



AMERICAN BENEFITS COUNCIL

September 6, 2016

Submitted via email to Notice.comments@irs.counsel.treas.gov

CC:PA:LPD:PR (REG-109086-15)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Premium Tax Credit NPRM VI

Dear Sir or Madam:

I write on behalf of the American Benefits Council (“Council”) to provide comment in connection with proposed regulations described in the above-referenced Notice of Proposed Rulemaking (“NPRM”) which was issued by the Department of the Treasury and the Internal Revenue Service (collectively, the “Department”). While the proposed regulations generally relate to the health insurance premium tax credit and individual shared responsibility, certain aspects of the regulations impact employers, including how they offer coverage, their potential liability under the employer shared responsibility provisions, and their obligations under the information reporting requirements of the Affordable Care Act (“ACA”). We are specifically commenting on the portion of the NPRM that addresses opt-out arrangements and the determination of an employee’s required contribution for coverage.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

In the NPRM, the Department reiterates its position as previously set forth in Notice

2015-87 with regard to “unconditional opt-out payments” (that is, additional compensation offered to an employee who chooses to decline coverage in a group health plan without having to meet any conditions to do so). The Department believes that an employee who forgoes an unconditional opt-out payment is in an economically equivalent position to an employee who elects a salary reduction to help pay for coverage. Therefore, if an employer offers additional compensation to an employee who chooses to opt out of employer-sponsored health coverage, the additional compensation offered will count against the affordability of the health coverage (effectively making the coverage less affordable for the employee). This, in turn, would make it easier for the employee to qualify for a premium tax credit (if he or she declines the coverage and chooses to purchase individual insurance through a Marketplace), and makes it more likely the employer could be subject to a penalty under the employer shared responsibility rules for not offering coverage that meets the affordability standard.

The NPRM, however, provides that amounts made available under a *conditional* opt-out arrangement will not count against affordability if the arrangement satisfies certain conditions. This type of arrangement is referred to as an “eligible opt-out arrangement” in the NPRM. As proposed, an eligible opt-out arrangement would be an arrangement under which the employee’s right to receive the opt-out payment is conditioned on the following: (1) the employee declining to enroll in the employer-sponsored coverage; and (2) the employee providing reasonable evidence that the employee (and all other individuals for whom the employee reasonably expects to claim a personal exemption deduction for the taxable year or years that begin or end in or with the employer’s plan year to which the opt-out arrangement applies) has or will have minimum essential coverage (other than coverage offered in the individual insurance market, and whether or not obtained through the Marketplace) during the period of coverage to which the opt-out arrangement applies.

With regard to the “eligible opt-out arrangement” requirements, the NPRM provides that “reasonable evidence of alternative coverage may include the employee’s attestation that the employee and all other members of the employee’s expected tax family have or will have minimum essential coverage (other than coverage in the individual market, whether or not obtained through the Marketplace) for the relevant period.” Also, the evidence of coverage must be provided no less frequently than every plan year to which the eligible opt-out arrangement applies, and must be provided no earlier than a reasonable period before the commencement of the period of coverage to which the eligible opt-out arrangement applies.

Notice 2015-87 provided that the Department’s position on opt-out arrangements (as described in the notice) would generally apply after December 16, 2015, unless the opt-out arrangement was “adopted” on or before December 16, 2015. If the opt-out arrangement was adopted on or before December 16, 2015, Notice 2015-87 anticipated that the Department’s position on opt-outs would “apply only for periods after the issuance of final regulations.” The NPRM suggests the regulations regarding opt-out

arrangements will be applicable for plan years on or after January 1, 2017, with regard to arrangements that were “adopted” on or before December 16, 2015. This anticipated effective date appears to be premised on the finalization of these regulations by the end of 2016.

The NPRM also appears to extend the “relief-eligible” treatment described in Notice 2015-87 to certain opt-out arrangements reflected in collectively bargained arrangements that were in effect prior to December 16, 2015. Specifically, an unconditional opt-out arrangement that is required under the terms of a collectively bargained agreement in effect before December 16, 2015 will be treated as having been adopted prior to December 16, 2015 for purposes of the relief. The relief provides that employers participating in the collective bargaining agreement are not required to increase the amount of an employee’s required contribution for purposes of those rules until the later of: (1) the beginning of the first plan year that begins following the expiration of the collective bargaining agreement in effect before December 16, 2015 (disregarding any extensions to the collective bargaining agreement after December 16, 2015); and (2) the applicability date of these regulations with respect to the employer shared responsibility rules or the information reporting rules. (This relief will apply to successor employers as well.)

