

- For purposes of determining the FTAP for the 2007 plan year, the value of net plan assets is determined as the value of plan assets under § 412(c)(2) as in effect for the 2006 plan year, adjusted as follows: (1) contributions made for the 2006 plan year are taken into account, regardless of whether those contributions are made during the plan year or after the end of the plan year and within the period specified under § 412(c)(10); (2) the value of plan assets taking into account the amount of contributions made for the 2006 plan year is increased or decreased, as necessary, so that it is neither less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for the 2006 plan year (taking into account assets attributable to contributions for the 2006 plan year); and (3) the plan's funding standard account credit balance as of the end of the 2006 plan year is subtracted (unless the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under § 412(l)(7) on the valuation date for the 2006 plan year).

A plan that determines the prior year AFTAP for the 2008 plan year in accordance with the rules of this Part III(B) cannot increase plan assets for purposes of this computation through elective reduction of the 2008 prefunding balance. If the plan sponsor wishes to increase plan assets for purposes of determining the prior year AFTAP through elective reduction of the prefunding balance, the plan sponsor should use generally applicable rules for determination of the prior year AFTAP (which would require use of the plan's 2007 valuation rather than the plan's 2006 valuation).

#### **IV. COMMENTS REQUESTED AND FUTURE REGULATIONS**

The transitional guidance provided in Part III applies for plan years beginning in 2008. Section 2(c)(2)(F) of both S. 1974 (passed by the Senate on December 19, 2007) and H.R. 3361 (as introduced in the House of Representatives), which would provide technical corrections to provisions enacted under PPA, would add a new pro-

vision to § 436 to provide the Secretary of the Treasury with authority to prescribe rules for the application of § 436 to plans with valuation dates other than the first day of the plan year. If statutory authority similar to that in these technical correction provisions is enacted, the IRS and the Treasury Department are considering including rules in the final regulations substantially similar to those set forth in Part III(B) for the determination of the prior year AFTAP for a plan with an end-of-year valuation date with respect to plan years after 2008. Similarly, if such authority is enacted, the IRS and the Treasury Department are considering including rules in the final regulations under which the certification of an AFTAP as of the last day of the prior plan year will be treated as the certification of the AFTAP for the current plan year for a plan with an end-of-year valuation date. The IRS and the Treasury Department are not contemplating any additional special rules under § 436 for small plans that have a valuation date other than the first day of the plan year. Thus, a plan with a mid-year valuation date may have difficulty in obtaining the required actuarial certification in time to avoid the imposition of benefit limitations under § 436. Comments are requested regarding the proposals set forth in this Part IV and whether there is a need for any other special rules for plans with valuation dates other than the first day of the plan year.

Written comments should be submitted by April 21, 2008. Send submissions to CC:PA:LPD:DRU (Notice 2008-21), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 4 p.m., Monday through Friday, to CC:PA:LPD:DRU (Notice 2008-21), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking portal at <http://www.regulations.gov> (Notice 2008-21). All comments will be available for public inspection.

#### **DRAFTING INFORMATION**

The principal authors of this notice are David Ziegler of the Employee Plans, Tax Exempt and Government Entities Division, and Lauson C. Green

and Linda S. F. Marshall of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, please contact Mr. Ziegler via e-mail at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov), or you may contact Mr. Green and Ms. Marshall at (202) 622-6090 (not a toll-free number).

## **Supplemental Health Insurance Coverage as Excepted Benefits Under HIPAA and Related Legislation**

### **Notice 2008-23**

#### **PURPOSE**

This notice provides a safe harbor for supplemental group health insurance to be considered excepted from the requirements that generally apply under Chapter 100 of the Internal Revenue Code (sections 9801 - 9833) to benefits provided under a group health plan. It is expected that the standards of this safe harbor will be incorporated as requirements (rather than just as a safe harbor) in a notice of proposed rulemaking in the future.

#### **BACKGROUND**

##### *HIPAA Health Reform and Related Legislation*

Titles I and IV of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (HIPAA) amended the Code, the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHS Act) to improve portability, access, and continuity with respect to group health plan coverage provided in connection with employment. These laws include limitations on preexisting condition exclusions, require issuance of certificates of creditable coverage, provide special enrollment rights, and prohibit discrimination on the basis of any health factor. Later amendments to these laws provide protections relating to mental health parity and hospital lengths of stay following childbirth. Regulations issued by the Departments of the Treasury, of Labor, and of

Health and Human Services (the Departments) on these group market provisions are contained in 26 CFR Part 54, 29 CFR Part 2590, and 45 CFR Parts 144 and 146. Additional reforms were provided in the PHS Act for health coverage in the individual market and are contained in 45 CFR Parts 144 and 148.

In general, these health reform provisions apply to group health plans (generally plans established or maintained by employers or employee organizations, or both) and health insurance issuers in the group or individual market. However, these provisions do not apply to certain excepted benefits. In general, if all benefits under a plan or coverage are excepted benefits, then the plan and any health insurance coverage under the plan do not have to comply with the health reform requirements, and the coverage may not qualify as creditable coverage.

