IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FAULK COMPANY, INC., Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of HHS, and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of Centers for Medicare & Medicaid Services (CMS), Defendants.[1]	Case No. 4:24-cv-00609

UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The United States of America, pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), moves the Court to dismiss Plaintiff Faulk Company, Inc.'s complaint because the complaint fails to state a claim upon which relief may be granted as to counts I and II and this Court lacks jurisdiction over counts III and IV. This motion is based on the allegations in the complaint and the United States' supporting brief filed contemporaneously with this motion.

[1] Plaintiff names as defendants the United States, the United States Department of Health and Human Services, and two HHS employees, in their official capacities. The United States is the real party in interest. *See* 26 U.S.C. § 7422(f)(1) (providing that tax refund claims "be maintained only against the United States"); *St Tammany Parish v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 317 (5th Cir. 2009) ("Section 702 of the APA authorizes suits against the United States through a limited waiver of sovereign immunity for 'relief other than money damages' related to an agency's regulatory action.") (citing 5 U.S.C. § 702).

Dated: November 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 1, 2024, I filed the foregoing document with the Clerk of Court using the CM/ECF electronic filing system, which will send notification to all counsel of record.

/s/ Mary Elizabeth Smith
MARY ELIZABETH SMITH

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BRIEF IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

[1] Plaintiff names as defendants the United States, the United States Department of Health and Human Services, and two HHS employees, in their official capacities. The United States is the real party in interest. *See* 26 U.S.C. § 7422(f)(1) (providing that tax refund claims "be maintained only against the United States"); *see also St Tammany Parish v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 317 (5th Cir. 2009) ("Section 702 of the APA authorizes suits against the United States through a limited waiver of sovereign immunity for 'relief other than money damages' related to an agency's regulatory action.") (citing 5 U.S.C. § 702).

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PRELIMINARY STATEMENT

The United States moves to dismiss this case under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) because Plaintiff Faulk Company Inc. has failed to state a claim for the refund of tax it seeks, and the Court lacks jurisdiction over its other claims. This case arises out of the Internal Revenue Service's assessment of an excise tax against Faulk for tax year 2019 pursuant to 26 U.S.C. § 4980H(a). Congress added § 4980H to the Internal Revenue Code as part of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). Titled "Shared Responsibility for Employers Regarding Health Coverage," § 4980H authorizes the IRS to assess an excise tax known as the employer shared responsibility payment ("ESRP") against certain employers that fail to offer to their full-time employees (and their dependents) health insurance coverage that meets certain minimum standards set by the ACA.

Faulk admits that in 2019 it did not offer its full-time employees the opportunity to enroll in minimum essential coverage through an employer-sponsored health care plan. But Faulk claims in counts I and II of the complaint that it is entitled to a tax refund under 26 U.S.C. ("I.R.C.") § 7422 for 2019 because two alleged preconditions to assessment were not met. Specifically, Faulk claims that it never received a certification required by I.R.C. § 4980H (count I) and that the IRS was required, but failed, to obtain supervisory approval under I.R.C. § 6751(b) before making the assessment (count II).

The United States moves to dismiss counts I and II under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The issue in count I is a legal one and requires this Court to interpret § 4980H's certification requirement. Faulk mistakenly claims § 4980H's requirement that certain information be "certified" to an employer refers to an employer notice requirement for health insurance exchanges discussed in § 1411(e)(4)(B)(iii) of the ACA (codified at 42 U.S.C. §

18081(e)(4)(B)(iii)) and implemented in HHS regulations at 45 C.F.R. § 155.310(h). The notice discussed in § 1411(e)(4)(B)(iii) of the ACA (42 U.S.C. § 18081(e)(4)(B)(iii)) is referred to as "the Exchange Notice."

As detailed below, § 4980H's certification requirement does not refer to, and indeed is separate from, the Exchange Notice. The IRS complied with § 4980H when it issued Faulk a pre-assessment letter (referred to as Letter 226-J), that Faulk admits it received. The only issues in dispute in count 1 are: (1) whether the certification referenced in § 4980H is the same as the Exchange Notice; and (2) if not, whether IRS Letter 226-J sent to Faulk satisfies the § 4980H certification requirement. Because the § 4980H certification is distinct from the Exchange Notice and Letter 226-J satisfies the § 4980H certification requirement, count I fails to state a claim for relief and should be dismissed.

Faulk's alternative theory to support its refund claim in count II also fails as a matter of law.[2] Although Faulk alleges that the ESRP is subject to I.R.C. § 6751(b), which requires written supervisory approval before the assessment of certain *penalties*, the ESRP is a not a penalty. The ESRP is a tax and therefore the IRS was not required to obtain written supervisory approval before assessing the ESRP against Faulk.

