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VIA ELECTRONIC SUBMISSION

Internal Revenue Service
Room 5203, POB 7604
Ben Franklin Station
Washington, DC 20044

RE: Shared Responsibility for Employers Regarding Health Coverage; Proposed Rule

To Whom It May Concern:

New Faculty Majority: The National Coalition for Adjunct and Contingent Equity (NFM) and the NFM Foundation are pleased to provide public comment on the proposed regulations on Shared Responsibility for Employers Regarding Health Coverage, specifically sections II. Identifying Full-Time Employees for Section 4980H Purposes, B. Hours of Service Rules, and 4. Employees Compensated on a Commission Basis, Adjunct Faculty, Transportation Employees and Analogous Employment Positions.

Background of Commentators

NFM and the NFM Foundation (NFM) are affiliated national non-profit associations whose mission is to improve the quality of higher education by improving the working conditions of the majority of its faculty. Currently, 75% (more than 1 million) faculty members teach "off the tenure track," that is, without secure access to the rights and responsibilities of faculty in tenured or tenure-track positions. NFM believes that this situation puts the quality of higher education, the integrity of college teaching, and the rights of non-tenure-track faculty at risk.

NFM membership is open to and includes faculty, administrators, students, parents, and any member of the public concerned with the well-documented relationship of faculty working conditions to student learning conditions.¹

¹ See especially The Delphi Project on the Changing Faculty and Student Success (www.thechangingfaculty.org). Also, note the following statement from the Association of American Colleges and Universities: "The continued increase in contingent faculty appointments is an "elephant in the

Key Facts

In order to further contextualize our comments, we offer some key facts:

- The percentage of faculty to whom this proposed rule could apply -- so-called "part-time" adjunct faculty at American colleges and universities -- has increased from 22.2% in 1970 to slightly over 50% in 2011.²
- Almost all faculty, whether officially full-time or "part-time," are classified as *exempt* employees.³
- "Part-time" faculty earn approximately 60% less than comparable full-time tenure-track and tenured faculty when salaries are expressed on an hourly basis.⁴
- Only 22.6% of "part-time" faculty seem to be provided some form of benefits -- and generally very modest, not including comprehensive medical insurance -- from their employing institution(s)⁵ and unionized faculty are more likely than non-unionized faculty to receive benefits from their employing institutions.⁶
- Numerous reports have appeared in the media describing how institutions are currently reducing adjunct faculty course assignments in order to avoid the economic costs of the employer mandate.⁷

room" for American higher education, threatening the future of scholarly community and putting at grave risk AAC&U's commitment to high-quality liberal education and inclusive excellence for all."

(http://www.aacu.org/About/documents/strategicplan2013_17.pdf)

² National Center for Education Statistics, *Digest of Education Statistics, 2012*, Table 263, advance release available at <http://nces.ed.gov/programs/digest/d12/tables/dt12_263.asp>.

³"... FLSA-exempt employees (e.g. adjunct faculty in a university setting or a project-based professional) may work variable hours but do not track nor keep hours." <http://www.dol.gov/ebsa/pdf/tr12-02-0022.pdf>

⁴ Curtis, 2005, and Toutkoushian & Bellas, 2003, cited in Kezar & Sam, *Understanding the New Majority of Non-Tenure-Track Faculty in Higher Education: Demographics, Experiences, and Plans of Action*, ASHE: 2010.

⁵From The Coalition on the Academic Workforce Part-time Faculty Salary Survey (2010): " Most part-time faculty respondents who had health benefits from any source received them from a source other than their academic employer: 17.5% from a primary employer other than their academic employer, and 37.3% from a spouse's or partner's employer (table 32). Only 22.6% indicated they had access to health benefits through their academic employer; among those respondents 4.3% indicated that the college or university paid for health care, 14.6% that the cost for health benefits was shared by the employee and employer, and 3.6% that health benefits were provided through the employer but that the total cost was borne by the employee.

