

## Final Regs Describe Requirements For Individual Mandate Under Affordable Care Act

◆ TD 9632, TDNR JL-2152

The IRS has issued final regs on the individual shared responsibility provision, also known as the “individual mandate.” The *Patient Protection and Affordable Care Act* (PPACA) imposed the individual mandate, beginning January 1, 2014. While the final regs provide relief on some issues, they generally track the proposed regs (NPRM REG-148500-12) without change. The final regs apply to tax years ending after December 31, 2013.

■ **CCH Take Away.** “The regulations do a good job of implementing Sec. 5000A,” Harvey Cotton, principal, Ropes & Gray LLP, Boston, told CCH. “People rarely talk about how complex a piece of legislation the Affordable Care Act is,” Cotton said. “There are so many pieces to the puzzle. As guidance has been issued, we have seen a recognition by the regulators that they can’t strive for perfection. The IRS has thought about how this law can work most effectively and has done a good job of determining the practical impact of its guidance.”

■ **Comment.** “The IRS is providing information to individuals who need to act with some degree of certainty,” Cotton added. “The government is doing what it can to provide affected individuals with the best information needed to comply with the individual mandate by the effective date. The roll-out will have its hiccups, but the process will improve going forward.”

### Individual mandate

The PPACA is designed to expand health care coverage to millions of Americans who currently lack coverage or who do not have adequate coverage. The individual mandate requires each individual to have basic health insurance coverage, which the PPACA refers to as minimum essential coverage (MEC). An individual who lacks MEC and who does not qualify for an

exemption from the coverage requirement must make a shared responsibility payment.

### Basics

One of the key issues under the individual mandate is whether an individual has access to health insurance coverage and whether that coverage qualifies as MEC. The code and regs provide extensive guidance to determine whether particular coverage is MEC.

MEC includes employer-sponsored coverage, Medicare and Medicaid, and other government-provided coverage. Another feature of PPACA is the establishment of affordable insurance marketplaces, or exchanges, that will seek to provide access to cheaper insurance for individuals and small employers. Insurance from a marketplace is MEC.

Another key issue addressed in the Tax Code and the final regs is the application of statutory exemptions that exempt individuals from the mandate even though they do not have health insurance. Exemptions can be for religious grounds, hardship,

lack of affordable coverage, membership in an Indian tribe, or a short coverage gap, among others.

### Medicaid

Medicaid health coverage for lower-income individuals generally qualifies as MEC. However, the proposed and final regs exclude limited Medicaid coverage for pregnant women from treatment as MEC. The preamble to the final regs notes that states may exercise an option to provide pregnant women with full Medicaid coverage. The IRS also indicated that for 2014, women with Medicaid pregnancy benefits will not owe the shared responsibility payment, because they may not be able to obtain other MEC in time.

■ **Comment.** Some women’s groups were concerned that treatment of Medicaid pregnancy benefits as MEC would deprive pregnant women of the opportunity to qualify for the health insurance premium

*Continued on page 420*

### *IRS Proposes To Increase Fees For Taxpayers Applying For Installment Agreements And Offers In Compromise*

The IRS has issued proposed regs that, effective January 1, 2014, would increase the user fees charged to taxpayers who seek to pay their taxes either through an installment agreement or an offer in compromise (OIC). The IRS noted that, under OMB rules, it must charge user fees and is supposed to recover full cost.

■ **Comment.** The IRS would increase the fees even though many practitioners believe that the user fees are counterproductive, discouraging taxpayers from entering into arrangements with the IRS to pay their taxes. Due to budget pressures, however, the IRS request for increased fees likely to move forward without Congressional interference.

**Installment agreements.** The IRS currently charges \$105 for an installment agreement. The fee is reduced to \$52 for a direct debt agreement, authorizing monthly payments, and \$43 for low-income taxpayers. The charge is \$45 to restructure or reinstate a defaulted agreement.

The IRS determined that the full cost of an agreement is \$282; \$122 for a direct debt agreement; and \$85 for a restructure or reinstatement. The IRS proposes to raise the installment agreement fee to \$120, and the restructuring fee to \$50. Other fees would not be increased.