Apart from seeking a tax refund, Faulk also seeks declaratory relief under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA") and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. In counts III and IV, Faulk asks this Court to declare HHS

[2] If count II survives the motion to dismiss, the United States intends to move for summary judgment as to count II on at least two grounds. First, Faulk did not argue in its administrative refund claim that the IRS had to comply with I.R.C. § 6751(b) and therefore Faulk may not make that argument here. *See Baxter v. United States*, 48 F.4th 358, 366 (5th Cir. 2022) (variance doctrine bars taxpayer from raising ground for recovery in refund suit that was not previously set forth in the administrative refund claim). Second, even if § 6751(b) does apply to the ESRP, a supervisor approved the exaction in writing before it was assessed against Faulk.

regulation 45 C.F.R. § 155.310(i) ("the HHS Certification Regulation") void and unenforceable. The HHS Certification Regulation merely confirms that the IRS is the agency that provides the requisite § 4980H certification to employers, which the IRS does by issuing Letter 226-J. Even though the ACA does not mention that HHS has the authority or is otherwise required to issue the § 4980H certification, Faulk nevertheless claims the HHS Certification Regulation improperly delegates such authority from HHS to the IRS. Faulk claims that it is entitled to declaratory relief because "the IRS continues to assess ESRP excise taxes against [it] in reliance on this misguided HHS regulation." ECF No. 1 ¶ 1; *see also id.* ¶ 33.

The United States moves to dismiss counts III and IV under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Even if the Court grants the requested declaratory relief (*i.e.*, issues an order declaring the HHS Certification Regulation void), such relief will not redress Faulk's alleged harm (*i.e.*, receiving a § 4980H certification from the IRS—not from HHS—for other years) and therefore Faulk lacks standing. Section 4980H of the I.R.C. requires that certain information be certified to an employer "under section 1411 [of the ACA]" before the IRS may assess the ESRP. Section 1411 of the ACA does not mention the § 4980H certification and the ACA is silent as to which agency must send the § 4980H certification. Because the ACA does not provide that HHS—as opposed to the IRS—must issue the certification required by § 4980H even if the HHS Certification Regulation is declared void such declaration will not prevent the IRS from issuing certifications under § 4980H.

Alternatively, even if the IRS's authority to issue the § 4980H certification is derived from the HHS Certification Regulation (it is not), the Court would still lack jurisdiction over Faulk's claims for declaratory relief. The APA, which provides a limited waiver of sovereign immunity in some cases, does not waive the United States' sovereign immunity here because the

requested relief is barred by the Declaratory Judgment Act. *See Taylor v. United States*, 292 Fed. Appx. 383, 388 (5th Cir. 2008) (concluding that because the Declaratory Judgment Act (as well as the Anti-Injunction Act) barred the equitable relief sought by the plaintiffs, "they cannot avail themselves of the APA's waiver of sovereign immunity to seek that relief in the district court"). According to Faulk, the IRS either has assessed or is in the process of assessing an ESRP against Faulk for tax years in addition to 2019. Faulk seeks to restrain the IRS's ability to assess an ESRP against it for other years by obtaining a declaration that the HHS's purported delegation of authority to the IRS to make the § 4980H certification is unlawful. That relief is designed to restrain the assessment and collection of taxes and is barred by the Declaratory Judgment Act.

STATUTORY AND REGULATORY FRAMEWORK

Congress passed the ACA in an effort "'to increase the number of Americans covered by health insurance and decrease the cost of health care.'" *Optimal Wireless LLC v. Internal Revenue Serv.*, 77 F.4th 1069, 1071 (D.C. Cir. 2023) (quoting *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 538 (2012)). Under the ACA, an applicable large employer ("ALE")[3] must offer full-time employees (and their dependents) "the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" or pay an employer shared responsibility payment. I.R.C. §§ 4980H(a)(1), (b)(1)(A). An ALE's full-time employee may be entitled to a premium tax credit (or cost sharing reductions) if the ALE did not offer the employee an opportunity to enroll in minimal essential coverage that is "affordable" and provides "minimum value" through an eligible employer-sponsored plan and the employee

[3] An ALE is an employer that had an average of at least fifty full-time employees in the preceding year. I.R.C. § 4980H(c)(2)(A). Faulk admits that it is an ALE. ECF No. 1 ¶ 17.

enrolls in coverage through an Exchange[4] (assuming other criteria are met that are not relevant here). I.R.C. §§ 36B(b)(1), (c)(2)(C)(i)(II)-(ii). If an employee is allowed a premium tax credit or paid a cost-sharing reduction, the employer may be subject to an exaction under § 4980H(a) or § 4980H(b). *See Optimal Wireless*, 77 F.4th at 1071.

An ALE that fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any month may be assessed an ESRP if

> at 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[.]