<http://www.academicworkforce.org/survey.html>

⁶ See <http://www.academicworkforce.org/survey.html>

⁷ See for example <http://www.insidehighered.com/news/2012/11/20/college-cuts-adjuncts-hours-avoid-affordable-care-act-costs>; <http://tv.msnbc.com/2013/01/14/colleges-roll-back-faculty-hours-in-response-to-obamacare/>; <http://online.wsj.com/article/SB10001424127887323635504578213502177768898.html>; <http://diverseeducation.com/article/50368/#>; http://www.huffingtonpost.com/2013/01/10/palm-beach-state-college-health-insurance_n_2441927.html

Key Principles

The following principles underlie our comments and suggestions:

1. The IRS rules need to support the spirit and intention of the Affordable Care Act and should not intentionally or unintentionally undermine its purpose.
2. Higher education is a public good.
3. Faculty working conditions directly affect student learning conditions.
4. These rules will have far-reaching implications for other policies and rules governing adjunct faculty, and by extension, their students. Examples of such policies and rules are adjunct faculty access to public student loan forgiveness, unemployment compensation, and proper worker classification.

Summary of Suggestions:

1. Require that any standard for determining the time status of adjunct faculty be a minimum standard based on parity with hours equivalencies for tenured and tenure track faculty and that it be determined for individual campuses rather than as a universal formula that would be nationally applicable.
2. Require that the determination of this standard be carried out intentionally, transparently, inclusively, and comprehensively by every institution of higher education that employs adjunct faculty. That is, the standard should be determined in a manner that reflects the highest standards of professionalism, collective bargaining, and shared governance upon which effective and ethical college and university functioning depend. This would mean that for institutions to be judged as having used "reasonable methods" to determine this standard, they must demonstrate that they have either addressed this question through truly representative collective bargaining or through truly representative shared governance.

Either approach would entail thorough and objective study of the working conditions of adjunct faculty, with representative involvement of adjunct faculty themselves, and would require consultation with the disciplinary and professional organizations that are responsible for determining the minimum standards of type of work and number of hours necessary to teach courses in any given discipline or field.

We urge the Department to adopt a policy that does not just address the immediate issue of how to credit adjunct faculty hours of service for the purpose of the ACA but that also encourages colleges to commit to resolving longstanding issues around the definition of adjunct faculty work in the manner that we've described -- intentionally, transparently, inclusively, and comprehensively, with equal attention to educational quality, professional ethics, and economic ramifications. For example, we would request that the Department consider granting a one-year (or some other period of time) exemption from the penalties

associated with the employer mandate while a college initiates the process that we are recommending. (We would also recommend requiring evidence of good faith effort to make progress toward the objective of resolving the question.) Such an action would discourage colleges from hastily enacting broad work-reduction policies that are jeopardizing faculty livelihoods. It would also discourage adjunct faculty from accepting or advocating for conversion formulas that could undermine the quality of education.

Colleges that refuse to do this should not only not be exempted but should be penalized in some way -- for engaging in unreasonable actions (including the current course cutting to avoid the penalty).

3. Articulate clearly what kinds of policies and actions do not and cannot constitute "reasonable" methods for determining full-time status for purposes of the ACA, and implement a penalty for engaging in such methods.

Rationale for our comments and suggestions:

General rationale: The overall rationale for our comments and suggestions is that decades of intensive research and experience indicate the need for an intentional and inclusive approach to devising or changing policies that affect adjunct faculty. This is true both for administrators making policy and for faculty seeking to challenge or change policy. It would be a mistake for the Department, out of a desire for expedience, to adopt rules that facilitate and encourage a continuation of the reactive and short-sighted habits that have helped to create the very problem that the rules are attempting to address.

Since the Affordable Care Act was upheld and colleges and universities began examining its implications and preparing for its implementation, many institutions are in fact engaging in reactive, crisis-management-oriented behavior that is undermining both the intention and spirit of the law and the quality of higher education. As mentioned above, numerous reports have appeared in the media describing how institutions are reducing adjunct faculty course assignments in order to avoid the economic costs of the employer mandate.

These actions are wreaking havoc on adjunct faculty members' livelihood -- causing many adjuncts to scramble to cobble together a livelihood by taking on work from additional, discrete employers. If they are unable to find work, as is likely in this economy, they will be forced to rely on the social safety net at considerable cost to taxpayers. In other words, the net effect of the current version of the law is that the instructional workforce is fragmenting even further, which is harmful both to the quality of higher education and to the well-being of the adjuncts themselves.

