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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 57

[TD 9711]

RIN 1545-BM52

Health Insurance Providers Fee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations that provide rules for the definition of a covered entity for purposes of the fee imposed by section 9010 of the Patient Protection and Affordable Care Act, as amended. The temporary regulations are necessary to clarify certain terms in section 9010. The temporary regulations affect persons engaged in the business of providing health insurance for United States health risks. The text of the temporary regulations also serves as the text of the proposed regulations (REG-143416-14) published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §§57.10 and 57.10T.

FOR FURTHER INFORMATION CONTACT: Rachel S. Smith, (202) 317-6855 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

## **Background**

Section 9010 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (124 Stat. 119 (2010)), as amended by section 10905 of PPACA, and as further amended by section 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 that provide health insurance for United States health risks. All references in this preamble to section 9010 are references to the ACA. Section 9010 did not amend the Internal Revenue Code (Code) but contains cross-references to specified Code sections. Unless otherwise indicated, all other references to subtitles, chapters, subchapters, and sections in this preamble are references to subtitles, chapters, subchapters, and sections in the Code and related regulations. All references to “fee” in this preamble are references to the fee imposed by section 9010.

On November 27, 2013, the Treasury Department and the IRS issued the Health Insurance Providers Fee regulations as final regulations (TD 9643). On August 12, 2014, the Treasury Department and the IRS issued Notice 2014-47, 2014-35 IRB 522, to provide further guidance for the 2014 fee year on the definition of a covered entity. The temporary regulations provide further guidance on the definition of a covered entity for the 2015 fee year and subsequent fee years.

## General Overview

Section 9010(a) imposes an annual fee on each covered entity engaged in the business of providing health insurance. The fee is due by the annual date specified by the Secretary, but in no event later than September 30<sup>th</sup> of each calendar year in which a fee must be paid (fee year).

Section 9010(b) requires the Secretary to determine the annual fee for each covered entity based on the ratio of the covered entity's net premiums written for health insurance for any United States health risk that are taken into account for the calendar year immediately before the fee year (data year) to the aggregate net premiums written for health insurance of United States health risks of all covered entities that are taken into account during the data year. In calculating the fee, the Secretary must determine each covered entity's net premiums written for United States health risks based on reports submitted to the Secretary by the covered entity and through the use of any other source of information available to the Secretary.

Section 9010(c)(1) defines a covered entity as any entity that provides health insurance for any United States health risk during each fee year. Section 9010(c)(2) excludes the following entities from being covered entities: (A) Any employer to the extent that the employer self-insures its employees' health risks; (B) any governmental entity; (C) any entity (i) that is incorporated as a nonprofit corporation under a State law, (ii) no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in section 501(h)), and which

does not participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office, and (iii) more than 80 percent of the gross revenues of which is received from government programs that target low income, elderly, or disabled populations under titles XVIII, XIX, and XXI of the Social Security Act; and (D) any entity that is described in section 501(c)(9) (a voluntary employees' beneficiary association (VEBA)) and is established by an entity (other than by an employer or employers) for purposes of providing health care benefits.

Section 9010(c)(3)(A) provides a controlled group rule under which all persons treated as a single employer under section 52(a) or (b) or section 414(m) or (o) are treated as a single covered entity. Section 9010(c)(4) provides that, if more than one person is liable to pay the fee on a single covered entity by reason of the application of the controlled group rule, then all such persons are jointly and severally liable for payment of the fee.

Section 57.2(c)(1) of the Health Insurance Providers Fee regulations defines the term controlled group to mean a group of two or more persons, including at least one person that is a covered entity, that is treated as a single employer under section 52(a), 52(b), 414(m), or 414(o). Section 57.2(c)(3)(ii) further provides that a person is treated as being a member of the controlled group if it is a member of the group at the end of the day on December 31<sup>st</sup> of the data year.

