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AFTRA Health & Retirement Funds

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April 9, 2012

Department of Labor
Washington, DC

Re: Notice 2012-17

To Whom It May Concern:

The AFTRA Health Fund (the Fund) submits these comments on Notice 2012-17, which addresses certain issues related to implementation of the Patient Protection and Affordable Care Act (the Affordable Care Act or the Act). Any reference in this comment letter to Notice 2012-17 similarly refers to the Department of Labor's Technical Release 2012-01.

The Fund is a multiemployer plan, established and maintained pursuant to collective bargaining agreements and operated through a stand-alone trust managed by a joint labor-management Board of Trustees. The Fund was established in the 1950's to provide benefits for actors, broadcasters, voice professionals and others in the performing arts who work under collective bargaining agreements between the American Federation of Television and Radio Artists (AFTRA) and various employers. The Fund has expanded its coverage base over the years, and now offers coverage to performers in broadcast, public and cable television (including news, sports and weather, drama and comedy, soaps, talk and variety shows, documentaries, children's programming, reality and game shows); radio (news, commercials and hosted programs); the sound recording industry; Internet and digital programming; television and radio advertising; non-broadcast video and interactive video games. As of January 2012, 8,985 participants and 8,140 dependents were enrolled for coverage. The Fund has over 2,500 signatory employers that make contributions to the Fund pursuant to collective bargaining agreements.

The Fund provides a comprehensive array of benefits including hospital, major medical, surgical, wellness, prescription drug, dental, mental health and chemical dependency and life insurance. Individuals qualify for coverage once they earn $10,000 in covered earnings in up to four consecutive calendar quarters or less. Individuals pay $121 per month in premium toward the cost of their coverage, and those who qualify for family coverage pay just over $232 per month if they choose to cover a family of four or more.

Overview of Comments

These comments respond to Notice 2012-17 and address the Act's ban on waiting periods of more than 90 days, as well as the employer responsibility provision (the free-rider penalty) imposed on large employers.

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As explained more fully below, we ask the Treasury Department and the IRS to:

- Not start the waiting period's 90-day clock until the end of the eligibility period used to determine whether the participant has sufficient earnings, as designated by the multiemployer plan's eligibility rules, to become eligible for health coverage through the multiemployer plan, and allowing such eligibility period to extend up to 12 months.

- Treat three (3) consecutive months as the equivalent of 90 days so that enrollment can take effect at the start of a month, as is typically the case today.

- Exempt contributing employers from the free-rider penalty *with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer health plan.* This means that such employees

    1. would not be counted in determining whether the employer is large enough to be subject to the free-rider penalty;

    2. would be treated as enrolled in coverage within the meaning of Code Section 4980H; and

    3. would be disaggregated from the employer's other employees for the purposes of Code Section 4980H and therefore not be taken into account in determining how much is owed, if the penalty applies with respect to the employer's non-bargained employees.

- To the extent that the suggestion in the preceding bullet point is not adopted, at the very least, the free-rider penalty should not apply with respect to any collectively bargained employee (for whom the employer has made contributions to a multiemployer health plan, whether newly hired or otherwise) for the period in which the employee has not yet satisfied the eligibility requirement or during the 90-day waiting period, provided that the eligibility requirement is not designed to avoid compliance with the 90-day waiting period limitation (consistent with our recommendation above).

- If at any point full-time employment were a criterion for determining whether the free-rider penalty applied, the Departments should also adopt an alternative definition of full-time employment based on cumulative earnings within a period of no less than 12 months (to address the fact that in certain types of work in the entertainment industry, it is difficult or impossible to determine the hours worked).

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Waiting Periods

1. Background

Public Health Service (PHS) Act section 2708, as added by the Affordable Care Act, provides that a group health plan shall not apply any waiting period that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan. In previous regulations, the Departments defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.