To illustrate: the preponderance of calls for a 1:1 ratio of in-class to out-of-class hours as a conversion formula is forcing both colleges and adjunct faculty to place economic survival above considerations of educational quality or of the integrity of the profession. The vast majority of adjunct faculty teach courses that are necessarily more teaching-labor-intensive, such as English Composition, rather than less, so this ratio will institutionalize the practice of underreporting hours. A 1:1 ratio not only distorts the reality of most faculty work, but would codify a standard that would discourage and even prevent

adjunct faculty from engaging in labor- and time-intensive "High Impact Practices," which experts on educational quality have identified as essential to student success.⁸

We would point out that some adjunct faculty in New Jersey are currently calling for a 1:1 ratio as a stopgap measure while they simultaneously attempt to persuade colleges to work collaboratively with them in the manner we describe to determine a more accurate and valid formula. We note that non-tenure-track faculty members, who cannot avail themselves of the protections that come with tenure or other due process and academic freedom provisions, engage in this kind of effort to encourage shared governance at great risk to their future employment. If the Department were to require the process we recommend, that risk to adjunct faculty would be mitigated.

The Department's directive requiring institutions to employ "reasonable" methods of determining adjunct faculty eligibility for health care coverage under the Affordable Care Act is too broad, is subject to abuse (as has been demonstrated by the use of the term in other contexts that affect adjunct faculty), and therefore must include a clear explanation of what "reasonable" means. We believe that decades of research on and experience with adjunct faculty working conditions strongly indicate that the only reasonable methods of crediting hours of service must be based on parity with full time tenure track faculty; must be determined using intentional, inclusive, comprehensive and transparent means; and must not harm the public trust by undermining educational, professional, and ethical considerations. We offer the following more detailed rationales for each of the three suggestions.

Detailed rationale:

1. *Require that any standard for determining the time status of adjunct faculty be a minimum standard based on parity with hours equivalencies for tenured and tenure track faculty and that it be determined for individual campuses rather than as a universal formula that would be nationally applicable.*

Rationale: As many commentators have noted, there are significant, mostly disciplinary-based differences among the amounts and types of work that adjunct faculty do outside the classroom, which advises against a universal conversion formula. However, it cannot be denied that work must be done outside the classroom, which underscores the need for a universally required effort to determine *some* kind of conversion formula based on the particularities of discipline and institution.

The only other universal that seems to be applicable here is that the definition of part-time and adjunct cannot be arbitrary but rather must be logically derived from a corresponding definition of full-time and tenure track. This raises the question of the definition of full-time and tenure track work.⁹

⁸ See the work of the Association of American Colleges and Universities at <http://www.aacu.org/leap/hip.cfm>

⁹ One of the reasons higher education has resisted defining the full-time work week is that, contrary to their human resources guidelines, collective bargaining agreements, and board policies, colleges and universities often compensate their professors not so much for what they do as for who they are. This is especially true in the case of "celebrity" faculty, who bring prestige to the workplace regardless of how they perform or even whether they perform at all. This is even the case when the celebrities hold adjunct appointments. A college may pay a celebrity adjunct \$20,000 to teach a one-semester lecture course that meets for one hour a week, while another adjunct at the same institution earns \$2700 that semester teaching an introductory class with one hundred students that meets three times a week.

From a **student's perspective**, there is no practical difference -- nor should there be -- between adjunct and tenure-track faculty. All students have the right of access to the same institutional supports in any and all sections of any course that is offered by a college or university, regardless of the time status or tenure status of the faculty member teaching it. This principle is reflected in the fact that the academic transcripts of students do not differentiate between grades given by part-time or non-tenure-track faculty and those given by full-time or tenure-track faculty. Furthermore, students pay the same tuition for courses taught by all faculty regardless of the faculty members' time status or tenure status.

We note that The Delphi Project on the Changing Faculty and Student Success, which brings together faculty, administrators, and higher education associations including those representing accreditors and governing boards, has recognized students' right to an "opportunity for an equal education" and observed that students could successfully challenge the legality of current policies and practices based on the unequal learning conditions that have been created by current adjunct faculty working conditions.¹⁰

From a **legal perspective**, adjunct faculty members' exempt status is not differentiated from tenure-track faculty members' exempt status. The definition of "learned professional" exempt status¹¹ suggests that all faculty regardless of time or tenure status are required to engage in the same kind of out-of-class professional development and student engagement that is required to exercise the rights and responsibilities that qualify them for their exempt status.

