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Firm Seeks Confirmation That Benefit Pools Qualify as Minimum Essential Coverage.

Erin Sweeney of Dickstein Shapiro LLP, writing on behalf of the TML Intergovernmental Employee Benefits Pool, has asked the IRS to make clear in proposed healthcare regulations (REG-132455-11) that health benefit pools qualify as minimum essential coverage, thus triggering a reporting obligation under section 6055.

October 3, 2013

Internal Revenue Service

Re: Information Reporting of Minimum Essential Coverage

Sir or Madam:

We write on behalf of the TML Intergovernmental Employee Benefits Pool ("TML IEBP") to comment in connection with the notice of proposed rulemaking ("Proposed Rule") published in the Federal Register on September 9, 2013, by the Department of the Treasury and the Internal Revenue Service. The Proposed Rule provides guidance relating to the information reporting requirements of section 6055 of the Internal Revenue Code of 1986, as amended ("Code"), as added by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010.

In legal terms, TML IEBP is a "risk pool" organized in 1989 pursuant to Chapter 172 of the Texas Local Government Code. A factual and functional description of TML IEBP would be to call it an interlocal cooperation employee benefits pool. A number of these pools have been formed across the country through the interlocal cooperation statutes enacted by the respective states. These entities provide pooled health benefits coverage between local governmental units. Often these pools are self-funded through the combined contributions of the members. TML IEBP is a Texas intergovernmental risk pool providing group accident and health benefits coverage to employees, officials, and retirees of political subdivisions of the State of Texas and to their dependents. This governmental pool has been successfully providing benefits to governmental entities in Texas since 1989.

We write today seeking confirmation that health coverage provided by TML IEBP may qualify as minimum essential coverage, thus triggering a reporting obligation under Section 6055 of the Code. We seek this confirmation because the regulations addressing the Shared Responsibility for Not Maintaining Minimum Essential Coverage ("Individual Mandate Regulations") are not clear that health benefit pools such as TML IEBP constitute minimum essential coverage because the term "group health insurance coverage" appears to modify the term "governmental plan". This is significant because many State health benefit pools, including TML IEBP (which are clearly "governmental plans" under section 2791(d)(8) of the Public Health Service Act ("PHSA")), are exempted from State laws regulating insurance. Without clarification, the proposed rules could be interpreted to exclude health benefit pool coverage provided by governmental plans from the definition of minimum essential coverage.

Specifically, the Individual Mandate Regulations define an “eligible employer-sponsored plan” as “[g]roup health insurance coverage offered by, or on behalf of, an employer to an employee that is . . . [a] governmental plan (within the meaning of section 2791(d)(8) of the [PHSA] (42 U.S.C. 300gg-91(d)(8))) . . .”

“Group health insurance coverage” is further defined in the Individual Mandate Regulations as having the same meaning as in section 2791(b) of the PHSA, 42 U.S.C. 300gg-91(b)(4). Under the PHSA, group health insurance coverage “means, in connection with a group health plan, health insurance coverage offered in connection with such plan.”

“Health insurance coverage” is defined in the Individual Mandate Regulations as having the same meaning as in section 2791(b)(1) of the PHSA, 42 U.S.C. 300gg-91(b)(1). Under the PHSA, health insurance coverage “means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer.” Although “health insurance issuer” could be read as applying only to “health maintenance organization contract”, given that policies and certificates are issued by health insurance issuers, the better reading of the language appears to be that “health insurance issuer” applies to each of the delineated items — policies, certificates, plan contracts or health maintenance organization contracts.

Finally, “health insurance issuer” is defined in the Individual Mandate Regulations as having the same meaning as in section 2791(b)(2) of the PHSA, 42 U.S.C. 300gg-91(b)(2). Under the PHSA, health insurance issuer “means an insurance company, insurance service, or insurance organization which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance. Such term does not include a group health plan.” (parentheticals omitted).

While TML IEBP is subject to limited regulation by the Texas Department of Insurance (e.g., financial oversight by the required filing of audited financial statements with the Texas Department of Insurance on an annual basis, application of certain Texas Insurance Code mandated benefits provisions, and the like), TML IEBP is not a health insurance issuer because it is not licensed by the Texas Department of Insurance. It is, however, a governmental plan.

We believe that health benefit pools such as TML IEBP and similar state health benefit pools are examples of coverage that Treasury has authority to clarify — and ought to clarify — are subject to the minimum essential coverage reporting requirements even though the health benefit pools are not subject to State laws regulating insurance. Of course, if Treasury determined that TML IEBP’s health benefit pools constituted minimum essential coverage, TML IEBP would need to separately demonstrate affordability and minimum value with respect to the employer shared responsibility payment.

Thank you for considering this comment submitted in response to the Proposed Rule issued with regard to the information reporting requirements of section 6055. If you have any questions or would like to discuss these comments further, please contact the undersigned at (202) 420-3477.

Sincerely,

Erin M. Sweeney

sweeneye@dicksteinshapiro.com

DicksteinShapiro LLP

Washington, DC

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