



CLIENT BULLETIN

IRS Publishes Regulations on PPACA "Effectiveness Fee"

The IRS published in the *Federal Register* proposed regulations on the fees (effectiveness fees) imposed by the *Patient Protection and Affordable Care Act* (PPACA) on issuers of certain health insurance policies and plan sponsors of certain self-insured health plans to fund the Patient-Centered Outcomes Research Trust Fund created by the PPACA. This regulation also contains a request for comments and provides notice of public hearing on these proposed regulations.

The proposed rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-17/pdf/2012-9173.pdf> or by "[clicking here.](#)"

The *Preamble* to the regulation notes Sections 4375 and 4376 of the Code impose fees on issuers of specified health insurance policies and plan sponsors of applicable self-insured health plans, and Section 4377 contains special rules that apply to these issuers and plan sponsors with respect to these fees under the PPACA. A multiemployer group health plan that self-insures is an "applicable self-insured health plan."

In particular, Section 4375(a) imposes a fee on an issuer of a specified health insurance policy for each policy year ending on or after October 1, 2012, and before October 1, 2019. The fee is two dollars (one dollar in the case of policy years ending before October 1, 2013) multiplied by the average number of lives covered under the policy. For policy years ending on or after October 1, 2014, the fee is increased based on increases in the projected per capita amount of National Health Expenditures. The fee imposed shall be paid by the issuer of the policy.

Similarly, Section 4376 imposes a fee on a plan sponsor of an applicable self-insured health plan for each plan year ending on or after October 1, 2012, and before October 1, 2019. For the plan year ending prior to October 1, 2013, the fee is one dollar multiplied by the average number of lives covered under the plan for the plan year. For the plan year ending on or after October 1, 2013 and before October 1, 2014, the fee is two dollars multiplied by the average number of lives covered under the plan for the plan year. For plan years ending on or after October 1, 2014, the fee is increased based on increases in the projected per capita

amount of National Health Expenditures. These increased fees will be announced at future dates. The fee shall be paid by the plan sponsor, which is the Board of Trustees in a multiemployer group health plan.

Source of Funds for Paying the Fee for Self-insured Health Plans

The fee under Section 4376 is imposed on the plan sponsor of an applicable self-insured health plan. Under the statute and the proposed regulations, the fee must be calculated using the applicable dollar amount in effect for the plan year (for example, one dollar for plan years ending on or after October 1, 2012, and before October 1, 2013) and one of the three permitted methods for determining the average number of lives covered under the plan during the plan year.

The proposed regulations provide that an applicable self-insured health plan does include a plan that is established or maintained solely for the benefit of former employees (commonly referred to as a retiree-only plan).

The *Preamble* notes several commentators requested that the guidance clarify that, in the case of an applicable self-insured health plan that is established or maintained by a board of trustees, plan assets (for example, amounts held in a trust) **or** the employer contributions to the plan could be used to pay the fee under Section 4376.

The *Preamble* also notes that because the use of plan assets to pay the fee under Section 4376 may have implications under various state and Federal laws (including, for example, *ERISA*'s fiduciary provisions), the question of what the permissible sources of funds are for paying the fee under Section 4376 is an issue that is outside the scope of these proposed regulations.

The IRS has consulted the Department of Labor (DOL) about the appropriate sources for self-insured plans to pay the fee due under Section 4376. The DOL has advised the IRS that it is considering permissible funding sources for these fee payments by plan sponsors that are subject to *ERISA*'s fiduciary provisions.

Calculation of the Fee for Self-Insured Plans

The fee imposed on the plan sponsor of an applicable self-insured health plan under Section 4376 is based on the *average number of lives* covered under the plan, using one of three alternative methods.

First, a plan sponsor may determine the average number of lives covered under the plan for the plan year by calculating the sum of the lives covered for each day of the plan year and dividing that sum by the number of days in the plan year ("*the actual count method*").