Other professions which are similarly designated as exempt yet which allow for part-time hourly designation, such as medicine and law, seem to presume that practitioners will be paid at an hourly rate that is 100% pro-rated to full-time work. In contrast, adjunct faculty earn approximately 60% less than comparable full-time tenure-track and tenured faculty when salaries are expressed on an hourly basis.¹² The fact that teachers are not subject to the minimum salary requirement governing the definition of exempt employee may be a factor in making pro-rata salary scales for adjuncts difficult to devise and implement.

The assertions of some full-time faculty and administrators that the extreme pay disparity between adjunct and full-time tenure track faculty is justified by a **purported difference in the type and amount of work** required by full-time faculty is not supported, first because of the aforementioned identical responsibilities of faculty toward students and the common designation of adjunct and tenure line faculty as exempt.

Assertions of different responsibilities are also not supported because adjunct faculty regularly carry out these additional types and amounts of work (service and research) without official recognition of that work. It is understood within the culture of higher education that adjuncts are expected to perform these additional types and amounts of work (service and research) in order to be judged as effectively

¹⁰ See "The Imperative for Change" from The Delphi Project on the Changing Faculty and Student Success

¹¹ See http://www.dol.gov/whd/regs/compliance/fairpay/fs17d_professional.pdf

¹² Curtis, 2005, and Toutkoushian & Bellas, 2003, cited in Kezar & Sam, *Understanding the New Majority of Non-Tenure-Track Faculty in Higher Education: Demographics, Experiences, and Plans of Action*, ASHE: 2010.

carrying out their responsibilities. For example, The Modern Language Association, which is the disciplinary organization that governs teaching and scholarship in English and Foreign Languages, invokes this expectation as part of its own argument for a 100% pro rata salary:

Recognizing that many variables enter into determinations of salary, the MLA believes that part-time faculty members should be compensated pro rata to salaries for full-time faculty members performing similar duties, whether by a per-course, per-credit-hour, or full-time-equivalent percentage. The following factors should be considered in determining compensation increases above annual minimums, as reflected in an appropriate salary schedule:

- Instructional workload: number of contact hours, class size, advising, and method for evaluating student work and assigning grades (e.g., labor-intensive reading and commenting on student papers)
- Ancillary duties, including but not limited to: recruitment; supervisory role and responsibilities; research, publication, other forms of professional development, and curriculum development¹³

The assumption that adjunct faculty do or should do more than "just teach" is also expressed in less admirable ways. For example, the excerpt below from *The Chronicle of Higher Education* baldly illustrates the attitude and tacit expectation of many administrators, who use the generally elusive promise of full-time work to encourage adjunct faculty to engage in uncompensated work for many years:

Several years ago, while I was serving as a department chair, one of the regular adjuncts in my department—we'll call her "Lisa"—came to see me. We had just wrapped up a search in which we had hired four people for tenure-track positions in her field. She wasn't one of them, although she had been interviewed.

At first our meeting she was cordial, even though I could tell she was upset. She wanted to know what I thought she could do to make herself more competitive the next time around. I told her I thought she was a very good teacher—but then, all of the people we interviewed were very good teachers. I noted that, of the four we hired, one was an adjunct ("Laura") who had been teaching at the college for about 10 years, compared with Lisa's three or four. I advised her that she would be more likely to be hired full time in the future if she took it upon herself to become as valuable to the department as possible—attending department meetings, participating in departmental tasks like exit-exam grading, and even serving on a committee or two.

To say Lisa didn't take my advice well would be an understatement. She sprang from her chair, leaned over my desk, and sputtered, red-faced, "So what you're saying is that I should do a lot of extra work for

¹³ http://www.mla.org/mla_recommendation_course

no more money? Well, that's not going to happen, bub. In fact, I'm done teaching at this school." And she turned and stomped out of my office.

OK, she didn't actually call me "bub," but true to her word, she never taught in our department again (her choice, not mine).