2. Eligibility Rules for Multiemployer Health Plans in General

Notice 2012-17 specifically states that the upcoming guidance under section 2708 is expected to address situations in which, under the terms of an employers' plan, employees are eligible for coverage once they complete a specified cumulative number of hours or service within a specified period (such as 12 months). The Notice also specifically asks for comments on how the waiting period should be applied to plans that credit hours of service from multiple different employers and plans that use hours banks.

Many multiemployer plans cover participants in industries where employment is historically fluid, with participants moving from one employer to another. Hours worked and/or earnings can fluctuate daily, weekly or monthly, and work can be erratic and episodic. This is particularly true with respect to industries like the entertainment industry in which the Fund operates. Indeed, the essential purpose of the multiemployer plan is twofold:

- to allow its contributing employers (which often are small employers) to pool their resources to provide benefits, and
- to allow participants to pool their service with multiple employers in order to obtain health coverage and other benefits under one health plan.

As a result, employees who regularly work in the entertainment industry can maintain continuous coverage even if they frequently change covered jobs. If it were not for the multiemployer plan structure, a significant percentage of these workers might not have access to affordable, comprehensive health coverage for themselves and their families.

Eligibility rules for multiemployer health plans are established by each plan's joint board of trustees (which, pursuant to the Taft-Hartley Act, is almost always comprised of an

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equal number of union and employer representatives) and are designed to reflect the unique working conditions of the particular industry. Typically, contributing employers pay an amount to a multiemployer plan that is set forth in a collective bargaining agreement. The amount can be based on the number of hours, days, or weeks of covered work performed by a covered employee. In the entertainment industry, earnings, rather than hours or some other measure, is often the relevant measure of work.

Whether the multiemployer plan uses hours or earnings, the intent is the same: to establish a proxy for full-time employment in an industry where plan participants work for a number of different employers in any month. Since the working conditions of a particular unionized industry vary, each plan's trustees design eligibility rules that make sense in the context of the work pattern in the particular industry. In so doing, the trustees typically establish an **eligibility period**, with work or earnings during that period leading to a later **coverage period**. Many multiemployer plans use a single calendar quarter as the eligibility period, but a fair number have longer eligibility periods. The reasoning behind the longer eligibility periods is not to deprive employees from coverage but rather to permit employees a longer period of time to be able to meet the requirements to qualify for coverage. Employees who do not accumulate sufficient hours or earnings in their first eligibility period often qualify for coverage during the second eligibility period or possibly later.

Most plans have an established lag period between the end of the eligibility period and the effective date of coverage (i.e., the start of the coverage period), to allow reports documenting hours worked or earnings from the contributing employers to be prepared and sent to the plan and to allow the plan to determine eligibility. Once hours or earnings have been counted and eligibility determined, coverage typically takes effect at the start of the coverage period, on the first day of a month.

Once participants earn coverage during the eligibility period, coverage continues for the full period for which the person is eligible, even if he or she is no longer working in the industry by the time the coverage period begins. Unlike single employer plans, where coverage begins around the date of hire and ends at termination of employment (subject to COBRA), multiemployer plans begin coverage after an eligibility period and then continue coverage on the back end, throughout the coverage period, even if the individual retires or is otherwise not working in the industry. In the entertainment industry, this "tail" of coverage typically lasts at least as long as the eligibility period. In essence, the lack of coverage during the initial eligibility period is balanced out by the extended coverage provided during the tail.

3. Eligibility Rules for this Fund

The Fund provides coverage in different ways depending on the type of performer. For freelance artists (and other performers not considered full-time staff and covered roster

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artists in the recording industry), coverage is first attained after earning a specific amount of covered earnings during a period of four calendar quarters or less. A performer qualifies for individual coverage once he or she earns $10,000. If the performer enrolls and pays the applicable premium, he or she (and his or her dependents, if he or she also qualifies for family coverage) is covered for twelve months. The initial eligibility and coverage periods are summarized in the following table.

