Part III – Administrative, Procedural, and Miscellaneous

Health Insurance Providers Fee; Procedural and Administrative Guidance

Notice 2016-14

SECTION 1. PURPOSE

This notice provides guidance for fee year 2016 on how the definition of expatriate health plans under the Expatriate Health Coverage Clarification Act of 2014 applies for purposes of the fee imposed by § 9010 of the Affordable Care Act.

SECTION 2. BACKGROUND

Section 9010 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), as amended by § 10905 of PPACA, and as further amended by § 1406 of the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act or ACA), imposes an annual fee on covered entities engaged in the business of providing health insurance for United States health risks. The fee is a fixed amount allocated among all covered entities in proportion to their relative market share as determined by each entity's net premiums written for the data year, which is the year immediately preceding the year in which the fee is paid (the year in which the fee is paid is the fee year).

Section 9010(b)(3) requires the Secretary to calculate the amount of each covered entity's annual fee. For this purpose, § 9010(g)(1) requires each covered entity

to report to the Secretary its net premiums written for health insurance for any United States health risk for the data year. Section 9010(d) defines United States health risk to mean a health risk of any individual who is: (1) a United States citizen; (2) a resident of the United States (within the meaning of § 7701(b)(1)(A)); or (3) located in the United States, during the period such individual is so located.

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published final Health Insurance Provider Fee regulations (T.D. 9643, 78 FR 71476) on November 26, 2013, to provide guidance regarding the § 9010 fee. The regulations require each covered entity to annually report its net premiums written for health insurance of United States health risks by April 15th of the fee year on Form 8963, *Report of Health Insurance Provider Information*. Section 57.2(k) of the regulations defines "net premiums written" as "premiums written, including reinsurance premiums written, reduced by reinsurance ceded, and reduced by ceding commissions and medical loss ratio (MLR) rebates with respect to the data year." For covered entities that file the Supplemental Health Care Exhibit (SHCE) with the National Association of Insurance Commissioners (NAIC), net premiums written for health insurance generally will equal the amount reported on the SHCE as direct premiums written minus MLR rebates with respect to the data year, subject to any applicable exclusions under § 9010.[1] Form 8963 accordingly requires reporting of direct premiums written for

[1] References to the SHCE are solely for the covered entity's convenience in identifying the premium information required for Form 8963. If the entity does not file an SHCE with NAIC, the entity is still required to file Form 8963 and provide direct premiums written for health insurance of United States health risks on Form 8963 and any other information required by the form. Other sources of information for determining direct premiums written include the MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight or any equivalent form required by the state of domicile of the entity or by federal law. If no single form contains all of the relevant data for determining all of the

purposes of determining net premiums written. Section 57.4(b)(2) of the regulations provides that the entire amount reported as direct premiums written on the SHCE (including direct premiums written for expatriate health plans) will be considered to be for United States health risks unless the covered entity can demonstrate otherwise.

The Health Insurance Providers Fee regulations do not provide specific rules for expatriate health plans. The SHCE includes separate reporting for expatriate health plans, which are defined by reference to the definition of expatriate policies in the MLR final rule issued by the Department of Health and Human Services (MLR final rule definition). The MLR final rule definition defines expatriate policies as predominantly group health insurance policies that provide coverage to employees, substantially all of whom are: (1) working outside their country of citizenship; (2) working outside their country of citizenship and outside the employer's country of domicile; or (3) non-U.S. citizens working in their home country. 45 CFR 158.120(d)(4).

On December 16, 2014, Congress enacted the Expatriate Health Coverage Clarification Act of 2014 (EHCCA) as part of the Consolidated and Further Continuing Appropriations Act, 2015, Division M, Public Law 113-235 (128 Stat. 2130 (2014)). Section 3(a) of the EHCCA provides that the ACA generally does not apply to expatriate health plans. Section 3(c)(1) of the EHCCA specifically excludes expatriate health plans from the § 9010 fee by providing that, for calendar years after 2015, a qualified expatriate (and any spouse, dependent, or any other individual enrolled in the plan) enrolled in an expatriate health plan is not considered a United States health risk. These

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direct premiums written for health insurance for United States health risks of an entity, then direct premiums written must be determined using aggregated data from multiple sources.

rules are generally effective for expatriate health plans issued or renewed on or after July 1, 2015, unless otherwise specified.

