ACA Exchange (1) certifying that an employee has enrolled in a health plan sold through the Exchange and has been determined eligible for a premium tax credit or cost-sharing reduction, (2) stating that the employer may as a result be liable for a tax assessment, and (3) explaining that the employer has the right to appeal such eligibility determinations.

No such notices were ever furnished for calendar year 2015 by the Exchange for which the Department of Health and Human Services ("HHS") had responsibility. Since most states opted not to establish their own Exchange, HHS operates the Exchange for a majority of states. HHS did issue notices for calendar year 2016, but it is unclear whether all employers entitled to a notice received one, and to our knowledge no assessments for that year have been made. Nor to our knowledge have any notices been issued by *any* ACA Exchanges for calendar years 2017 or 2018.

The statutory requirement that employers receive a notice of certification from an Exchange prior to any employer assessment is clearly and unambiguously stated in Code sections 4980H(a) and (b). Those sections provide that employers may be subject to "assessable payments" only if:

> [A]t least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost sharing reduction is allowed or paid with respect to the employee. (*see* Code sections 4980H(a)(2) and 4980H(b)(1)(B)).

ACA section 1411 requires the Secretary of HHS to establish the process for determining whether an employee is eligible for a premium tax credit or cost-sharing reduction and has enrolled in an Exchange plan. Once that determination has been made, ACA section 1411(e)(1) requires the Secretary of HHS to so notify the Exchange. Once an Exchange receives such notice, it must notify the employer of the determination and the potential consequences. As the statute states in relevant part:

> If the Secretary [of HHS] notifies an Exchange that an enrollee is eligible for a premium tax credit…or cost-sharing reduction…*the Exchange shall notify the employer of such fact and that the employer may be liable for the payment assessed under section 4980H of such Code (emphasis added)*. (ACA section 1411(e)(4)(B)(iii)).

The Treasury Department incorporated this explicit statutory requirement in final regulations implementing the employer mandate:

> The term Section 1411 Certification means the certification received as part of the *process established by the Secretary of Health and Human Services* under which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee *(emphasis added)*. (Treas. Reg. section 54.4980H–1(40)).

HHS regulations describe how an Exchange must notify employers:

> *The Exchange must notify an employer* that an employee has been determined eligible for advance payments of the premium tax credit and cost-sharing reductions and has enrolled in a qualified health plan through the Exchange *within a reasonable timeframe* following a determination that the employee is eligible for advance payments of the premium tax credit and cost-sharing reductions [citations omitted] and enrollment by the employee in a qualified health plan through the Exchange *(emphasis added)*. (45 C.F.R. section 155.310(h)).

Employers Receiving an Exchange Notice Are Guaranteed the Right to Appeal the Eligibility Determination

In addition, ACA section 1411(e)(4)(C) provides that employers receiving an Exchange notice must be informed of their right to appeal eligibility determinations. ACA section 1411(f) describes the Secretary of HHS's obligation to establish an appeals process, and the purpose of the process, which is to:

> [P]rovide an employer the opportunity to—(i) present information to the Exchange for review of the determination either by the Exchange or the person making the determination, including evidence of the employer-sponsored plan and employer contributions to the plan; and (ii) have access to the data used to make the determination to the extent allowable by law.

Thus, a key reason for the notice and appeals process is to give employers a chance to resolve health coverage issues *before* having to face the IRS. As HHS stated in the Exchange notices sent to employers for calendar year 2016, an appeal "could help reduce the employee's potential tax liability" (by avoiding clawbacks of subsidies that may have been improperly granted)—which would simultaneously protect taxpayers from unlawful expenditures for premium tax subsidies and cost-sharing reductions. HHS also advised employers that an appeal "could eliminate reports to the IRS"—which could reduce the likelihood of the employer ever getting an IRS assessment. Those salutary purposes were thwarted by failure to comply with the notice and appeals requirements unambiguously set forth in ACA section 1411.

IRS 226J Letters Are Not ACA Exchange Notices as Required Under ACA Section 1411

In its 226J letters, the IRS asserts that "[this] letter certifies, under section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of your full-time employees was enrolled in a qualified health plan for which a PTC was allowed." But, a 226J letter manifestly is *not* the notice required by ACA section 1411. As noted, ACA section 1411 requires the Secretary of HHS—*not* the Secretary of Treasury or the IRS—to notify an Exchange that an enrollee is eligible for a premium tax credit or cost-sharing reduction. And further, section 1411 requires the *Exchange* to notify the employer.

Nowhere does ACA section 1411 refer to the IRS, much less direct or authorize that agency to issue notices under that section of the law. The final HHS Exchange regulations expressly rejected any notion that the IRS could satisfy the section 1411 notice requirement:

> *Comment*: One commenter suggested that IRS, and not HHS, effectuate the notice described in Sec. 155.310(h) [the ACA section 1411 notice] because (1) IRS has information about employers subject to free rider assessments, and (2) IRS maintains a database of employer contacts for the transmission of sensitive personal information… *Response*: Section 1411(e)(4)(B)(iii) provides that this notice must be provided to employers by Exchanges in connection with certain eligibility determinations. *It is not within the discretion of the Secretary to shift responsibility for provision of this notice to the IRS...* (77 F.R. 18310 at 18357 (March 27, 2012) *(material in parentheses and emphasis added)*).

We do not know the basis for the IRS's assertion that the 226J letters constitute a notice under ACA section 1411. Some have suggested that it may be based on regulations published by HHS in 2013 referring to "methods" the IRS would adopt to certify eligibility determinations as part of its independent authority to determine employer liability. (*see* 45 C.F.R. section 155.310(i)). But as HHS pointed out in the preamble of these regulations, any such certification by the IRS would be a *separate and distinct process* from the required section 1411 notice. (*see* 78 Fed. Reg. 42160, 42250 (July 15, 2013)).

Thus, while a 226J letter may be a certification by the IRS, it is not—nor is it a substitute for—the notice Exchanges must make under ACA section 1411—notices that are essential to protecting employers' due process right to "two bites of the apple" before tax penalties can be assessed.

Employer Penalties Should Be Suspended Until the Employer Mandate Is Repealed

Given the ongoing cost, complexity, and confusion surrounding compliance with the recordkeeping and reporting requirements of the employer mandate, especially for smaller businesses—and the denial of employers' due process rights by failing to satisfy the mandated notice and appeals requirements under ACA section 1411—we respectfully urge that all further employer tax assessments be suspended, and that Executive Branch efforts be directed in support

of full repeal of the employer mandate. Suspension of assessments is a necessary and appropriate step in furtherance of the Administration's pledge to do everything lawfully possible to minimize the ACA's economic and regulatory burdens.

Sincerely,

American Staffing Association
Associated General Contractors
College and University Professional Association for Human Resources
Home Furnishings Association
HR Policy Association
International Foodservice Distributors Association
National Association of Health Underwriters
National Association of Professional Employer Organizations
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Restaurant Association
National Retail Federation
NFIB
Outdoor Amusement Business Association
Retail Industry Leaders Association
Retailers Association of Massachusetts
Small Business & Entrepreneurship Council
Society for Human Resource Management
Society of American Florists
The ERISA Industry Committee
Western Growers Association