Expatriate Health Coverage Clarification Act of 2014,
Interim Guidance

Notice 2015-43

I. PURPOSE

This notice provides interim guidance on the application of certain provisions of the Affordable Care Act[1] to expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans, as defined in the Expatriate Health Coverage Clarification Act of 2014 (EHCCA).[2] This notice does not apply to the health insurance providers fee imposed by § 9010 of the Affordable Care Act (§ 9010 fee). For purposes of the § 9010 fee, Notice 2015-29, 2015-15 IRB 873, applies to the 2014 and 2015 fee years, and future guidance will address the 2016 and later fee years.

The Department of the Treasury (Treasury), Department of Labor (DOL), and Department of Health and Human Services (HHS) (collectively, the Departments) intend to publish proposed regulations implementing and providing guidance on the requirements for expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans. The DOL and HHS have reviewed this notice and have advised Treasury and the Internal Revenue Service (IRS) that they agree with the guidance in this notice.

[1] The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111-152, was enacted on March 30, 2010 (They are collectively referred to as the "Affordable Care Act").
[2] Division M of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113-235.

To assist with the development of the proposed regulations, this notice also invites comments on the application of the EHCCA to expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans.

II. BACKGROUND

Insurance market reforms, taxes, and other requirements enacted by Affordable Care Act. Title I of the Affordable Care Act made various changes to the law with respect to health insurance coverage in the individual and group markets and the law with respect to group health plans. These changes include new requirements for group health plans and group and individual health insurance coverage. These requirements, referred to in this notice as the Affordable Care Act market reform requirements, provide a range of protections for consumers, including the requirements that a plan provide coverage until age 26 if the plan covers dependents, that a plan provide coverage of certain preventive health services with no cost sharing, and that a plan not apply any lifetime or annual dollar limits on essential health benefits as well as the prohibitions on preexisting condition exclusions and waiting periods in excess of 90 days.[3]

The Affordable Care Act also imposes several taxes and fees relating to health coverage, including the § 9010 fee on certain health insurance providers and the fee relating to specified health insurance policies and applicable self-insured health plans

[3] Section 1001 of the Affordable Care Act added new Public Health Service Act (PHS Act) §§ 2711-2719. Section 1563 of the ACA (as amended by ACA § 10107(b)) added Code § 9815(a) and Employee Retirement Income Security Act of 1974, as amended (ERISA) § 715(a) to incorporate the provisions of part A of title XXVII of the PHS Act into the Code and ERISA, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728. Accordingly, these referenced PHS Act sections (i.e., the market reforms) are subject to shared interpretive jurisdiction by the Departments.

under §§ 4375 and 4376 of the Internal Revenue Code (Code) for funding the Patient-Centered Outcomes Research Institute (PCORI fee). The Affordable Care Act also requires that providers of health coverage that constitutes minimum essential coverage report on the coverage under § 6055 and that certain employers report under § 6056 with respect to the health coverage offered to their full-time employees.

Temporary relief from Affordable Care Act market reforms for expatriate plans. On March 8, 2013, the Departments issued Affordable Care Act Implementation Frequently Asked Questions (FAQs) Part XIII, Q&A-1, providing relief from the Affordable Care Act market reform requirements for certain expatriate group health insurance coverage.[4] For plan years ending on or before December 31, 2015, the FAQ provides that, with respect to expatriate health plans, the Departments will consider the requirements of subtitles A and C of Title I of the Affordable Care Act[5] satisfied if the plan and issuer comply with the pre-Affordable Care Act version of Title XXVII of the PHS Act. For purposes of the relief, an expatriate health plan is an insured group health plan with respect to which enrollment is limited to primary insureds who reside outside of their home country for at least six months of the plan year and any covered dependents, and its associated group health insurance coverage.[6] The FAQ also states that coverage provided under an expatriate group health plan is a form of minimum essential coverage under § 5000A. On January 9, 2014, the Departments issued

[4] Frequently Asked Questions about Affordable Care Act Implementation (Part XIII), available at http://www.dol.gov/ebsa/pdf/faq-aca13.pdf and http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/ACA_implementation_faqs13.html.