Earnings Cycle is twelve months ending	One calendar quarter waiting period is:	Four-quarter coverage period:
September 30	October 1 – December 31	January 1 – December 31
December 31	January 1 – March 31	April 1 – March 31
March 31	April 1 – June 30	July 1 – June 30
June 30	July 1 – September 30	October 1 – September 30

As you can see from the above, the waiting period for coverage is one calendar quarter between when a performer earns enough to qualify and when his or her coverage with the Fund begins. By way of example of how the "tail" coverage works, theoretically, suppose a performer in our Plan earns $10,000 in September 2011. While the performer would not receive coverage until January 1, 2012, the performer would be eligible for coverage for the *entire* 2012 calendar year *even if* the performer never worked again after September 30, 2011.

A performer will qualify for continued coverage under the Fund if he or she has enough covered earnings during each successive four-quarter *earnings cycle*. Once established, the timeframe of subsequent earnings cycles will not change as long as the performer earns at least $10,000 in each earnings cycle and does not experience a break in coverage. This table below illustrates the earnings cycles.

Initial earnings cycle period:	One quarter waiting period	Four-quarter coverage period:	Four-quarter earnings cycle for determining continued qualification:
October 1 - September 30	October 1-December 31	January 1-December 31	October 1-September 30
January 1 -December 31	January 1-March 31	April 1-March 31	January 1 – December 31
April 1 - March 31	April 1-June 30	July 1-June 30	April 1-March 31
July 1 - June 30	July 1-September 30	October 1-September 30	July 1-June 30

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Thus, if a performer earns at least $10,000 in covered earnings during each twelve-month earnings cycle, his or her coverage (and that of their dependents, if eligible) will continue. The Fund provides health coverage to individuals with low levels of earnings, a group that is often not able to enjoy employer-sponsored coverage nor able to afford individual coverage in the insurance market.

A staff performer (full-time staff employee of a radio or television station or network) is treated differently due to the different work pattern. Specifically, such an individual qualifies for coverage on the first day of the month after completing 30 days of full-time employment with a contributing employer. Coverage continues until the last day of the calendar quarter following the quarter in which the staff performer loses employment if the performer was covered continuously for less than five years (not including COBRA or disability coverage), or until the last day of the last coverage period for which he or she qualified based on earnings under the general rules for performers if the performer was covered continuously for five or more years (not including COBRA or disability coverage).

This provision is similar to that in the single employer market, where there is a minimal waiting period for new employees. It is a stark example of the fact that there is no simple paradigm to reflect full-time employment in this type of industry, which creates the necessity for multiemployer plans to consider and establish rules that make sense within the context of industry work patterns not under the plans' control.

In the recording industry, a special qualification rule applies to artists signed to certain record labels if the signatory record label makes an annual special payment to the Fund on the artist's behalf to provide one year of individual coverage. This happens if:

- The performer is a covered artist bound by an exclusive recording agreement with the record label;
- The performer's royalty earnings from that label over the current and immediately preceding six-month reporting period are insufficient to qualify for individual coverage – or the performer is a new artist who recently signed a royalty agreement with a signatory label and does not yet have sufficient earnings to qualify under the normal earnings requirements; and
- The performer enrolls in the Fund and pays the required premium for individual coverage.

In the case of these artists, the Fund often provides health coverage for individuals *before they have any earnings to qualify for coverage.*

You will note that, in summary, **none of the Fund's eligibility and coverage rules described above require a waiting period that exceeds one calendar quarter, as long**

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as the period during which eligibility conditions are being met is not counted toward the waiting period. Since the period during which the performer accumulates eligibility is typically made up for in the "tail" period, we believe that interpreting the Act to disregard such period in determining whether the 90-day rule is satisfied is protective of employees and consistent with the purposes of the Act.

4. Recommendation

Notice 2012-17, A7 specifically states that other conditions for eligibility under the terms of a group health plan would generally be permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. It is our view that eligibility rules should continue to be set by the multiemployer fund's Board of Trustees. To implement the Act's ban on waiting periods of more than 90 days, we recommend that the Treasury Department and the IRS start the 90-day clock at the **end** of the eligibility period during which the participant works sufficient hours or has sufficient earnings to become eligible for Fund coverage. This would mean that a fund's lag period between earning eligibility and commencement of coverage – if it had such a lag period – could not be longer than 90 days.