Perhaps I could have been more sensitive. I didn't intend to insult her, or to suggest that she do anything she wasn't comfortable doing. I was just trying to offer some practical advice. And it's not like I was making anything up: My suggestions were based on my observations of Laura over the years. In her decade of teaching at the college—during which she had applied for a full-time position at least four times—Laura had made herself such an integral part of the department that a couple of the search-committee members were shocked to see her application. They thought she was already a tenured professor.

I believe my advice to Lisa was sound then—even if it made her furious—and it's sound now. If you're an adjunct instructor at a community college and you want to land a full-time, tenure-track position, the best thing you can do is to treat the temporary job, as much as possible, as if you were already on the tenure track. Take it seriously. Teach as many sections as you can, or as many as the administration will allow you to teach. Attend meetings, ask to serve on committees, volunteer to help with departmental tasks—the more odious, the better. Attend conferences and workshops and otherwise engage in professional development. Get to know your colleagues, both in your department and at other institutions.

That advice probably isn't practical for everyone. Many adjuncts have neither the time nor the resources to do everything on that list. All I'm suggesting is that you do what you can. To the extent that you're able to follow my advice, I believe it will help you land a full-time job. If that makes me a shill for The Man, so be it.¹⁴

Within academic culture adjuncts are expected to volunteer the same services that tenure-track faculty provide, to the extent to which adjuncts are willing to be exploited or to the extent to which adjuncts are compelled by economic and personal circumstances to be exploited.

2. Require that the determination of this standard be carried out intentionally, transparently, inclusively, and comprehensively by every institution of higher education that employs adjunct faculty. That is, the standard should be determined in a manner that reflects the highest standards of professionalism, collective bargaining, and shared governance upon which effective and ethical college and university functioning depend. This would mean that for institutions to be judged as having used "reasonable methods" to determine this standard, they must demonstrate that they have either addressed this

¹⁴Rob Jenkins, "The Advice Nobody Likes" in *The Chronicle of Higher Education*, February 23, 2011
<http://chronicle.com/article/The-Advice-Nobody-Likes/126454/>

question through truly representative collective bargaining or through truly representative shared governance. Either approach would entail thorough and objective study of the working conditions of adjunct faculty, with representative involvement of adjunct faculty themselves, and would require consultation with the disciplinary and professional organizations that are responsible for determining the minimum standards of type of work and number of hours necessary to teach courses in any given discipline or field.

Rationale: Many commentators have made suggestions of what needs to be done without identifying how it will get done and who will do it. A common refrain in comments made on this rule is that it would be impractical or administratively impossible to implement certain desirable solutions.

However, in the case of defining adjunct faculty work, extensive research and experience has not only corroborated that there is an urgent need for clarification and action but has also already identified how best to do it, who should be doing it, and what model efforts already exist to be studied, adopted, or adapted. Faculty-administration engagement through collective bargaining and/or shared governance has already been identified in the research and through experience as the best, most effective and efficient ways to change policies toward adjunct faculty for the good of students, faculty, and the public trust. There is an opportunity here for the Department to avoid having to reinvent the wheel and instead to be able to get some wheels off the ground and onto a vehicle that is ready to move forward.

Put another way: Section 4980H(c)(4)(b) states that "The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis." The tradition of shared self-governance in American colleges and universities provides a mechanism by which to facilitate the execution of this charge with respect to adjunct faculty. By requiring the process we have suggested, the Department of the Treasury and the Department of Labor would be exercising the responsibility outlined in Section 4980H. This would have the additional effect of strengthening accountability and the practice of shared governance¹⁵ in postsecondary institutions while simultaneously alleviating both government agencies of the considerable burden of time and resources that would be required if the agencies had to make the determination all by themselves.

Alternatively, if this determination cannot be required to be delegated to campuses, we note that our organization is already working collaboratively with the Department of Labor and with faculty unions on clarifying the applicability of federal unemployment insurance law to adjunct faculty. We also intend to work similarly closely with the Department of Education on clarifying the applicability of public student loan forgiveness regulations¹⁶ to adjunct faculty and have identified a need for similar clarification of the

¹⁵ See "The Inclusion in Governance of Faculty Members Holding Contingent Appointments" of the American Association of University Professors at <http://www.aaup.org/report/governance-inclusion>

¹⁶ <http://chronicle.com/article/30-Hour-Threshold-Affects-More/136841/>

applicability of current exempt/non-exempt employment categories to faculty. We would be eager to work closely with all of these agencies on all of these issues.