[5] Subtitles A and C of Title I of the Affordable Care Act generally relate to the market reforms for health plans in the group and individual markets, with the requirements of subtitle A generally becoming effective for plan years beginning six months after enactment and the requirements of subtitle C generally becoming effective for plan years beginning on or after January 1, 2014.

[6] This definition is based on the MLR definition of expatriate health coverage under 45 CFR 153.400(a)(1)(iii).

Affordable Care Act Implementation FAQs Part XVIII, Q&A-6 and Q&A-7, which extended the relief of Affordable Care Act Implementation FAQs Part XIII, Q&A-1 for insured expatriate health plans to subtitle D of Title I of the Affordable Care Act[7] and also provided that the relief under Affordable Care Act Implementation FAQs Part XIII, Q&A-1 (as extended to address the requirements of subtitles A, C, and D of Title I of the Affordable Care Act) would apply for plan years ending on or before December 31, 2016.[8]

PCORI fee. Sections 4375 and 4376 impose the PCORI fee only with respect to individuals residing in the United States. In addition, final regulations under the PCORI fee exempt any specified health insurance policy or applicable self-insured health plan designed and issued specifically to cover employees who are working and residing outside the United States. See §§ 46.4375-1(b)(1)(ii)(B), 46.4376-1(b)(1)(ii)(C).

Expatriate Health Coverage Clarification Act of 2014. The EHCCA was enacted on December 16, 2014 as part of the Consolidated and Further Continuing Appropriations Act. Section 3(a) of the EHCCA generally provides that the Affordable Care Act does not apply to expatriate health plans, employers with respect to expatriate health plans (but solely in the employer's capacity as a plan sponsor of the expatriate health plan), and expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans. The EHCCA generally applies to expatriate health plans issued or renewed on or after July 1, 2015.

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[7] Subtitle D of Title I of the Affordable Care Act sets forth certain requirements relating to Qualified Health Plans and the Marketplace Exchanges.

[8] Frequently Asked Questions about Affordable Care Act Implementation (Part XIII), available at http://www.dol.gov/ebsa/pdf/faq-aca18.pdf and http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/ACA_implementation_faqs18.html

Section 3(b)(1) of the EHCCA generally provides that health coverage provided by an expatriate health plan to qualified expatriates is minimum essential coverage for purposes of § 5000A and any other section of the Code that incorporates the definition of minimum essential coverage in § 5000A(f) by reference. Section 3(b)(2) of the EHCCA provides that EHCCA's exemption from the Affordable Care Act provisions generally does not apply to §§ 6055, 6056, and 4980H, and applies only under certain circumstances to § 4980I. Section 3(c)(1) of the EHCCA excludes an expatriate health plan from the § 9010 fee and is effective for calendar years after 2015. Section 3(c)(2) of the EHCCA provides a special rule for the § 9010 fee for the 2014 and 2015 calendar years.

Section 3(d) of the EHCCA includes definitions and special rules for expatriate health plans and expatriate health insurance issuers. The definition of an expatriate health plan under § 3(d)(2) of the EHCCA includes a number of specific requirements. Section 3(d)(3) of the EHCCA defines three types of qualified expatriates.

III. INTERIM GUIDANCE

General rule. In light of the guidance issued and in effect prior to the enactment of the EHCCA, the Departments have determined that issuers, employers, and plan sponsors need additional time and guidance to modify their current arrangements to comply with the EHCCA's requirements. Until the issuance of further guidance and except as otherwise provided in this notice, taxpayers are generally permitted to apply the requirements of the EHCCA using a reasonable good faith interpretation of the EHCCA. In particular, until the issuance of further guidance, treatment of an expatriate health plan, as defined in Affordable Care Act Implementation FAQs Part XIII, Q&A-1,

and FAQs XVIII, Q&A-6 and Q&A-7, as an expatriate health plan for purposes of the EHCCA is generally a reasonable good faith interpretation. However, these good faith rules do not apply with respect to the PCORI fee and the § 9010 fee. See *Special rule for the PCORI fee* below, and see discussion below under *Effective/Applicability Dates* providing that this notice does not apply to the § 9010 fee.