## **Explanation of Provisions**

Following the publication of the final regulations in TD 9643, the Treasury Department and the IRS received questions about how to apply the exclusions under section 9010(c)(2) to the general definition of a covered entity. The Treasury Department and the IRS also received questions about whether covered entities must report information on net premiums written for certain members of a controlled group. Notice 2014-47 was subsequently issued to resolve those questions for the 2014 fee year. The temporary regulations adopt the general approach of Notice 2014-47 to resolve those questions for the 2015 fee year and each subsequent fee year.

Application of Exclusions under Section 9010(c)(2)

Notice 2014-47 provided that, for the 2014 fee year, the Treasury Department and the IRS would not treat any entity as a covered entity if it would be excluded from the definition of a covered entity because it qualified for one of the exclusions under section 9010(c)(2) either for the entire 2013 data year or for the entire 2014 fee year, which began on January 1, 2014. As described later in this preamble, the controlled group rules under section 9010(c)(3)(A) and §57.2(c)(1) do not apply for the limited purpose of determining whether an entity qualifies for an exclusion under section 9010(c)(2). Notice 2014-47 further provided that the entity should not report its net premiums written for the 2013 data year because the Treasury Department and the IRS would not treat such an entity as a covered entity.

The temporary regulations amend the rules in the existing Health Insurance Providers Fee regulations to incorporate the general approach in

Notice 2014-47. Specifically, the temporary regulations provide that, for the 2015 fee year and each subsequent fee year, an entity qualifies for an exclusion under section 9010(c)(2) if it qualifies for an exclusion either for the entire data year ending on the prior December 31<sup>st</sup> or for the entire fee year beginning on January 1<sup>st</sup>. An entity that qualifies for an exclusion under this rule is not a covered entity for that fee year and must not report its net premiums written.

The temporary regulations also impose two additional requirements. First, the temporary regulations generally impose a consistency requirement that binds an entity to its original selection of either the data year or the fee year (its test year) to determine whether it qualifies for an exclusion under section 9010(c)(2) for the 2015 fee year and each subsequent fee year. For example, if an entity selects the 2014 data year as its test year for the 2015 fee year, it must use the data year as its test year for the 2016 fee year and each subsequent fee year.

Second, the temporary regulations impose a special rule for an entity that uses the fee year as its test year. A special rule is important in this context because the fee is due by September 30<sup>th</sup> of the fee year, and it may not be clear until the end of the fee year whether an entity will in fact qualify for an exclusion. If an entity using the fee year as its test year does not report its net premiums written because it expects to qualify for an exclusion under section 9010(c)(2), but the entity ultimately does not qualify for an exclusion, the temporary regulations require the entity to use the data year as its test year in all subsequent fee years. In this circumstance, the entity will necessarily be a covered entity that is required to report its net premiums written for the

immediately following fee year. In addition, an entity that does not timely file a report in a fee year, and that is a covered entity for that fee year because it does not qualify for an exclusion, may be subject to penalties, including the failure to report penalty under section 9010(g)(2).

For example, assume that for the 2015 fee year an entity used the fee year as its test year and reasonably expected to qualify for the section 9010(c)(2)(C) exclusion for that fee year. As a result, the entity did not report its net premiums written and it was not treated as a covered entity for purposes of the 2015 fee calculation. Further assume that as of December 31, 2015, the entity did not satisfy the 80 percent minimum gross revenues requirement of section 9010(c)(2)(C)(iii) and therefore did not qualify for this or any other exclusion under section 9010(c)(2) for the 2015 fee year. Under the temporary regulations, this entity must use the data year for each subsequent fee year to determine whether it qualifies for an exclusion under section 9010(c)(2). Thus, for the 2016 fee year, because this entity must determine its eligibility for an exclusion based on the 2015 data year, it would not be eligible for an exclusion under section 9010(c)(2) for the 2016 fee year and must submit a report in that year. This entity must also use the data year as its test year for the 2017 fee year and each subsequent fee year.

The Treasury Department and the IRS request comments regarding whether there are any circumstances in which an entity should be permitted by the IRS to change its test year, and if so, what conditions and limitations should apply to any such change.