#### *Supplemental Health Insurance Coverage*

One category of excepted benefits is supplemental excepted benefits. Benefits are supplemental excepted benefits only if they are provided under a separate policy, certificate, or contract of insurance and are either Medicare supplemental health insurance, TRICARE supplemental programs, or similar supplemental coverage provided to coverage under a group health plan. The phrase “similar supplemental coverage provided to coverage under a group health plan” is not defined in the statute or regulations. However, the regulations clarify that one requirement to be similar supplemental coverage is that the coverage must be specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles (but similar supplemental coverage does not include coverage that becomes secondary or supplemental only under a coordination-of-benefits provision). § 54.9831-1(c)(5)(i)(C) of the Miscellaneous Excise Tax Regulations, 29 CFR 2590.732(c)(5)(i)(C), and 45 CFR 146.145(c)(5)(i)(C).

#### *Coordination of Administration*

Various situations have come to the attention of the Departments that raise concerns about whether all of the coverage

that is being marketed as similar supplemental coverage actually qualifies as such.

Section 104 of HIPAA requires the Secretaries of the Treasury, of Labor, and of Health and Human Services to ensure that guidance under HIPAA issued by the Departments that relates to the same matter be administered so as to have the same effect at all times. In accordance with section 104 of HIPAA, each of the Departments is issuing guidance for “similar supplemental coverage” to be considered benefits excepted from the requirements of HIPAA. The guidance being issued has been developed on a coordinated basis by the Departments. HHS is also issuing guidance on similar supplemental coverage for the individual market.

#### DISCUSSION

The section immediately below (SAFE HARBOR STANDARDS) provides that if the standards in that section are satisfied, the supplemental health insurance will be considered to satisfy the conditions for being excepted benefits for purposes of chapter 100. Supplemental health insurance not satisfying the conditions for the safe harbor is subject to further examination for a determination whether it is not “similar supplemental coverage to coverage under a group health plan” and thus is subject to all the requirements of chapter 100.

To fall within that safe harbor, the policy, certificate, or contract of insurance must be issued by an entity that does not provide the primary coverage under the plan and must be specifically designed to fill gaps in primary coverage.

To be “similar supplemental coverage to coverage under a group health plan”, the value of the supplemental coverage must be significantly less than the value of the primary coverage that it supplements. To fall within the safe harbor below, the cost of supplemental coverage may not exceed 15 percent of the cost of the plan’s primary coverage. Cost is determined in the same manner as the “applicable premium” is calculated under a COBRA continuation provision.<sup>1</sup> Some plans subject to HIPAA titles I or IV are not subject to the COBRA continuation coverage requirements, such as church plans and plans maintained by an employer with fewer than 20 employ-

ees. These plans should compute cost as if they were subject to COBRA. (For insured coverage — all supplemental coverage and primary coverage to the extent insured — the COBRA cost is, for purposes of this notice, the cost of the insurance coverage.)

Issuers of Medicare supplemental health insurance (commonly referred to as “Medigap”) generally are subject to prohibitions against discrimination based on enrollees’ or potential enrollees’ health status. Accordingly, to fall within the safe harbor below, supplemental health insurance also must not differentiate among individuals in eligibility, benefits, or premiums based upon any health factor of the individual.

#### SAFE HARBOR STANDARDS

Supplemental health insurance under a group health plan will be considered to be “similar supplemental coverage provided to coverage under a group health plan” under § 54.9831-1(c)(5)(i)(C) if it is provided through a policy, certificate, or contract of insurance separate from the primary coverage under the plan and if it satisfies all of the following requirements:

(1) *Independent of Primary Coverage.* The supplemental policy, certificate, or contract of insurance must be issued by an entity that does not provide the primary coverage under the plan. For this purpose, entities that are part of the same controlled group of corporations or part of the same group of trades or businesses under common control, within the meaning of section 52(a) or (b) of the Code, are considered a single entity.

(2) *Supplemental for Gaps in Primary Coverage.* The supplemental policy, certificate, or contract of insurance must be specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles, but does not include a policy, certificate, or contract of insurance that becomes secondary or supplemental only under a coordination-of-benefits provision.

(3) *Supplemental in Value of Coverage.* The cost of coverage under the supplemental policy, certificate, or contract of insurance must not exceed 15 percent of the cost of primary coverage. Cost is determined in the same manner as the applicable pre-

<sup>1</sup> Under the COBRA rules, plans are generally permitted to charge up to 102 percent of the applicable premium. Thus, COBRA cost for purposes of this notice is 100 percent of the applicable premium, not 102 percent of the applicable premium that the plan is generally permitted to charge under the COBRA rules.

mium is calculated under a COBRA continuation provision.

(4) *Similar to Medicare Supplemental Coverage.* The supplemental policy, certificate, or contract of insurance that is group health insurance coverage must not differentiate among individuals in eligibility, benefits, or premiums based on any health factor of an individual (or any dependent of the individual).

