

October 27, 2011

Internal Revenue Service
1111 Constitution Avenue, N.W.
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: IRS REG 131491 – 10

To Whom It May Concern:

Thank you for the opportunity to comment on the Health Insurance Premium Tax Credit Proposed Rule, published at 76 Fed. Reg. 50931 *et. seq.* (August 17, 2011). We appreciate having the opportunity to express our views on this regulation.

HighRoads provides health and welfare employee benefit and ERISA communications consulting and solutions to large and medium sized employers located throughout the United States. Although our clients typically self-insure and will likely not utilize the Exchanges to provide health benefits to their employees, they could nevertheless be affected by this regulation and the policy decisions that the Internal Revenue Service (IRS) makes in implementing it. Therefore, we feel that it is important to share our thoughts with the IRS as it finalizes the rule.

At the outset, we would like to commend the IRS for its thoughtful consideration of several policy issues with which it was presented in drafting this rule. We believe that in facing these policy issues, the IRS took policy positions that are consistent with the role of a robust employer-based health insurance marketplace in the United States. Because our clients recognize the importance of a robust benefit package as a recruitment and retention tool for their employees, we agree with the policy positions that the IRS took in drafting this regulation.

There are four issues, in particular, on which we would like to comment. Each of them flow from the consequences of § 4980H(b)(1)(B) of the Internal Revenue Code of 1986, which imposes a penalty on employers that do not offer affordable coverage to their employees, or do not offer a health benefit plan that offers minimum value to employees, if their employees later utilize an Exchange to purchase a tax-subsidized qualified health plan. The four issues are:

- Availability of the tax subsidies for an employee who enrolls in an employer-based plan;
- The affordability standard;
- Definition of “household income”;
- Appeals procedures.

Enrollment in an Employer-Based Plan

Section 36B(c)(2)(C) of the Internal Revenue Code permits a taxpayer for whom an employer plan is not affordable or that does not offer minimum value to claim the tax subsidy by deeming that taxpayer ineligible for minimum essential coverage. The consequences of this statutory provision are that an employer of such an employee is subject to a penalty under §

4980H(b)(1)(B) of the Code. Clause (iii) of § 36B(c)(2)(C), however, expresses the logical policy that the subsidies are unavailable if an employee nevertheless enrolls in the employer plan. The consequence of this statutory provision is that the employer is therefore not subject to the § 4980H(b)(1)(B) penalty.

In the proposed rule, the IRS proposes to codify this policy at 26 C.F.R. § 1.36B(c)(3)(vii)(A). *See also* discussion at 76 Fed. Reg. at 50935. We agree with the IRS decision to codify this policy. In our view, the statute is clear that the credit is unavailable to a taxpayer who enrolls in employer-based coverage that constitutes minimum essential coverage, even if that coverage is “unaffordable” or does not offer “minimum value” within the meaning of the statute, and the employer is consequently not subject to penalties. Because we believe that the statute is clear, we do not believe that the IRS had policy discretion to propose a different policy, and we thank the IRS for adopting the policy that it did.

Test of Affordability

The test of whether or not a policy is “affordable” for an employee is measured by reference to the cost of a self-only plan, even if the employee is enrolled in a family plan.¹ As a general rule, if the cost of self-only coverage exceeds 9.5% of household income, coverage is unaffordable and an employee can purchase a plan on an Exchange, claim the credit, and her employer is subject to the penalty. The converse, then, is also true: if the cost of self-only coverage is under 9.5% of household income, even if an employee is enrolled in family coverage, the employee cannot claim the subsidy and no penalty is payable by the employer.

We therefore agree with the IRS codification of this policy at 26 C.F.R. § 1.36B-2(c)(3)(v)(A)(1) and the discussion that accompanies it at 76 Fed. Reg. 50935. As the IRS correctly notes, Congress clearly intended this result, and the agency cites the description of the policy published by the Joint Committee on Taxation.² We urge the agency to finalize this policy as proposed in the final rule.

The Household Income Safe Harbor

As noted above, if an employer does not offer “affordable” health insurance coverage to an employee and that employee enrolls in a qualified health plan through an Exchange and claims the tax subsidy, the employer is subject to a sanction.³ Coverage is “affordable” if it is less than

¹ *See* Internal Revenue Code § 36B(c)(2)(C)(i)(II) (imposing affordability test by reference to the employee’s “required contribution.”). The term “required contribution” is defined at Code § 5000A(e)(1)(B)(i) as the “premium which would be paid by the individual ... for self-only coverage.” Emphasis added.

² Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress, JCS-2-11 (March, 2011) at 265.

³ Internal Revenue Code § 4980H(b)(1)(B).

or equal to 9.5% of “household income.”⁴ Some observers have noted that an employer would not typically know what their employees’ “household income” is, and have questioned how the test would be applied.⁵

Therefore, we commend the IRS for the innovative solution that it discusses at 76 Fed. Reg. 50936 and that it formally proposed on September 14, 2011. Although we will be separately commenting on that safe harbor before the December 13 deadline, we would like to note that the proposed safe harbor is an elegant solution to what could have been a difficult problem for employers. Specifically, we believe that the proposal to measure affordability based upon the employee’s current W-2 wages from the employer is the correct approach and will be broadly supported in the employer community.

Appeals Procedures

Section 1411(f)(2)(A) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by Pub. L. No. 111-152 (hereinafter, PPACA), directs the Secretary of Health and Human Services (HHS) to establish an appeals process in the situation where an employer is notified that an Exchange has made a determination that an employer is not offering affordable coverage to an employee, thereby subjecting the employer to penalties under § 4980H of the Code. In the Exchange functions regulation published on August 17, 2011, the Department of Health and Human Services announced that it was not developing such a regulation at this time, but intended to do so in the future.⁶

The statute provides that the HHS-designed appeals mechanism is “in addition to any rights of appeal the employer may have under subtitle F of” the Internal Revenue Code.⁷ We appreciate that HHS will develop an appeals mechanism in the future. In the interim, we have urged HHS, and we urge the IRS, to clarify how the subtitle F procedures of the Code would apply to an employer that is challenging an assessment based upon an erroneous determination by an Exchange that coverage is unaffordable for an employee. This would be helpful to employers as they await guidance on the HHS appeals mechanism.

Conclusion

Thank you for permitting HighRoads to submit these comments on these important regulations. To re-iterate, we appreciate the thoughtful approach that the IRS took to drafting

⁴ *Id.* at § 36B(c)(2)(C)(i)(II).


⁵ See Allison Bell, “PPACA: IRS Gets Real About Group Health Affordability,” Life & Health National Underwriter (Sept. 14, 2011) (noting that statute could force employers “to track group health plan participants’ household income).

⁶ See 76 Fed. Reg. 51202, 51223.

⁷ PPACA § 1411(f)(2)(A), 42 U.S.C. § 18081(F)(2)(A).

them and we look forward to continuing to participate in the rulemaking process. Please do not hesitate to let us know if we can provide further assistance to the agency as it finalizes these regulations.

Sincerely,



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