April 9, 2012

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via email: e-ohpsca-er.ebsa@dol.gov

Re: Request for Comments in DOL Technical Release 2012-1 and IRS Notice 2012-17 on Automatic Enrollment, Employer Shared Responsibility, and Waiting Period Issues

Dear Sir or Madam:

Wakefern Food Corporation is writing in response to the Department of Labor, Department of Treasury, and Department of Health and Human Services (collectively, the "Agencies") request for comments in DOL Technical Release 2012-1 and IRS Notice 2012-17 (the "Notice") regarding the guidance provided in the form of Frequently Asked Questions (FAQs) on the automatic enrollment, employer shared responsibility and waiting period provisions that were enacted as part of the Patient Protection and Affordable Care Act ("ACA"). The comments in this letter supplement the comments we, in conjunction with the Mid-Atlantic Joint Labor Management Council, submitted on June 17, 2011, in response to the request for comments in IRS Notice 2011-36 on these issues.

Wakefern Food Corporation ("Wakefern"), a retailer-owned supermarket cooperative based in Keasbey, New Jersey, is the largest supermarket cooperative in the United States. Founded in 1946, the cooperative comprises 47 members who today individually own and operate more than 200 supermarkets under the ShopRite banner in New Jersey, New York, Connecticut, Pennsylvania, Maryland, and Delaware.

Wakefern appreciates the opportunity to provide comments before the issuance of proposed regulations on the automatic enrollment, employer shared responsibility and waiting period issues referenced in the Notice. These issues are critically important to both employers and employees. We believe that it is essential that guidance issued by the Agencies be administrable and flexible for employers and employees. In fact, we believe that the workability of these rules will help determine whether employers will continue to offer health coverage to their employees.

Below is a discussion of key issues we believe should be addressed in the proposed regulations and our recommendations as to how those issues should be resolved. In addition, as you work to provide guidance on, and create possible exemptions to, the shared responsibility, waiting period and automatic enrollment requirements referenced in the Notice, we ask that you recognize the role that collective bargaining has played in providing employees in the retail food industry the maximum health coverage that is economically feasible, and encourage you to

accommodate and preserve the unique nature of multiemployer plans and the collective bargaining process to the greatest extent legally possible.

I. Waiting Period Limitation

We appreciate that the Notice provides some clarity for employers and group health plans on the implementation of the ACA requirement that group health plans may not impose waiting periods that exceed 90 days. We continue to believe that any future regulations or other guidance with respect to waiting periods should not prohibit common plan eligibility and enrollment practices. In addition, we believe that in drafting future proposed regulations, the Agencies should be mindful of the possible impact of the waiting period limitation on plans that cover part-time employees, and provide employers and unions with as much flexibility in this area as possible.

We particularly want to thank the Agencies for recognizing in the Notice that the 90-day limit on waiting periods does not require employers to offer coverage to part-time employees or any other classification of employees, and that employers may exclude part-time employees (or other classifications of employees) from coverage entirely. We also support the decision of the Agencies to retain the existing HIPAA regulatory definition of waiting period – i.e., a waiting period begins when an employee is "otherwise eligible" for coverage under the terms of the plan. It is critically important that employers and unions retain the flexibility to define which employees are eligible for coverage and choose when and how to offer health coverage to employees, including part-time employees.

In this regard, we recommend that the proposed regulations address the following issues:

A. Requirements and Conditions for Eligibility

We appreciate that the Notice recognizes that an employer generally may impose requirements and conditions on an employee's eligibility for coverage. Specifically, the Notice states that conditions for eligibility under the terms of a group health plan generally will be permissible, unless a condition is designed to avoid compliance with the 90-day waiting period limit, and lists the following as examples of permissible conditions: full-time status, bona fide job categories, and receipt of a business license. We recommend that the proposed regulations specifically provide that a group health plan may limit coverage to only full-time employees or employees in a specific job category (and list other permissible conditions), and that a waiting period for purposes of the 90-day limit begins only after the employee meets the applicable eligibility requirements.

B. Eligibility Based on Length of Service

We disagree with the statement in the guidance that eligibility conditions that are based solely on the lapse of a time period would be permissible for no more than 90 days. Multiemployer plans in the retail food industry have traditionally relied upon continuous period of service requirements to determine employee eligibility for a variety of bargained benefits, including group health coverage. For example, Wakefern and ShopRite generally provide and

pay for certain health benefits for both their full-time and part-time employees, but out of economic necessity, part-time employees are typically covered at more modest levels and are subject to longer eligibility service periods than full-time employees. This is because part-time employees change jobs much more frequently than full-time employees and present a greater risk of adverse selection. Under many collective bargaining agreements in the retail food industry, part-time employees gradually "grow into" additional types and higher levels of coverage as they gain seniority.