I.R.C. § 4980H(a)(2) (emphasis added). Under § 4980H(a), the ESRP assessment will be "equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month." *Id.* § 4980H(a); *see id*. § 4980H(c)(1) (defining "applicable payment amount" as "with respect to any month, 1/12 of $2,000").

Under § 4980H(b), an ALE (i) that offers minimum essential coverage to its full-time employees (and their dependents); and (ii) nevertheless had at least one full-time employee separately enroll in a qualified health plan through an Exchange, for whom a premium tax credit

[4] Under the ACA, States were directed to establish "Exchanges" for individuals, including employees who are not offered affordable insurance that meets certain minimum standards by their employers, to purchase and enroll in insurance plans. *See, e.g*., 42 U.S.C. § 18031(b). If a State did not establish an Exchange, HHS was directed to establish and operate an Exchange in that state. *See id.* § 18041(c). Certain low- and middle-income individuals who purchase insurance on an exchange may then qualify for refundable tax credits, in an amount linked to the premiums paid. I.R.C. § 36B. Enrollees may also be entitled to a "cost-sharing reduction." 42 U.S.C. § 18071 (*e.g*., reduced deductibles). The allowance or payment of these premium tax credits and cost-sharing reductions to employees form, in part, the basis of an employer's liability under I.R.C. § 4980H.

or cost-sharing reduction is allowed or paid because coverage offered by the employer was not considered affordable or did not provide minimum value, may face an ESRP as well. *Id.* The IRS's ability to assess an ESRP against an employer under § 4980H(b) also requires that one or more full-time employees of the ALE has been "certified to the employer under section 1411 of the [ACA] as having enrolled for such month in a qualified health plan with respect to which the applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." I.R.C. § 4980H(b)(1)(B). "In that case, an employer is subject to 'an assessable payment equal to the product of the number of full-time employees' having received such certification 'and an amount equal to 1/12 of $3,000." *Optimal Wireless*, 77 F.4th at 1072 (quoting I.R.C. § 4980H(b)(1)(B)).

Although §§ 4980H(a) and (b) of the I.R.C. require that certain information be "certified to the employer under section 1411 [of the ACA]", § 1411 of the ACA does not mention a "certification" process for employers.[5] Instead, § 1411 of the ACA describes a separate notification process (*i.e.*, the Exchange Notice) that Exchanges must provide to employers when an employee is first found *eligible* for a premium tax credit or cost-sharing reduction. 42 U.S.C. § 18081(e)(4)(B)(iii) (§ 1411(e)(4)(B)(iii) of the ACA). The Exchange Notice must inform the employer that it may be liable for an ESRP assessment under § 4980H and inform the employer

[5] Section 1411 of the ACA (42 U.S.C. § 18081) uses the terms "certificate" or "certification" four times but only to refer to the certification of exemption for individuals under 42 U.S.C. § 18031(d)(4)(H). *See* 42 U.S.C. §§ 18081(a)(4), (b)(5), (e)(2)(B), (e)(4)(B)(iv). That certification relates to whether an individual is exempt from the individual responsibility requirement or the related penalty under I.R.C. § 5000A. This is distinct from and not relevant to whether an employer is liable for the ESRP under I.R.C. § 4980H. The terms "certificate" or "certification" are not found elsewhere in § 1411 of the ACA, and there is no reference to the § 4980H certification in § 1411 of the ACA.

of a separate appeals process afforded to the employer under 42 U.S.C. § 18081(f)(2)(A); *see also id.* §§ 18081(e)(4)(B)(iii), (e)(4)(C).[6]

As detailed below, the certification discussed in I.R.C. § 4980H and the notification discussed in § 1411(e)(4)(B)(iii) of the ACA (42 U.S.C. § 18081(e)(4)(B)(iii)) are different. Moreover, the Treasury Department and HHS issued regulations that address the procedure for § 4980H certifications. The Treasury regulations provide that an ESRP will be imposed if an ALE "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month, and the [ALE] member has received a Section 1411 Certification with respect to at least one full-time employee." 26 C.F.R. § 54.4980H-4(a); *see also id.* § 54.4980H-4(b) (providing that an ALE will not be treated as having offered coverage if the coverage offered is not affordable and does not provide minimum value"). The Treasury regulations define a "Section 1411 Certification" as "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 for which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 C.F.R. § 54.4980H-1(a)(40).