## DRAFTING INFORMATION

The principal author of this notice is Russ Weinheimer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice, contact Russ Weinheimer at (202) 622-6080 (not a toll-free call).

---

*26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.*  
(Also Part 1, §§ 6662, 6694, 1.6662-4, 1.6694-2.)

## Rev. Proc. 2008-14

### SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2006-48, 2006-47 I.R.B. 934, and identifies circumstances under which the disclosure on a taxpayer's return with respect to an item or a position is adequate for the purpose of reducing the understatement of income tax under section 6662(d) of the Internal Revenue Code (relating to the substantial understatement aspect of the accuracy-related penalty), and for the purpose of avoiding the preparer penalty under section 6694(a) (relating to understatements due to unreasonable positions) with respect to income tax returns. This revenue procedure does not apply with respect to any other penalty provisions (including the disregard provisions of the section 6662 accuracy-related penalty, which are subject to an exception for adequate disclosure). Also, under this revenue procedure, no disclosure on a return other than an income tax return will be adequate with respect to a preparer penalty under section 6694(a).

This revenue procedure applies to any income tax return filed on 2007 tax forms for a taxable year beginning in 2007, and to any income tax return filed on 2007 tax

forms in 2008 for short taxable years beginning in 2008.

### SECTION 2. CHANGES FROM REV. PROC. 2006-48

.01. Editorial changes and line reference changes to Form 1040, Schedule A, have been made in updating Rev. Proc. 2006-48.

.02. This revenue procedure has been updated to reflect changes made to section 170(f) by Public Law 109-280, section 1217, and to section 6694 by Public Law 110-28, section 8246.02.

.03. Section 4.02(3)(f) concerning difference in book and income tax reporting is expanded by adding Form 1120-F, Schedule M-3 (Form 1120-F), *Net Income (Loss) Reconciliation for Foreign Corporations With Reportable Assets of \$10 Million or More*: Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II, (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items).

### SECTION 3. BACKGROUND

.01 If section 6662 applies to any portion of an underpayment of tax required to be shown on a return, an amount equal to 20 percent of the portion of the underpayment to which the section applies is added to the tax. (The penalty rate is 40 percent in the case of gross valuation misstatements under section 6662(h).) Section 6662(b)(2) applies to the portion of an underpayment of tax that is attributable to a substantial understatement of income tax.

.02 Section 6662(d)(1) provides that there is a substantial understatement of income tax if the amount of the understatement exceeds the greater of 10 percent of the amount of tax required to be shown on the return for the taxable year or \$5,000. Section 6662(d)(1)(B) provides special rules for corporations. A corporation (other than an S corporation or personal holding company) has a substantial understatement of income tax if the amount of the understatement exceeds the lesser of 10 percent of the tax required to be shown on the return for a taxable year (or, if greater, \$10,000) or \$10,000,000. Section 6662(d)(2) defines an understatement as the excess of the amount of tax required to

be shown on the return for the taxable year over the amount of the tax that is shown on the return reduced by any rebate (within the meaning of section 6211(b)(2)).

.03 In the case of an item not attributable to a tax shelter, section 6662(d)(2)(B)(ii) provides that the amount of the understatement is reduced by the portion of the understatement attributable to any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return, and there is a reasonable basis for the tax treatment of the item by the taxpayer.

.04 Section 6694(a) imposes a penalty on a tax return preparer for filing a return or claim for refund that results in an understatement of liability due to a position of which the preparer knew or should have known, if the preparer did not have a reasonable belief that the position would more likely than not be sustained on the merits and the position was not disclosed in accordance with section 6662(d)(2)(B)(ii). The penalty is equal to the greater of \$1,000 or 50% of the income derived (or to be derived) by the preparer with respect to the return or claim.

.05 In general, this revenue procedure provides guidance for determining when disclosure is adequate for purposes of section 6662(d)(2)(B)(ii) and section 6694(a)(2)(C)(i). For purposes of this revenue procedure, the taxpayer must furnish all required information in accordance with the applicable forms and instructions, and the money amounts entered on these forms must be verifiable. Annual guidance under Treas. Reg. § 1.6662-4(f)(2) and Treas. Reg. § 1.6694-3(e)(1) and (2) for returns filed on 2006, 2005, and 2004 tax forms is provided in Rev. Proc. 2006-48, 2006-47 I.R.B. 934, Rev. Proc. 2005-75, 2005-2 C.B. 1137, and Rev. Proc. 2004-73, 2004-2 C.B. 999, respectively.

.06 Fiscal and short tax year returns. (a) In general. This revenue procedure may apply to a return for a fiscal tax year that begins in 2007 and ends in 2008. This revenue procedure may also apply to a short year return for a period beginning in 2008 if the return is to be filed before the 2008 forms are available. (Note that individuals are generally not put in this position as a decedent's final return for a fractional part of a year is due the fifteenth day of