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U.S. Department of Labor  
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Employee Benefits Security Administration,  
200 Constitution Avenue, NW, Room N-5653  
Washington, DC 20210

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### **Notice 2012-17: Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods**

The Retail Industry Leaders Association (RILA) appreciates the opportunity to provide comments on Notice 2012-17 and emphasize its positions on several key aspects of the employer requirements under the Patient Protection and Affordable Care Act (PPACA), including the importance of issuing proposed regulations as quickly as possible and providing for a significant implementation period.

RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA members offer quality and affordable health care to their employees and families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs.

Since the enactment of PPACA over two years ago, RILA and its member companies have had numerous constructive conversations with officials at the Departments of the Treasury, Labor, and Health and Human Services, the Internal Revenue Service, and the White House, about the importance of developing regulations that provide employers with the flexibility needed to continue offering quality, affordable health coverage to hardworking Americans and their families. The RILA-formed and -led Employers for Flexibility in Health Care (EFHC) Coalition has provided the Administration with extensive policy recommendations and thoughtful input on the PPACA employer requirements. While RILA greatly appreciates the Administration's willingness to meet with, and receive feedback from, retailers and the EFHC Coalition, we remain concerned with the slow progress of the regulatory process.

With less than two years before implementation of the PPACA employer requirements, the Administration still has not proposed regulations on the majority of the most important areas that businesses will need in order to implement the law. Employers large and small will be making

major business decisions as a result of the new requirements under PPACA. PPACA has created grave uncertainty for retailers of all sizes nationwide. This uncertainty is detrimental to the employer-sponsored health system and is contributing to a slower-than-expected economic recovery. In this regard, RILA cannot overemphasize the importance of providing employers with significant time to review and comment on proposed regulations, and design benefits plans and negotiate contracts that adhere to the new requirements come 2014. Employers will also have to develop reporting and IT systems, and budget for all of these changes before being required to comply with thousands of pages of new regulations and be subject to tax penalties for non-compliance. RILA strongly supports the establishment of a transition period in which no penalties would be assessed until at least 2016. A transition period would provide employers with time to establish, test, and run internal systems needed to comply with the new requirements, and provide the Administration with time to ensure that the federal infrastructure is in place to handle the new reporting, tax assessment, and appeals functions that PPACA created.

Provided below are comments regarding specific issues raised in Notice 2012-17. In addition, the EFHC Coalition letter on Notice 2012-17, filed separately, includes more detailed comments which were developed with extensive input from RILA member companies. RILA supports and incorporates herein the EFHC Coalition comments and urges the Administration to take these comments into careful consideration as the regulatory development process continues.

### **Definition of Full-Time Employees/Utilizing a Look-Back for All Employees**

RILA supports the look-back/stability period safe harbor method that the Administration proposed last year in Notice 2011-36 to determine the full-time status of all employees, regardless of whether someone is a current employee or a new hire. The proposed three- to twelve-month look-back measurement period followed by a stability period is a flexible approach that can avoid the revolving door, or churn, effect of employees bouncing between employer-sponsored plans, coverage through an Exchange, or a federal program such as Medicaid or Medicare. The intended stability would benefit employees by maintaining consistent and predictable coverage, while also benefiting employers by avoiding the burdensome administration costs associated with a frequently changing employment status.

RILA is very concerned that Notice 2012-17 deviates from the original look-back measurement period proposed in Notice 2011-36 by creating separate processes to determine the full-time status for current employees and new hires. The concept described in Notice 2012-17 in which an employer would utilize a single three-month measurement period possibly followed by a second three-month measurement period for determining the employment status of new hires is needless and would cause great confusion to the retail industry which has a large variable-hour workforce. PPACA does not differentiate between an eligibility standard for a new hire and a current employee so neither should the regulations.

RILA understands that the intent of the law is to ensure that individuals who are of full-time status and are eligible for employer-sponsored coverage receive that coverage. RILA believes that implementing a single three- to twelve-month look-back measurement period for all employees, regardless of whether someone is a current employee or a new hire, makes more sense for employers, employees, and the federal government. Due to the nature of the retail

industry, hours worked can fluctuate based on employee preference and business needs (i.e. busy holiday and vacation seasons). Retail employees are often students, retirees, and parents who want a secondary income while their kids are in school. These types of employees frequently change their availability to work based on their personal situations on a weekly basis – the flexibility that often draws individuals to seek employment in the retail industry. RILA does not support the concept of implementing two distinctively separate eligibility processes for new hires and current employees.

### **90-Day Waiting Period**

RILA believes employees must continue to work throughout the 90-day waiting period to be eligible for plan benefits. For employers whose plan eligibility includes a probationary period or conditions of participation separate from the 90-day waiting period, an employee should be required to continue to work throughout the probationary and waiting periods. Additionally, the 90-day waiting period should be consecutive, must restart upon rehire and employers must not be expected to look back to prior terms of employment. Accounting for prior periods of employment would be unnecessarily burdensome, especially since most human resources information systems archive history after a certain point. When systems are upgraded, history is often left in the legacy (previous) system. For these reasons, the history is often not available to the new system's processing logic.

As recognized in Notice 2012-17 and noted above, many employers currently utilize a condition of participation standard that must be met before an employee is eligible for a plan. RILA strongly urges that regulations be developed to provide employers with the flexibility to utilize currently-established conditions of participation standards, while staying consistent with the intent of the law with respect to the full-time eligibility determination. Further, the statute does not require employers to provide coverage to part-time employees. Therefore, RILA does not believe the 90-day waiting period should be applied to plans that cover part-time employees. Adding unnecessary burden to insurance coverage for part-time employees may discourage employers from offering the coverage.

RILA also supports the implementation of a reasonable administration period of up to 45 days following the 90-day waiting period to enable employers to enroll employees in plans, consistent with the currently established carrier systems, plans and policies.

### **Automatic Enrollment**

RILA appreciates the Department of Labor recognizing employers' concerns about implementation of, and compliance with, the automatic enrollment requirement in Notice 2012-17. Further, RILA is pleased that the Department of Labor does not intend to implement this requirement prior to 2014. Automatic enrollment into health coverage will be notably different from automatic enrollment into retirement plans. For lower paid employees living paycheck-to-paycheck, payroll deductions for health care will be notably larger than those for a 401(k) plan, and therefore have a greater financial impact on them and their decision to consider opting-out. Invariably, employers will be dealing with employees who "did not know" they were going to be auto enrolled and want to opt-out, especially in retail industry which employs younger

individuals and those new to the workforce who are not familiar with benefits elections. Many large employers offer a choice of health plan options. Individuals may be auto enrolled in a plan that does not fit their specific health needs or is not accepted by their health providers. An employee who is automatically enrolled in coverage may already be eligible for and enrolled in coverage from his or her spouse's plan, a parent's plan, Medicare, Medicaid, or a state Exchange plan.

## **Conclusion**

Thank you for taking into strong consideration RILA's comments and the policy recommendations developed by the EFHC Coalition. We greatly appreciate the Administration's continued efforts to reach out to stakeholders, such as RILA member companies, during this critical time of implementation.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at [Christine.pollack@rila.org](mailto:Christine.pollack@rila.org) or 703-600-2021.