To the extent that the Departments do not wish to provide a blanket rule in that regard, we respectfully submit that the Departments should disregard the eligibility period when the period of coverage is not less than the period used for the particular participant to attain eligibility. Since the period of coverage is no less than the eligibility period plus 90 days, it would be unreasonable to conclude that such a rule is in any way designed to avoid compliance with the 90-day rule.

We also recommend that three (3) consecutive months be treated as the equivalent of 90 days so that enrollment can take effect at the start of a month, as is typically the case today. Because most health plans measure eligibility in monthly or quarterly increments and base their programming on this standard, a strict 90-day provision would be extremely disruptive, forcing plans to start coverage on the 28th or 29th day of the month.

Employer Shared Responsibility

1. Background

The Affordable Care Act requires large employers (those with 50 or more full-time employees) to pay a penalty if one of their full-time employees obtains subsidized coverage through a state health insurance exchange beginning in 2014. The amount of the penalty will vary depending on whether or not the employer offers health coverage to its employees.

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2. Workers Covered by Multiemployer Health Plans

As discussed above, multiemployer plans cover participants in industries where employment is historically fluid, with participants moving from one employer to another. Hours can fluctuate daily, weekly or monthly, and work can be erratic and episodic. Without the multiemployer plan to pool contributions from contributing employers and pool employees' service with various employers, these individuals would not have access to affordable, comprehensive health coverage for themselves and their families.

3. Workers Covered by this Fund

As noted in the description of eligibility rules regarding the 90-day waiting period, the Fund provides coverage based on the level of covered earnings of the performer. Generally, freelance artists are not paid by the hour or for a specific number of hours worked, but are paid based on the project performed. It would be difficult or impossible for an employer to determine the number of hours worked on many freelance projects. Similarly, artists in the recording industry are not compensated based on hours worked. As we noted previously, roster artists can earn eligibility based on a payment made by the record label, and often have little or no earnings that generate contributions to the Fund. Record labels have no access to or industry-related reason to keep track of the number of hours a performer works.

Often earnings are reported in the entertainment industry by paymasters, companies that make payments on behalf of various employers to the performers and the benefit funds. The companies may find it very difficult to coordinate with the paymasters to determine the number of hours worked by a performer for whom contributions are made.

In the entertainment industry, performers often earn royalties or residuals for work performed in the past but for which they still received payment based on their contract. The earnings generated by these royalty and/or residual payments often qualify the performer for health care coverage even if the performer had no related work during the time for which the contributions were made. It makes better sense for employers not to count these individuals as full time employees as they may not perform any services for the employer during the time period in question.

The Trustees have developed the eligibility provisions of the Fund over many years to fit the intricacies of the wide variety of types of work in the industry covered by the Fund. We feel that exempting employers from the free-rider penalty for the employees on whom they make contributions to this Fund allows the Fund to design eligibility rules and plan designs that best fit the collective interests of employers and employees in the entertainment industry. This request is consistent with the Affordable Care Act because the Fund's eligibility provisions have been designed over time through a shared

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responsibility of employers and employees, where the Board of Trustees (jointly representing the Union employees and the contributing employers) developed eligibility provisions to promote expanded and affordable health coverage.

4. Multiemployer Plans and the Free-Rider Penalty in General

Many contributing employers to multiemployer plans will not be subject to the penalty due to their small size. Many other contributing employers will not actually have to pay the penalty because the health coverage provided to their employees through the multiemployer plan will meet the 60% minimum value test and the coverage will be affordable. Health coverage provided through multiemployer plans is typically comprehensive, with cost-sharing requirements that would easily meet the 60% test. The coverage will typically meet the affordability test because contributions from multiemployer plan participants for their own or their family's coverage tend to be modest (if required at all). As a result, it makes little sense to try to design ways to count the hours worked by different types of workers, for multiple employers, for the purpose of assessing a financial penalty that will rarely apply. Indeed, we believe that any attempt to determine hours in this industry would prove impossible.