HHS issued the HHS Certification Regulation—titled "Certification program for employers"—which addresses the § 4980H certification. 45 C.F.R. § 155.310(i). The HHS

[6] The HHS appeals process is "in addition to any rights of appeal the employer may have" under I.R.C. § 4980H. 42 U.S.C. § 18081(f)(2)(A). The HHS appeals process is intended to provide the employer an opportunity to "present information to the Exchange for review of the determination either by the Exchange or the person making the determination [that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage with respect to an employee], including evidence of the employer-sponsored plan and employer contributions to the plan." *Id.*

Certification Regulation provides: "As part of its determination of whether an employer has a liability under section 4980H of the Code, the Internal Revenue Service will adopt methods to certify to an employer that one or more employees has enrolled for one or more months during a year in a [qualified health plan] for which a premium tax credit or cost-sharing reduction is allowed or paid." *Id.* In the proposed and final rules issuing the HHS Certification Regulation, HHS explained the purpose behind it:

> Section 4980H of the Code limits the employer's liability for payment under that provision when the employer offers coverage to one or more full-time employees who are "certified to the employer under section 1411" as having enrolled in a [qualified health plan] through the Exchange and for whom an applicable premium tax credit or cost-sharing reduction is allowed or paid. We propose to add new paragraph (i) regarding a certification program pursuant to the Secretary's program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions in accordance with section 1411(a) of the Affordable Care Act. **This certification program is distinct from the notification specified in section 1411(e)(4)(B)(iii) and paragraph (h).**
>
> In new § 155.310(i), we propose that the certification to the employer will consist of methods adopted by the Secretary of Treasury as part of the determination of potential employer liability under section 4980H of the Code. In this manner, the certification program will address not only individuals on whose behalf advance payments of the premium tax credit and cost-sharing reductions are provided, but also individuals claiming the premium tax credit only on their tax returns. We welcome comments on this proposal.

78 Fed Reg. 4594, 4636 (Jan. 22. 2013) (emphasis added); *see also* 78 Fed. Reg. 42159, 42250 (July 15, 2013). The only public comment submitted in response to the proposed HHS Certification Regulation on this point supported the language that the Secretary of the Treasury would adopt methods to provide the § 4980H certification. 78 Fed. Reg. 42159, 42250 (July 15, 2013). The Secretary of the Treasury issued regulations addressing the procedure for ESRP assessments as well as the § 4980H certification. *See* 26 C.F.R. §§ 54.4980H-1 through -5.

HHS also issued a regulation, 45 C.F.R. § 155.310(h), which details the separate procedure for the Exchange Notice.

FACTUAL BACKGROUND[7]

Faulk is a Texas corporation that provides janitorial services for Texas schools. ECF No. 1 ¶ 2. In 2019, Faulk was subject to the ACA as an ALE. *Id.* ¶ 17. Faulk offered minimum essential coverage to its employees before 2019 but stopped because it alleges no employees enrolled. *Id.*

On or about December 1, 2021, the IRS issued a letter (Letter 226-J) to Faulk proposing an ESRP be assessed against Faulk in the amount of $205,621.71 for tax year 2019 under I.R.C. § 4980H. *Id.* ¶¶ 18, 38.[8] The letter advised Faulk of the IRS's preliminary calculation of a potential ESRP assessment based, in part, on tax forms filed by Faulk with the IRS[9] and tax returns filed by some of Faulk's full-time employees claiming a premium tax credit that the IRS allowed. *See* APP-001. The IRS advised Faulk that "[t]his letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of [Faulk Company's] full-time employees was enrolled in a qualified health plan for which a . . .

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[7] The United States, solely for purposes of this motion, assumes the truth of the factual allegations in the complaint and reserves the right to dispute those allegations later.

[8] A copy of the Letter 226 J issued to Faulk is attached as Exhibit A (excluding enclosures), Appendix (APP)-001 to 006. The Court may consider the Letter 226-J in deciding the United States' motion to dismiss because the letter is referred to in the complaint and the letter is central to Faulk's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) ("'In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. Fed. R. Civ. P. 12(b)(6). . . . 'Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'") (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). The United States attaches Letter 226-J to provide context to Faulk's claims, but ultimately the letter is not necessary to decide the motion to dismiss. The central issue here is whether the IRS may make the certification referenced in I.R.C. § 4980H.

[9] Those forms include Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns. *See* APP-001.

[premium tax credit] was allowed." ECF No. 1 ¶ 38; *see also* APP-001. The letter invited Faulk to respond by either agreeing to the computed liability or by submitting information disputing the liability. *See* APP-002.

On December 30, 2021, Faulk responded to Letter 226-J, advising that it disagreed with the proposed assessment of the 2019 ESRP and that it was paying the proposed assessment under protest. ECF No. 1 ¶¶ 32, 40. Faulk claimed that it did not receive notice from HHS or the Exchange under the ACA of its potential liability under § 4980H, and that HHS was required—but failed—to provide the requisite certification under § 4980H. *Id.* ¶¶ 16, 18, 37, 39.