As indicated earlier, the EHCCA's exemption from the Affordable Care Act provisions generally does not apply to the requirements of §§ 6055 and 6056. Providers of minimum essential coverage must comply with the requirements of § 6055 and applicable large employers (as defined in § 4980H) must comply with the requirements of § 6056, regardless of whether the coverage is offered and/or provided through an expatriate health plan. However, for expatriate health plans, statements to individuals reporting minimum essential coverage under § 6055 or offers of employer coverage under § 6056 may be furnished in electronic format unless the recipient refuses consent. See EHCCA § 3(b)(2).

Special rule for the PCORI fee. Until the issuance of further guidance, issuers and plan sponsors are permitted to determine the PCORI fee by excluding the lives covered under a specified health insurance policy that is issued or renewed on or after July 1, 2015, or under an applicable self-insured health plan for plan years starting on or after July 1, 2015, if the facts and circumstances demonstrate that the policy or plan (1) was designed and issued specifically to cover primarily employees (a) who are working and residing outside the United States, or (b) who are not citizens or residents of the United States but who are assigned to work in the United States for a specific and temporary purpose or who work in the United States for no more than six months of the

policy year or plan year; or (2) was designed to cover individuals who are members of a group of similarly situated individuals for purposes of § 3(d)(3)(C) of the EHCCA under the rule described in *Special rule for groups of similarly situated individuals* below. For purposes of determining whether an insured is residing outside the United States, issuers and plan sponsors may rely on the most recent address on file for the primary insured.[9]

Special rule for groups of similarly situated individuals. Under the EHCCA, enrollment in an expatriate health plan is generally limited to qualified expatriates, as defined in § 3(d)(3) of the EHCCA. The definition of a qualified expatriate includes an individual who is a member of a group of similarly situated individuals described in § 3(d)(3)(C) of the EHCCA.

Until the issuance of further guidance, the Departments will consider an individual to be a member of a group of similarly situated individuals for purposes of § 3(d)(3)(C) if the following conditions are met: (1) the group of individuals satisfies the standards under §§ 3(d)(3)(C)(i) and (ii) of the EHCCA; (2) in the case of a group organized to travel outside the United States, each member of the group is expected to travel or reside outside the United States for at least six months of the policy year (or, in the case of a policy year that is less than 12 months, for at least half of the policy year), and in the case of a group organized to travel within the United States, each member of the group is expected to travel or reside in the United States for not more than 12 months; and (3) the group of individuals meets the test for having associational ties

[9] See also, Treas. Reg. § 46.4377-1(a)(2).

under § 2791(d)(3)(B) through (F) of the PHS Act (42 U.S.C. 300gg-91(d)(3)(B) through (F)).[10]

IV. REQUEST FOR COMMENTS

The Departments anticipate issuing guidance under the EHCCA. Comments are requested on clarifications needed for the statutory definitions of the terms expatriate health plan and qualified expatriate, as well as the interaction of the EHCCA with existing relief for expatriate health plans. It is expected that the comments responding to this notice and Notice 2015-29 will be used to inform proposed regulations that will be issued in the future for further public notice and comment.

Public comments should be submitted no later than [insert date 90 days from issuance]. Comments should include a reference to Notice 2015-43. Send submissions to CC:PA:LPD:PR (Notice 2015-43), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2015-43), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically to the following e-mail address: Notice.comments@irscounsel.treas.gov. Please include "Notice 2015-43" in the subject line of any electronic communication. All material submitted will be available for public inspection and copying.

[10] Pursuant to § 3(d)(3)(C)(iii) of the EHCAA, for purposes of this interim guidance, the Secretary of HHS, in consultation with the Secretaries of Labor and the Treasury, has determined that access to health insurance and other related service and support in multiple countries is required in these circumstances.

V. EFFECTIVE/APPLICABILITY DATES

This notice applies to policies that are issued or renewed on or after July 1, 2015, and plan years that start on or after July 1, 2015. This notice does not apply for purposes of the § 9010 fee. Notice 2015-29 addresses the application of the EHCCA to the § 9010 fee for the 2014 and 2015 fee years. Future guidance will address the 2016 and later fee years.

VI. DRAFTING INFORMATION

The principal author of this notice is Lisa Mojiri-Azad of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Ms. Mojiri-Azad at (202) 317-5500 (not a toll-free call).