5. Recommendation

We recommend that the Treasury Department and the IRS exempt contributing employers from the free-rider penalty *with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer plan that provides health benefits* (whether those health benefits are self-insured, insured, or some combination). This means that such employees (a) would not be counted in determining whether the employer is large enough to be subject to the free-rider penalty; and (b) would not be taken into account in determining how much is owed, if the penalty applies with respect to the employer's non-bargained employees.

Most of the complexity in implementing the free-rider penalty where employers provide health benefits through a multiemployer plan stems from the difficulty in applying the concept of full-time employee to many of the workers typically covered by multiemployer health plans. This is especially true in the entertainment industry. Part of the complexity stems from the contributing employers' lack of critical information relevant to the operation of the free-rider penalty, plus their lack of control over the plan design decisions. Since eligibility rules, benefit levels, and participant contribution requirements (if any) are set by the plan's Board of Trustees, contributing employers generally will not know (a) whether a particular individual has accrued enough hours or earnings to be eligible for plan coverage; (b) the effective date(s) of that coverage and coverage period(s); (c) whether the plan meets the 60% minimum value test; or (d) whether participant contributions are required and, if so, the amount of those

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contributions. Similarly, the multiemployer health and welfare plan may not know whether an individual is working "full-time" as defined under the law, and even when they do, they often only receive that information a month or longer after the work is completed.

To the extent that the foregoing recommendation is not adopted, at the very least, the free-rider penalty should not apply within the 90-day period (as proposed in Notice 2012-17), *or* during the eligibility period used to determine whether the participant has sufficient earnings, as designated by the multiemployer plan's eligibility rules, to become eligible for health coverage through the multiemployer plan. Employment in the entertainment industry can be very sporadic, and employees can qualify for coverage based on earnings for one eligibility cycle and not in the following cycle, then qualify again in a future eligibility cycle.

For that reason, we further note that the concept of "newly hired" employees does not readily apply in an industry where much work is project related. Even if it were possible for an employer to define the concept of "newly hired", the plan itself would not be able to define eligibility provisions around that definition because the plan is not part of that employment relationship.

Therefore, we encourage the Departments to recognize the project nature of work and earnings in the entertainment industry and allow the multiemployer plans to establish eligibility provisions that meet the needs of the employers and participants within the industry. Thus, as noted above, we recommend that the Departments exempt contributing employers from the free-rider penalty with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer plan that provides health benefits. To the extent the Departments wish to implement a more narrow rule, we recommend that they instead conclude that no free-rider penalty will apply with respect to any such collectively bargained employees (for whom such contribution is made, whether newly hired or otherwise) to the extent that the employee has not yet satisfied the eligibility requirement and 90-day waiting period, provided that the eligibility requirement is not designed to avoid compliance with the 90-day waiting period limitation (consistent with our recommendation above). As noted above, this is unlikely to impact the length of coverage a full-time employee would receive because typically the employee would receive coverage for a designated period even after he or she is no longer working. Put another way, each 12-month period to establish eligibility creates another 12 months of coverage, even after all work ceases.

In addition, if the foregoing recommendation is not adopted, we respectfully submit that the Departments will need to craft rules that address the fact that in certain types of work in the entertainment industry, it is impossible for the Fund (or even an employer) to determine the hours worked and, in many other segments where it is possible, it is very

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difficult. In that case, the Departments should identify an alternative definition of full-time that is based on cumulative earnings within a period that is no less than 12 months.

We appreciate the opportunity to submit comments on these important issues. Please do not hesitate to contact me at 212-499-4821 if you have any questions about our comments or need additional information.

Respectfully submitted on behalf of the Board of Trustees,

Christine Dubois
Chief Executive Officer