On December 31, 2021, Faulk paid the proposed 2019 assessment. *Id.* ¶ 41. On January 28, 2022, Faulk filed a refund claim with the IRS for the 2019 ESRP. *Id.* ¶ 42. Faulk does not make any allegations about the accuracy of the computation of the IRS's assessment; instead, Faulk's refund claim is based on the allegation that HHS did not issue a certification to Faulk under the ACA or provide Faulk with any appeal rights before the IRS issued Letter 226-J proposing an ESRP assessment against Faulk for tax year 2019. *Id.* ¶ 39.

ARGUMENT

I. Faulk's tax refund claim in count I fails as a matter of law because the IRS's assessment complied with I.R.C. § 4980H.

A. The IRS's Letter 226-J satisfied the certification requirement in § 4980H.

The IRS's ESRP assessment against Faulk for 2019 complied with I.R.C. § 4980H. Faulk's sole argument to the contrary is that Congress conditioned the IRS's ability to assess an ESRP under § 4980H on whether the employer received notice from an Exchange of its potential ESRP liability under § 1411 of the ACA. Faulk is wrong.

Faulk did not offer its full-time employees the opportunity to enroll in minimum essential coverage through an employer-sponsored health plan for any month in 2019. Thus, the

applicable ESRP provision is I.R.C. § 4980H(a). Section 4980H(a) authorizes the IRS to assess an ESRP (which is calculated on a monthly basis) when "at 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[.]" *Id.*

The IRS satisfied the § 4980H certification requirement when it sent Faulk Letter 226-J regarding the proposed ESRP assessment because the letter included all the information required by § 4980H (*i.e.*, certification that for each month the IRS proposed an ESRP at least one of Faulk's full-time employees enrolled in a qualified health plan and was allowed a premium tax credit). *See* APP-001 to 006. Indeed, Faulk does not allege that the Letter 226-J omitted information required by § 4980H. Instead, Faulk argues that Letter 226-J could not certify the information "under section 1411" of the ACA because it did not come from HHS. ECF No. 1 ¶¶ 16, 36. Again, Faulk is wrong.

The ACA does not require HHS to send the § 4980H certification. The ACA is silent as to which agency must send the certification. Even though I.R.C. § 4980H requires that certain information be "certified to the employer under section 1411 [of the ACA]" before the IRS can assess the ESRP against the employer, § 1411 does not mention the § 4980H certification. Thus, HHS and Treasury issued regulations addressing the certification process. HHS confirmed that the IRS will create the procedure to make the certification required by § 4980H (*see* 45 C.F.R. § 155.310(i)), and the Treasury regulations describe that certification procedure. *See* 26 C.F.R. § 54.4980H-4. Even if HHS has the authority to design the certification procedure, there is nothing in the ACA requiring that HHS—rather than the IRS—certify the information to the employer.

B. The Exchange Notice described in § 1411 of the ACA is different from the certification requirement in I.R.C. § 4980H.

Although Faulk asserts that "certified to the employer under section 1411" means the certification must come from HHS not the IRS, § 1411 of the ACA does not mention the § 4980H certification let alone provide that HHS is the entity that must issue the certification. Undeterred, Faulk claims that when Congress used the phrase "certified to the employer under section 1411", Congress was referring to the Exchange Notice discussed in § 1411 which reads:

> If the Secretary [of HHS] notifies an Exchange that an enrollee is eligible for a premium tax credit under section 36B of title 26 or cost-sharing reduction under section 18071 of this title because the enrollee's (or related individual's) employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage, the Exchange shall notify the employer of such fact and that the employer may be liable for the payment assessed under section 4980H of title 26.

42 U.S.C. § 18081(e)(4)(B)(iii) (§ 1411(e)(4)(B)(iii) of the ACA).

But the § 4980H certification and the Exchange Notice are not the same. Indeed, there are material differences between the § 4980H certification and the Exchange Notice.

To begin, I.R.C. § 4980H (which concerns the certification) and § 1411(e)(4)(B)(iii) of the ACA (which concerns the Exchange Notice) use different terminology. Section 4980H(a)(2) of the I.R.C. provides that the ESRP will apply "for such month" if at least one full-time employee "has been *certified* to the employer under section 1411 of the [ACA] 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." *Id.* (emphasis added). Thus, under § 4980H(a)(2), an ALE must receive a certification providing that for the month at issue one or more of its full-time employees was enrolled in a qualified health plan and a premium tax credit ("PTC") or cost-sharing reduction was allowed or paid for the employee.