## Reporting for Controlled Group Members

Notice 2014-47 provided that a controlled group must report net premiums written only for each person who is a controlled group member at the end of the day on December 31<sup>st</sup> of the data year and who would qualify as a covered entity in the fee year if it were a single-person covered entity (that is, not a member of a controlled group). The temporary regulations incorporate this rule for the 2015 fee year and each subsequent fee year. Therefore, a controlled group must not report net premiums written for any controlled group member who would fail to be a covered entity in the fee year if it were not a member of a controlled group. Although that person's net premiums written are not taken into account, it remains a member of the controlled group and is jointly and severally liable for the fee amount allocated to the controlled group.

## **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

## **Drafting Information**

The principal author of these regulations is Rachel S. Smith, IRS Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

## **List of Subjects in 26 CFR Part 57**

Health Insurance, Reporting and recordkeeping requirements.

## **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 57 is amended as follows:

### **PART 57--HEALTH INSURANCE PROVIDERS FEE**

Paragraph 1. The authority citation for part 57 continues to read in part as follows:

Authority: 26 U.S.C. 7805; sec. 9010, Public Law 111–148 (124 Stat. 119 (2010)).

\* \* \* \* \*

Par. 2. Section 57.2 is amended by:

1. Redesignating paragraph (b)(3) as paragraph (b)(4).
2. Adding paragraph (b)(3).
3. Revising paragraph (c)(3)(ii).

The addition and revision read as follows:

### **§57.2 Explanation of terms.**

\* \* \* \* \*

(b) \* \* \*

(3) [Reserved]. For further guidance, see §57.2T(b)(3).

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) [Reserved]. For further guidance see §57.2T(c)(3)(ii).

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Par. 3. Section 57.2T is added to read as follows:

§57.2T Explanation of terms (temporary).

(a) through (b)(2) [Reserved]. For further guidance, see §57.2(a) through (b)(2).

(3) Application of exclusions--(i) Test year. An entity qualifies for an exclusion described in §57.2(b)(2)(i) through (iv) if it so qualifies in its test year. The term test year means either the entire data year or the entire fee year.

(ii) Consistency rule. For purposes of paragraph (b)(3)(i) of this section, an entity must use the same test year as it used in its first fee year beginning after December 31, 2014, and in each subsequent fee year. Thus, for example, if an entity used the 2014 data year as its test year for the 2015 fee year, that entity must use the data year as its test year for each subsequent fee year.

(iii) Special rule for fee year as test year. For purposes of paragraph (b)(3) of this section, any entity that uses the fee year as its test year but ultimately does not qualify for an exclusion described in §57.2(b)(2)(i) through (iv) for that entire fee year must use the data year as its test year for each subsequent fee year.

(b)(4) through (c)(3)(i) [Reserved]. For further guidance, see §57.2(b)(4) through (c)(3)(i).

(ii) A person is treated as being a member of the controlled group if it is a member of the group at the end of the day on December 31<sup>st</sup> of the data year. However, a person's net premiums written are included in net premiums written for the controlled group only if the person would qualify as a covered entity in the fee year if the person were not a member of the controlled group.

(d) through (n) [Reserved]. For further guidance, see §52.7(d) through (n).

Par. 4. Section 57.10 is revised to read as follows:

§57.10 Effective/applicability date.

(a) In general. Except as provided in paragraph (b), §§57.1 through 57.9 apply to any fee that is due on or after September 30, 2014.

(b) [Reserved]. For further guidance, see §57.10T(b).

Par. 5. Section 57.10T is added to read as follows:

§57.10T Effective/applicability date (temporary).

(a) [Reserved]. For further guidance, see §57.10(a).

(b) Paragraphs (b)(3) and (c)(3)(ii) of §57.2T. Paragraphs (b)(3) and (c)(3)(ii) of §57.2T apply on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

(c) Expiration date. Paragraphs (b)(3) and (c)(3)(ii) of §57.2T expire on February 23, 2018.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: February 19, 2015.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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