Second, a plan sponsor may determine the average number of lives covered under the plan for the plan year by adding the totals of lives covered on one date in each quarter, or an equal number of dates for each quarter, and dividing the total by the number of dates on which a count was made ("*the snapshot method*"). For this purpose, the number of lives covered on a date may be determined as equal to

either the sum of the actual number of lives covered on the dates (*the snapshot count method*) or the sum of (1) the number of participants with self-only coverage on that date, plus (2) the product of the number of participants with coverage other than self-only coverage on the date and 2.35 (*the snapshot factor method*).

Third, a plan sponsor may determine the average number of lives covered under the plan for the plan year based on a formula that includes the number of participants actually reported on the Form 5500 for the applicable self-insured health plan for the plan year ("*the Form 5500 method*"). For a plan providing only self-only coverage, under the Form 5500 method the plan sponsor may treat the average number of covered lives under the plan for a plan year as the sum of the total participants at the beginning and the end of the plan year, in each case as reported on the Form 5500, divided by two.

For plans providing coverage that is not limited to the self-only coverage, the Form 5500 does not identify whether the coverage is self-only or family (or some other non-self-only coverage). Therefore, the number of participants reported on the Form 5500 generally is converted to covered lives by multiplying the number of participants on each date by a factor of 2.0. (This factor is lower than the 2.35 factor used in the *snapshot factor method* because this factor takes into account participants with self-only coverage that covers one life, as well as participants with other coverage that covers two or more lives.)

Accordingly, under the *Form 5500 method* for plans that provide coverage not limited to self-only coverage, a plan sponsor may simply add the number of participants reported for the beginning of the plan year to the number reported for the end of the plan year to determine the average number of covered lives for the plan year.

The proposed regulations direct a plan sponsor to apply a single method in determining the average number of lives covered under the plan for the entire plan year. However, a plan sponsor is not required to use the same method from one plan year to the next.

The Payment Of The Fee – When is it Due?

The proposed regulations require the fee to be reported and paid in full only once a year on IRS Form 720. **The due date will be July 31 of each year.** A return will generally cover policy years (Section 4375 insured plans) and plan years (Section 4376 self-insured plans) that end during the preceding calendar year. The instructions for Form 720 inform filers how and when to file and pay. These instructions require that the filer have an Employer Identification Number (EIN) to use in filing the Form 720.

These proposed regulations do not impose any specific recordkeeping requirements for calculating the fees due but the instructions for Form 720 have general information on Form 720 recordkeeping requirements. The IRS will be revising the current Form 720 to reflect these *PPACA* fees.

The Payment Of The Fee – How to Submit Payment?

The *Preamble* notes the Form 720 may be filed electronically. See www.irs.gov/efile for more information on e-filing the Form 720. Although electronic filing of the Form 720 is not required, the IRS *encourages filers to file the Form 720 electronically*. A responsible party wishing to file the Form 720 electronically must submit it through an approved transmitter software developer. The IRS has posted on its website contact information for all approved Form 720 e-file transmitters at: <http://www.irs.gov/efile/lists/0,,id=176152,00.html>. To electronically file the Form 720, the filer will incur the cost of the required service fee for online submission.

Although the *Preamble* noted the IRS has established limited third-party reporting and payment regimes in certain instances for other fees, the IRS does not intend to adopt such a program for the fee under Section 4375 or the fee under Section 4376 because the benefits of such a program would be outweighed by the administrative burdens, particularly given the limited period over which the fee will apply.

Effective Date

These regulations are proposed to apply to policy and plan years ending on or after October 1, 2012 and before October 1, 2019. Issuers and plan sponsors may rely on these proposed regulations for guidance pending the issuance of final regulations.

Final regulations will be effective as of the date these proposed regulations are published in the *Federal Register*. If and to the extent future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will not be applied retroactively.

Comments

Written or electronic comments must be received by July 16, 2012. Send submissions to:

CC:PA:LPD:PR (REG-136008-11)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

or send comments electronically via the Federal eRulemaking Portal at:

<http://www.regulations.gov/#!submitComment;D=IRS-2011-0028-0001>

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