In contrast, § 1411 of the ACA requires an Exchange to "notify" an employer that an employee has been determined *eligible* for a PTC or cost-sharing reduction because the employer "does not provide minimum essential coverage through an employer-sponsored plan" or that "the employer does provide that coverage but it is not affordable coverage." 42 U.S.C. § 18081(e)(4)(B)(iii) (§ 1411(e)(4)(B)(iii) of the ACA). Even though the ESRP is assessed on a per month basis, the Exchange Notice only concerns an employee's *initial* eligibility for a PTC or cost-sharing reduction. *Id.* The Exchange Notice requirement in § 1411(e)(4)(B)(iii) of the ACA does not provide for notification of an employee's ongoing monthly enrollment in a qualified health plan or the employee's *allowance* of the PTC for the month or payment of cost-sharing reductions. Moreover, § 1411(e)(4)(B)(iii) of the ACA also does not distinguish between ALEs subject to § 4980H and other types of employers, nor does it distinguish between full-time and part-time employees.

Thus, the Exchange Notice does not contain all the information required by § 4980H. As detailed above, the Exchange Notice concerns an employee's initial eligibility for a PTC or cost-sharing reduction. It does not disclose whether the IRS *allows* a PTC and for which months the PTC is allowed. Yet the § 4980H certification must reflect whether a PTC or cost-sharing reduction was allowed or paid for each month at issue.

Indeed, the Exchange Notice cannot inform the employer when the IRS allows a PTC. Whether a PTC is "allowed" is not determined by the IRS until after the employee files a tax return claiming the PTC. In contrast, the Exchange Notice requires the Exchange merely to inform an employer when HHS determines the employee to be *eligible* for the PTC or cost-sharing reduction. Eligibility is not the same as allowance. Further, employees who are enrolled in a qualified health plan through the Exchange are not required to apply for the PTC at the

Exchange and can instead claim the PTC on their income tax return. Thus, an employee may claim a PTC on their tax return and the PTC may be "allowed or paid with respect to the employee" within the meaning of § 4980H without HHS ever making an eligibility determination before enrollment and an Exchange notifying an employer of that determination pursuant to the Exchange Notice.

In addition, § 1411(e)(4)(B)(iii) of the ACA does not require the Exchange Notice to be issued to an employer whose offer of coverage fails to provide minimum value. The statute only requires that the Exchange Notice be issued to an employer if the employer "does not provide minimum essential coverage through an employer-sponsored plan" or the employer does provide minimum essential coverage "but it is not affordable coverage." 42 U.S.C. § 18081(e)(4)(B)(iii) (§ 1411(e)(4)(B)(iii) of the ACA). But § 1411(e)(4)(B)(iii) of the ACA does not account for a third scenario in which an employer may be subject to an ESRP. Under § 4980H(b), an employer may be subject to an ESRP even if it offers minimum essential coverage if such coverage is either not affordable or does not provide minimum value. It is doubtful that Congress would condition a tax liability on a notification process that does not account for each circumstance that gives rise to that liability.

C. The Exchange is not entitled to access all the information that must be certified to the employer in I.R.C. § 4980H.

Faulk's interpretation of § 4980H also fails to recognize that the Exchange is not entitled to access all the information necessary to issue the § 4980H certification. Indeed, if the Exchange were required to make the certification, the IRS would have to disclose tax information after the close of the tax filing season for the preceding year because the Exchange would not otherwise have access to information about PTCs allowed or paid for specific months. To make such a disclosure, the IRS would need explicit authority under I.R.C. § 6103 to disclose to the Exchange

information relating to the allowance or payment of the PTC to the employee. Section 6103 does not confer such authority. *See* I.R.C. §§ 6103(c)-(o). Even if the IRS was authorized to disclose to the Exchange whether an employee was allowed the PTC after the employee filed an income tax return, I.R.C. § 6103 does not authorize the Exchange to disclose that same return information to the employer. Thus, the Exchange is legally prohibited from being the entity to make the § 4980H certification.

D. The IRS is the agency in the best position to certify the information required by I.R.C. § 4980H to employers.

As detailed above, the § 4980H certification is distinct from the Exchange Notice. Although I.R.C. § 4980H(a)(2) requires that certain information be "certified to the employer under section 1411 of the [ACA]," § 1411 of the ACA does not mention the § 4980H certification. Thus, by requiring that information be certified to an employer under § 1411 of the ACA, Congress likely meant that the certification should be consistent with § 1411.

Requiring the IRS to issue the § 4980H certification is consistent with § 1411 of the ACA. Indeed, nothing in the ACA requires that HHS issue the certification. The ACA is silent as to which agency has that authority. In addition, as detailed above, the IRS—not HHS—is the agency with access to all the information that must be contained in the § 4980H certification. And even though § 1411 describes the Exchange Notice, there are many inconsistencies between the § 4980H certification and the Exchange Notice, demonstrating that Congress envisioned a certification process separate from the Exchange Notice process.