**Offers in Compromise.** The IRS currently charges \$150 for processing an OIC. No fee is imposed on a low-income taxpayer. The fee may be applied to the unpaid taxes. The IRS claimed that the full cost of an OIC is \$2,718. The IRS proposes to raise the user fee for an OIC to \$186.

*NPRM REG-144990-12, FED ¶49,584; TRC IRS: 42,100.*

## Final Regs Adopt Use Of Differential Income Stream For Applying Income Method To Cost-Sharing Arrangement

### ◆ TD 9630

The IRS has issued final regs that adopt the use of a differential income stream approach when applying the income method to a cost-sharing arrangement (CSA). The IRS may use this approach to determine the payment by one controlled party to another for a platform contribution meets the arm's-length standard.

■ **CCH Take Away.** The final regs adopt without change the temporary regs issued by the IRS in December 2011. The regs address the IRS's concerns that parties are not using appropriate discount rates to value projected income from a CSA and to determine the appropriate payment for a platform contribution.

### Platform contributions

Controlled participants in a CSA share the costs of developing an intangible product. As part of the CSA, the parties must determine the arm's-length amount to charge for a platform contribution. A platform contribution is a resource or right

that one participant developed outside the development of the intangible product, that the participant contributes to develop the product.

### Income method and discount rates

The regs set out several methods for determining the arm's-length amount for a platform contribution. One method is the income method. The income method considers the cost to bear the entire risk of development and to license the resulting intangibles. This would require the use of a higher discount rate applied to determine the present value of projected results (such as income) of developing the product.

The income method considers the cost to the platform "recipient" to license the use of intangibles to be developed by a licensor that bears the entire development risk. This would require a lower discount rate. The particular discount rates imply that certain other activities will have a particular discount rate. If the implied discount rate is inappropriate, then the application of the income method may not be appropriate.

### Final regs

The IRS has been concerned that taxpayers applying the income method were using relatively low licensing discount rates and relatively high cost-sharing discount rates. This practice has given rise to material distortions and the potential for platform contribution payments that did not satisfy the arm's-length standard.

The temporary and the final regs provide additional guidance on evaluating the use of the income method, involving implied discount rates. The regs also provide for the use of the differential income stream to assess the best method for determining platform contribution payments. The differential income stream is the difference to the party paying for the platform contribution between the party's undiscounted income under the cost-sharing alternative and under the licensing alternative.

This difference must be discounted at an appropriate rate to determine the arm's-length charge. The final regs provide two examples to illustrate the differential income stream method.

*References: FED ¶47,029;  
TRC INTL: 15,156.*

## Individual Mandate

*Continued from page 419*

tax credit under Code Sec. 36B. (Individuals with access to affordable MEC would not be eligible for the credit.) The treatment in the final regs enables pregnant women with access to Medicaid to continue to qualify for the credit.

### Employer-related programs

The final regs clarify that self-insured group health plans are eligible employer-sponsored plans and will be MEC. Plans offered by a third-party on behalf of an employer are treated as eligible employer-sponsored plans and qualify as MEC. Third-party arrangements include multi-employer plans, collectively-bargained plans, and plans

offered by a professional employer organization or leasing company.

■ **Comment.** "When the Affordable Care Act was passed, there were a whole lot of questions about minimum essential coverage," Cotton said. "For example, one of the big questions has been whether self-insured coverage qualifies as an eligible employer-sponsored plan (and as minimum essential coverage). The regulations clarified that it does."

The final regs do not characterize employer arrangements to subsidize employees or fund a pre-tax arrangement to purchase individual coverage. The IRS expects to address this in future guidance. A related issue is whether a health reimbursement arrangement (HRA) that

is integrated with employer-provided coverage should be counted as part of an employee's required contribution, when determining whether coverage is affordable. The IRS anticipates that future guidance will treat HRA amounts as part of an employee's contribution.

■ **Comment.** The required contribution rules affect whether the employee might qualify for an exemption from the individual mandate because coverage is unaffordable.

### Children

The individual mandate applies to children; they must have MEC, qualify for an exemption, or make a payment. The proposed regs provided that the adult who can claim the child as a dependent is responsible for the

*Continued on page 421*