COMMENTS

In previous written comments, the Council has requested that opt-out arrangements should not be treated by the Department as analogous to salary reduction arrangements and that doing so is unlikely to change an employee’s actual cost for coverage. Treating such opt-out payments as analogous to salary reduction agreements is unlikely to result in any change to the employee’s actual cost for coverage and is likely to cause some employees to lose access to opt-out payments they otherwise would have been provided absent the NPRM.

For example, take a typical scenario where an employee’s annual salary is \$35,000 and the employer offers a health plan where the employer pays 80% of the premium and the employee pays 20% of the premium, but also offers the employee an additional \$200 monthly in taxable wages to the employee for opting out. Under the Department’s position as described in Notice 2015-87 and the NPRM, by eliminating the availability of the extra \$200 monthly payment for opting-out, the coverage is considered to become less affordable for the employee. This is because the employee’s choice to elect coverage would cause them to forego the \$200 opt-out payment.

The unfortunate result of the Departments’ rule will be that employers who currently or might utilize opt-out payments will likely cease or forego providing such general opt-out payments. Employees will be financially disadvantaged as a result of this required change because the employee’s actual premium contribution for coverage is likely to remain unchanged. All that is likely to change is that these employees who

continue to elect to decline coverage will no longer have access to the opt-out payments – payments that these employees might otherwise rely on to assist with meeting household expenses (such as rent or groceries) or saving for retirement (through additional 401(k) plan contributions).

Notwithstanding the above, the Council appreciates that the NPRM includes the concept of an “eligible opt-out arrangement.” As noted above, an eligible opt-out arrangement is conditioned in part on the employee providing reasonable evidence that the employee and all other individuals for whom the employee reasonably expects to claim a personal exemption deduction for the taxable year or years that begin or end in or with the employer’s plan year to which the opt-out arrangement applies have or will have minimum essential coverage (other than coverage in the individual market, whether or not obtained through the Marketplace) during the period of coverage to which the opt-out arrangement applies.

The NPRM provides that an employee cannot participate in an eligible opt-out arrangement if such employee, or anyone in such employee’s “expected tax family” has or will have individual market coverage. We urge the Department to clarify in the final regulations that Medicare, TRICARE, Medicaid, or other similar government-sponsored coverage which qualifies as minimum essential coverage, also constitutes minimum essential coverage that would allow an employee to qualify to participate in an eligible opt-out arrangement as described in the NPRM. While we assume that the Department intends for such government-sponsored minimum essential coverage to satisfy the requirements of the NPRM, it would be helpful if this could be stated clearly in any final rule.

The Council also is supportive of the rule set forth in the NPRM that permits an employer to rely on the employee’s attestation that the employee and the employee’s tax family has, or will have, minimum essential coverage for the coverage period for purposes of obtaining “reasonable evidence.” Requiring further evidence of the alternative coverage would create a substantial administrative burden given that employers generally have little (if any) knowledge of an employee’s coverage options and/or enrollment outside of the group health plans arrangements offered by the employer. Accordingly, requiring evidence beyond an employee attestation would likely make it very difficult, if not impossible, for many employers to maintain an eligible opt-out arrangement.

The Council also supports the rule in the NPRM providing that if an employee or family member’s alternative coverage subsequently terminates, the amount of an opt-out payment made available under an eligible opt-out arrangement may continue to be excluded from the employee’s required contribution for the remainder of the period of coverage to which the opt-out payment originally applied (regardless of whether the opt-out payment is required to be adjusted or terminated due to the loss of alternative coverage, and regardless of whether the employee is required to provide notice of the

loss of alternative coverage to the employer). A contrary rule would be administratively onerous. We therefore encourage the Department to preserve this provision as part of final rulemaking.

With regard to the effective date of these rules, the Council appreciates the extension of the “relief-eligible” opt-out arrangements (adopted prior to December 16, 2015) to collectively bargained arrangements. It appears the intent of the Department is for these rules to generally apply for plan years on or after January 1, 2017. The Council believes this effective date will only be manageable for plan sponsors if the final regulations do not significantly deviate from the NPRM – particularly with regard to any obligations imposed on plan sponsors with respect to the design, or administration of these programs. If, in response to comments, the Department contemplates making material changes to the rules set forth in the NPRM relating to opt-out arrangements, the Council strongly urges the Department to re-propose the rules or, at a minimum, delay the effective date of any final rule to allow plan sponsors adequate time to implement any new requirements.

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Thank you for considering these comments submitted in response to the NPRM. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn Wilber". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Kathryn Wilber
Senior Counsel, Health Policy