As detailed above, HHS cannot determine whether an individual should be allowed a PTC and cannot certify to an employer that its employees were in fact allowed a PTC. Such authority rests with the IRS. The HHS Certification Regulation is therefore consistent with

§ 1411 of the ACA, I.R.C. § 4980H, and I.R.C. § 6103. Logic dictates that the IRS, which is tasked with enforcing the tax code, is the appropriate agency to satisfy the § 4980H certification requirement that is a precondition to assessing the ESRP. Thus, Faulk's contention that HHS is the agency that must certify the information detailed in § 4980H and that HHS improperly delegated such authority to the IRS fails as a matter of law.

II. Faulk's tax refund claim in count II fails as a matter of law because I.R.C. § 6751(b) does not apply to the ESRP.

In count II, Faulk asserts an alternative basis for its refund claim. According to Faulk, supervisory approval of penalties under I.R.C. § 6751(b) applies to ESRP assessments. But Faulk fails to recognize that § 6751(b) does not apply to taxes like the ESRP.

By its terms, supervisory approval in I.R.C. § 6751(b) is limited to "penalt[ies]," a term that is defined to "include[ ] any addition to tax or any additional amount." I.R.C. § 6751(c). But the ESRP is not a penalty or an addition to tax. As recognized by the Fifth Circuit in the context of determining whether the Anti-Injunction Act applies, the ESRP is a *tax*. *Hotze v. Burwell*, 784 F.3d 984, 996-99 (5th Cir. 2015); *see also Optimal Wireless*, 77 F. 4th at 1074 ("Congress described 4980H as a 'tax' four different times."). The Fourth Circuit similarly held that the ESRP is a tax for constitutional purposes. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 95-98 (4th Cir. 2013). And in the analogous context of how to treat the ESRP under the Bankruptcy Code, courts have held that the ESRP functions as a tax. *Welt v. United States*, No. 22-20294, 2022 WL 17652629, at *3-*6 (S.D. Fla. Sept. 29, 2023), *report and recommendation adopted*, 2023 WL 2891014, at *1 (S.D. Fla. Jan. 23, 2023); *In re Creative Hairdressers, Inc.*, 639 B.R. 320, 329-30 (Bankr. D. Md. 2022).

Faulk's contrary argument depends on I.R.C. § 4980H(d)(1), which reads: "Any assessable payment provided by this section shall be paid upon notice and demand by the

Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* But by providing that the ESRP should be assessed and collected in the same manner as assessable penalties, Congress simply intended to render inapplicable to ESRPs "[t]he restrictions on assessment under section 6213"—including the requirement that the IRS issue a notice of deficiency enabling the taxpayer to petition the Tax Court for a redetermination of that deficiency. *See General Explanation of Tax Legislation Enacted in the 111th Congress*, JCS-2-11 No. 14, 2011 WL 940380, at *30 (Mar. 1, 2011). It did not, as Faulk suggests, convert ESRPs into a species of penalty subject to the supervisory approval requirements of I.R.C. § 6751(b). Thus, count II of the complaint fails as a matter of law.

III. The Court lacks subject matter jurisdiction over counts III and IV because Faulk lacks standing to seek a declaration invalidating the HHS regulation at issue.

In counts III and IV, Faulk asks this Court to declare the HHS Certification Regulation (45 C.F.R. § 155.310(i)) void and unenforceable. According to Faulk, the regulation "conflicts with Section 1411 of the ACA in that it purports to sever certification from Section 1411." ECF No. 1 ¶ 56. Faulk claims that declaratory relief is necessary because "the IRS continues to assess ESRP excise taxes against [it] in reliance on this misguided HHS regulation." *Id.* ¶¶ 1, 33. Faulk admits that since 2019 it has remained an ALE. *Id.* ¶ 17.

Faulk, as the party invoking federal jurisdiction, bears the burden of establishing the elements of Article III standing. *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998)). To establish Article III standing, Faulk must show "injury in fact, causation, and redressability." *Id.*; *see also TransUnion v. Ramirez*, 594 U.S. 413, 423 (2021).

Faulk's claimed injury is that the IRS continues to propose ESRP assessments against it

and that the IRS's proposed assessments (contained in Letters 226-J) do not satisfy the certification requirement under § 4980H because the certification must come from HHS under § 1411 of the ACA. As detailed above, this argument lacks merit because the § 4980H certification is different from the Exchange Notice detailed in § 1411 of the ACA. In any event, Faulk cannot show that its claimed injury is redressable by the requested declaratory relief.

"To satisfy redressability, a plaintiff must show that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Inclusive Communities Project, Inc.*, 946 F.3d at 655 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Indeed, even if the Court issues an order declaring the HHS regulation at issue void and unenforceable, such relief is not likely to result in a change in the IRS's certification and assessment process under I.R.C. § 4980H.