3. *Articulate clearly what kinds of policies and actions do not and cannot constitute "reasonable" methods for determining full-time status for purposes of the ACA ,and implement a penalty for engaging in such methods.*

Rationale: Experience has shown that if the Department does not articulate clearly what constitutes "reasonable" and "unreasonable," then colleges will exploit words like "reasonable" to the detriment of adjunct faculty. In the case of unemployment compensation, American colleges and universities, and state unemployment agencies, regularly and mistakenly claim that adjunct faculty have "reasonable assurance of continued employment," a key phrase in the federal unemployment statute, because of the lack of clear guidance from the Department of Labor that the phrase does not in fact apply to college faculty on contingent appointments. This problem became so widespread that adjunct faculty in two states, California and Washington, had to avail of expensive legal means to correct it. Across the rest of the country, the inconsistent understanding and application of the statute has led to a national effort by our organization, in conjunction with faculty unions and nonprofits like the National Employment Law Project, to petition the Department of Labor to issue a UIPL to clarify the phrase and ensure that adjunct faculty are not denied access to this standard benefit.¹⁷

By being aware of the history associated with institutions' interpretation of the term "reasonable" in crafting and implementing policies pertaining to adjunct faculty, the Department has an opportunity to prevent, in the context of the ACA, the grave injustice that the misapplication of the term effected with respect to unemployment compensation. Clear and detailed examples of what constitute "reasonable" and "unreasonable" methods -- derived from the principles we have articulated here -- would serve the Department, postsecondary institutions, adjunct faculty members, and the public.

Examples of methods, policies, and actions that should be considered "unreasonable":

*Until a formal determination of the conversion formula is made using an authentic model of shared governance or collective bargaining, reducing an adjunct's assignment for the purpose of evading employer responsibility under the ACA.

*Claiming that adjunct faculty are new employees every semester or term in order to take advantage of the 90 day waiting period during which employers are not required to cover new employees, even though adjunct faculty are typically hired on a term-by-term basis and technically are new hires every term.

* Fabricating or arbitrarily determining conversion formulas that are not based on a comprehensive analysis of part-time faculty work relative to full-time faculty work and that fail to include all faculty in the discussion.

¹⁷ See our national project on unemployment, the Steve Street National Unemployment Compensation Initiative, at <http://www.nfmuci.org>.

Conclusion: Implications

We are very concerned that this law could have far-reaching, unintended detrimental effects on higher education because while it is not possible to predict how administrators will restructure their workforce in response to these regulations, experience and research demonstrate that "although administrators have entertained ideas for change for twenty years, they do not appear invested or committed to creating better conditions for non-tenure-track faculty."¹⁸ We foresee at least two alarming possibilities, which are already coming to pass in many places even before the law takes effect:

First, there is danger that as colleges seek to avoid the employer mandate, the instructional workforce will be further fragmented (that is, colleges will divide teaching assignments up into smaller and smaller portions, which will cause many adjuncts to have to cobble together a livelihood by taking on work from ever more discrete employers). This is harmful both to the quality of higher education and to the well-being of the adjuncts themselves. A second possibility will be that adjuncts will lose employment, be unable to find other work, and be forced to rely on the social safety net at considerable cost to taxpayers. Neither of these effects honors the intention or spirit of the Affordable Care Act.

Extensive experience and research instead support the conclusion that authentic shared governance and efforts that include or are initiated by empowered and respected adjunct faculty are much more likely to lead to lasting, positive change. This ethos is consistent with that of the Affordable Care Act.

While we realize that the quality of higher education is not the explicit responsibility of the Department of the Treasury, we ask that the agency consider the implications of these rules for educational quality and the integrity of the profession of college teaching because education is a public trust. All teachers, whether at public or private institutions, are public servants, and should be recognized as such much more widely and consistently than is presently the case. Faculty working conditions, which include whether or not faculty have access to healthcare, affect student learning conditions. Confronted with the challenge of defining adjunct faculty work for the purpose of this law, the Department has an opportunity not only to achieve its policy goals but also to strengthen the health and future of higher education as a whole.

¹⁸ Kezar & Sam, 2010, p. 99.