Applying the waiting period limitation in a way that prohibited continuous period of service requirements would have the effect of eliminating an important tool that employers and unions use to manage costs so they can provide some health coverage to part-time employees. Eliminating this tool would likely increase the cost of coverage above the contribution levels that employers can afford and for which unions have bargained, and ultimately could result in thousands of part-time employees losing their group health plan coverage. Therefore, at least in the case of employees covered by a collective bargaining agreement who become eligible for coverage under a multiemployer plan, group health plans should be permitted to require that the employees satisfy a continuous period of service eligibility requirement before the 90-day waiting period begins.

C. Cumulative Hours Requirements

Along these same lines, we generally agree that the proposed regulations should permit group health plans to condition eligibility for coverage on an employee completing a specified cumulative number of hours of service within a specified time period (e.g., 12 months).

We do not, however, agree with the suggestion in the Notice that future guidance permitting such a cumulative hours requirement should specify a cap (e.g., 750 hours) on the cumulative hours that could be required. As noted above, for economic reasons, employers and unions have negotiated precisely what health benefits should be available to employees under multiemployer health plans and precisely when those benefits should be available. In many cases, members "earn" benefits as they satisfy hours of service requirements and become more senior with the company. The Agencies should not disrupt this traditional structure that has served multiemployer plans and employees covered by such plans so well through the years. If future proposed regulations nevertheless do provide a cap on any cumulative hours eligibility requirement, the cap should be set at a much higher level than the 750 hours cap suggested in an example in the Notice.

II. Coordination of Shared Responsibility and Waiting Period Restrictions

As the Agencies have recognized, the automatic enrollment, employer shared responsibility penalty and waiting period limitation provisions are intertwined. We are heartened to see that the Agencies are proactively soliciting comments from employers, group health plans and employee groups on the coordination of these provisions and that many of the FAQs released by the Agencies demonstrate a pragmatic concern with ensuring that the standards and requirements issued are fair and administrable. In particular, we appreciate that the Agencies intend to provide an "affordability" safe-harbor permitting the use of Form W-2 wages for

purposes of the shared responsibility penalty, and that the Agencies recognize the need to coordinate future guidance on the automatic enrollment requirement with guidance on the shared responsibility and waiting period provisions.

Similarly, Wakefern strongly recommends that future regulations clearly and explicitly provide that an employer will not be subject to the shared responsibility penalty for failing to offer coverage to an employee during a permitted waiting period.

III. Look-Back and Stability Periods

We believe that "look-back/stability period" safe harbors of up to 12 months like those described in the Notice and in Notice 2011-36 will go a long way toward making compliance with the shared responsibility penalty feasible. As we previously commented, determining whether an employee is full-time on a monthly basis would be extremely problematic for the retail food industry, where a large number of employees work varying hours and employment schedules vary greatly based on customer demand. We commend the Agencies for their flexibility and willingness to work with employer and employee groups to ensure that the shared responsibility penalty is implemented in the most effective and practical way possible.

Because of the enormity of the task for employers of highly-mobile workforces, we continue to urge that the regulations provide flexible rules – including look-back/stability period safe harbors -- under which employers and unions can identify groups of employees to which the shared responsibility requirements apply. For example, proposed regulations should permit the use of different look-back and stability periods for different groups of employees (e.g., based on reasonable employment classifications or for different business entities within the controlled group) to the extent there are bona fide, employment-based reasons to do so. We encourage the Agencies to continue to solicit comments from employers and employee groups on shared responsibility administrative compliance issues and to continue to provide clear guidance on these critical issues.

IV. Determination of Full-Time Status of New Employees

Wakefern agrees that Treasury and IRS should issue regulations that provide a period during which employers will be able to determine whether a newly-hired employee is full-time for purposes of the shared responsibility requirements. We also agree that this determination should depend on whether, based on the facts and circumstances, the employee is reasonably expected at the time of hire to work a full-time schedule.

We are concerned, however, that the approach outlined in the guidance is too detailed and formulaic and needlessly treats new employees differently than current employees in all cases. The Notice generally provides that employers must make a determination of full or part-time status within the first three or six months of an employee's employment, and provides detailed and complicated rules for determining what period applies. Instead, we believe that employers also should have the option of applying the general look-back and stability period safe harbor rules for newly hired employees. For example, employers could be permitted to apply a shortened look-back period beginning the first of the month after the new employee's date of hire

and running through the remainder of the current look-back period, to determine full-time employee status for the subsequent "stability period."

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We appreciate the opportunity to provide comments on the Notice. Please contact Lorelei Mottese at (732) 906-5153 if you have any questions.

Sincerely,

Joseph Colalillo
Chief Executive Officer, Wakefern Food Corporation