The IRS does not derive its authority to make the § 4980H certification from the HHS Certification Regulation. The ACA does not authorize or require HHS to issue the § 4980H certification. The ACA is silent as to which agency must issue the certification. Even if the HHS Certification Regulation is declared unenforceable it will not preclude the IRS from issuing certifications under § 4980H and assessing ESRPs. Thus, Faulk lacks Article III standing to seek the relief requested in counts III and IV, and the Court lacks subject matter jurisdiction over those claims. *Abraugh v. Altimus*, 26 F.4th 298, 303 (5th Cir. 2022) (noting that Article III standing is required before a federal district court can exercise subject matter jurisdiction).

IV. Alternatively, the Court lacks jurisdiction over counts III and IV because the Declaratory Judgment Act bars Faulk's requested relief.

The APA does not waive the United States' sovereign immunity for counts III and IV because the requested relief is barred by the Declaratory Judgment Act. The Declaratory Judgment Act provides, in relevant part:

> In a case of actual controversy within its jurisdiction, ***except with respect to Federal taxes*** ... any court … may declare the rights and other legal relations of any interested party seeking such declaration.

28 U.S.C. § 2201(a) (emphasis added). The federal tax exemption to the Declaratory Judgment Act is "at least as broad as the Anti-Injunction Act." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974); *McCabe v. Alexander*, 526 F.2d 963, 965 (5th Cir. 1976).

The Anti-Injunction Act, 26 U.S.C. § 7421, provides that with exceptions not applicable here "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *Id.* The "manifest purpose" of the Anti-Injunction Act "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). This statute reflects a "congressional antipathy for premature interference with the assessment or collection of any federal tax[,]" *Bob Jones University*, 416 U.S. at 732 n.7, and has been extended to declaratory judgments through the federal tax exemption to the Declaratory Judgment Act.

Suits seeking relief specifically barred by the Anti-Injunction Act and the tax exemption to the Declaratory Judgment Act are properly dismissed for lack of jurisdiction. *Enochs*, 370 U.S. at 5 ("The object of § 7421 is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."); *Warren v. United*

States, 874 F.2d 280, 281-82 (5th Cir. 1989) (reversing district court dismissal under Fed. R. Civ. P. 12(b)(6), and instead ordering dismissal for lack of jurisdiction, where taxpayers sued seeking declaratory judgment that their tax returns were "not frivolous").

The Anti-Injunction Act and Declaratory Judgment Act apply "when the target of a requested injunction [or declaration] is a tax obligation." *CIC Servs., LLC v. Internal Revenue Serv.*, 593 U.S. 209, 218 (2021). To determine a suit's target, courts look to the face of the taxpayer's complaint. *Id.* Specifically, courts look "to the relief requested—the thing sought to be enjoined." *Id.* The face of Faulk's complaint seeks to restrain the assessment or collection of an ESRP against Faulk for other tax years. Indeed, Faulk claims that declaring the HHS Regulation void is necessary "given that the IRS continues to assess ESRP excise taxes against [it] in reliance on this misguided HHS regulation[.]" ECF No. 1 ¶ 1; *see also id.* ¶ 33 ("[T]he IRS continues to pursue ESRP excise taxes against Faulk Company in reliance on an HHS regulation that has altogether severed that which is to be 'certified to the employer' from 'under Section 1411.' HHS regulation 45 C.F.R. § 155.310(i) is therefore contrary to the statutory text of the ACA, and Plaintiff seeks the Court's ruling setting aside that regulation."). The requested declaratory relief seeks to restrain the IRS's ability to assess and collect ESRPs against Faulk and is thus barred by the Declaratory Judgment Act.

Because the tax exception to the Declaratory Judgment Act applies to Faulk's claims in counts III and IV, Faulk's invocation of various provisions of the APA are futile. The APA judicial review provisions apply "except to the extent that . . . statutes preclude judicial review." 5 U.S.C. § 701(a)(1). And the APA's waiver of sovereign immunity does not "affect[] other limitations on judicial review." *Id.* § 702(1). The Anti-Injunction Act and tax exception to the Declaratory Judgment Act are among the statutory limitations on judicial review that §§ 701 and

702 of the APA incorporate. *Taylor*, 292 Fed. Appx. at 388-89. Thus, the Court lacks jurisdiction over counts III and IV.

CONCLUSION

Counts I and II of the complaint should be dismissed under Rule 12(b)(6) because the IRS's pre-assessment Letter 226-J to Faulk for 2019 satisfied the certification requirement of I.R.C. § 4980H, and the ESRP is a tax that is not subject to the supervisory approval requirement in I.R.C. § 6751(b). Counts III and IV should be dismissed under Rule 12(b)(1) because either Faulk lacks standing to seek the requested declaratory relief, or the requested relief is barred by the Declaratory Judgment Act.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 1, 2024, I filed the foregoing document with the Clerk of Court using the CM/ECF electronic filing system, which will send notification to all counsel of record.

/s/ Mary Elizabeth Smith
MARY ELIZABETH SMITH