Section 3(c)(2) of the EHCCA provides a special rule that applied solely for purposes of determining the fee under § 9010 for fee years 2014 and 2015. The special rule did not affect the calculation of the fee generally for all covered entities. Instead, after the fees were calculated, the special rule proportionally reduced the fee of a covered entity with expatriate health plans to account for its net premiums written for those plans. Thus, for fee years 2014 and 2015, a covered entity with net premiums written for expatriate health plans paid a lower fee but this reduction had no impact on the fee for the remaining covered entities. By contrast, for fee years 2016 and beyond, the reduction for covered entities with net premiums written for expatriate health plans will affect the allocation of the fee among all covered entities.

Section 3(d)(2) of the EHCCA provides a definition of the term “expatriate health plan” that is more detailed than the MLR final rule definition of expatriate health policies. Treasury and the IRS determined that the MLR final rule definition of expatriate policies also used on the SHCE was sufficiently broad to cover potential expatriate health plans described in § 3(d)(2) of the EHCCA. Because guidance was needed to implement the special rule for fee years 2014 and 2015, on March 30, 2015, Treasury and the IRS issued Notice 2015-29, 2015-15 I.R.B. 873, to define expatriate health plan by reference to the MLR final rule definition solely for the limited purpose of the special rule for fee years 2014 and 2015.

On June 30, 2015, Treasury and the IRS, in consultation with the Department of Labor and the Department of Health and Human Services (referred to collectively as the

Departments), issued Notice 2015-43, 2015-29 I.R.B. 73, to provide interim guidance, pending the publication of proposed regulations, on the application of certain ACA provisions to expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans, as defined in the EHCCA, including the definition of expatriate health plan in § 3(d)(2).

The interim guidance in Notice 2015-43 generally allows a taxpayer to apply the requirements of the EHCCA using a reasonable good faith interpretation of the EHCCA until further guidance is issued. However, that interim guidance does not apply to the § 9010 fee. Notice 2015-43 states that, for purposes of the § 9010 fee, Notice 2015-29 applies to the 2014 and 2015 fee years, and future guidance will address the 2016 and later fee years.

SECTION 3. GUIDANCE FOR FEE YEAR 2016

The Departments are developing proposed regulations under § 3(d)(2) of the EHCCA that will address the definition of an expatriate health plan. Because guidance is needed for the 2016 fee year on the definition of expatriate health plan in § 3(d)(2) of the EHCCA for purposes of § 3(c)(1) of the EHCCA, which excludes expatriate health plans from the § 9010 fee beginning in 2016, this notice provides that solely for this limited purpose the definition of expatriate health plan will be the same as provided in the MLR final rule definition. No inference is intended regarding the definition of expatriate health plan in § 3(d)(2) of the EHCCA for any other purpose, nor for purposes of the § 9010 fee for later years.

SECTION 4. PROCEDURES FOR AMOUNTS REPORTED ON SHCE

.01 Filing Requirement.

If a covered entity (including controlled group members, if any) reported direct premiums written for expatriate health plans on its SHCE(s) for 2016, the covered entity must exclude those direct premiums written for expatriate health plans from the Direct Premiums Written column (f) on its 2016 Form 8963 and attach the reconciliation described in § 4.02 of this notice. For this limited purpose, an expatriate health plan means an expatriate policy under the MLR final rule definition described in § 2 of this notice.

.02 Reconciliation.

A covered entity described in § 4.01 of this notice must attach a statement to its 2016 Form 8963 certifying the following:

(1) The covered entity (or designated entity, in the case of a controlled group) filed the SHCE for 2016;

(2) The covered entity is filing the statement pursuant to Notice 2016-14;

(3) The aggregate dollar amount of direct premiums written for expatriate health plans reported on the SHCE(s) for 2016 for the covered entity (including the amounts for all members of the controlled group, if applicable) are excluded from direct premiums written reported in the Direct Premiums Written column (f) on the covered entity's 2016 Form 8963.

.03 Example.

The following example illustrates the application of this section 4:

Company X, the designated entity of a controlled group, and X's controlled group members (collectively, X Group) reported $2 million in direct premiums written for expatriate health plans, in the aggregate, on their SHCEs and X Group excluded that

amount from direct premiums written on its 2016 Form 8963. Company X attaches the following statement to its 2016 Form 8963:

> Company X hereby certifies that: (1) X Group filed SHCEs with the NAIC reporting direct premiums written for expatriate health plans in the 2016 fee year; (2) X Group is filing this statement pursuant to Notice 2016-14; (3) X Group is reporting an aggregate of $2 million in direct premiums written for expatriate health plans on its 2016 SHCEs and has excluded that amount from direct premiums written in column (f) on the attached 2016 Form 8963.

The preceding example meets the requirements of § 4.02.

SECTION 5. PROCEDURES FOR AMOUNTS NOT REPORTED ON SHCE

01 Filing Requirement.

If a covered entity (including controlled group members, if any) received direct premiums written for expatriate health plans in 2015 that were not reported on SHCEs for 2016, then the covered entity (including controlled group members, if any) must exclude direct premiums written for expatriate health plans from the Direct Premiums Written column (f) on its 2016 Form 8963 and attach the reconciliation described in § 5.02 of this notice. For this limited purpose, an expatriate health plan means an expatriate policy under the MLR final rule definition described in § 2 of this notice.

.02 Reconciliation.

A covered entity described in § 5.01 of this notice must attach a statement to its 2016 Form 8963 certifying the following:

(1) The covered entity is filing the statement pursuant to Notice 2016-14;

(2) The aggregate dollar amount of direct premiums written for expatriate health plans that met the MLR final rule definition that it excluded from the Direct Premiums Written column (f) on its 2016 Form 8963 (including the amounts for all members of the controlled group, if applicable); and

(3) The source of information that the covered entity has available on request for determining direct premiums written for expatriate health plans for 2016, such as the Accident and Health Policy Experience filed with the NAIC, the MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight of the Department of Health and Human Services, or any similar statements filed with the NAIC, with any state government, or with the federal government pursuant to applicable state or federal requirements.

.03 Example.

The following example illustrates the application of this section 4:

Company Y, the designated entity of a controlled group, and Y's controlled group members (collectively, Y Group) received $20,000 in direct premiums written for expatriate health plans, in the aggregate, in 2015 and excluded this amount from its reporting of direct premiums written in column (f) on its 2016 Form 8963. Y Group did not file any SHCEs in 2016. Company Y attaches the following statement to its 2016 Form 8963.

> Company Y hereby certifies that: (1) Company Y is filing this statement pursuant to Notice 2016-14; (2) Y Group excluded an aggregate of $20,000 in direct premiums written for expatriate health plans that met the MLR final rule definition from its reporting of direct premiums written in column (f) on its 2016 Form 8963;

and (3) Y Group expects to report for 2016 an aggregate of $20,000 in direct premiums written for expatriate plans on Y Group's MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight, which Y Group will supply upon request.

The preceding example meets the requirements of § 5.02.

SECTION 6. APPLICABILITY DATE

This notice applies to the 2016 fee year.

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2249.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in sections 4.02 and 5.02 of this notice. Collecting the required information may provide covered entities with relief from a certain portion of the health insurance providers fee imposed by § 9010 of the ACA.

The estimated total annual reporting and/or recordkeeping burden is 4 hours.

The estimated annual burden per respondent and/or recordkeeper is .5 hours. The estimated total number of respondents and/or recordkeepers is 8.

The estimated frequency of collection of such information is annually.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Rachel S. Smith of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, please contact Ms. Smith at (202) 317-6855 (not a toll-free call).