



Submitted via email to Notice.comments@irscounsel.treas.gov

February 11, 2016

CC: PA: LPD: PR (Notice 2015-87)
Room 5203
Internal Revenue Service
P. O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: **IRS Notice No. 2015-87**

Dear Sir/Madam:

The Association of Governmental Risk Pools (“AGRiP”) respectfully submits these comments in response to Notice No. 2015-87 and in the support of the issuance of proposed rules regarding the treatment of employer “opt-out” arrangements (Q & A No. 9) and the adjustment of affordability threshold (Q & A No. 12).

BACKGROUND

Founded in 1998 and currently headquartered in Latham, New York, AGRiP is a national association of public entity risk pools with over 200 public entity risk pool members from forty-nine (49) states, plus Canada and Australia. In the United States, our membership includes some thirty (30) public entity health benefits pools or trusts. AGRiP’s mission is to promote pooling as a practical extension of local government’s obligation to be a good steward of public funds.

For over twenty-five (25) years, public entity health pools have performed the essential government function of providing health benefits to public employees and their dependents at the lowest possible cost to local governments and their taxpayers. They are comprised of thousands of school districts, counties, municipalities, authorities and other governmental entities, and are all tax exempt, non-profit and funded by local tax revenues.

Overseen by directors or trustees elected from and by their public entity participants, these pools are established under state intergovernmental cooperation laws which allow their participating municipalities, counties, schools, and special districts to self-fund their health benefits on a pooled basis. Their public employer pool participants are all public entities and the health benefits pools themselves are all governmental instrumentalities funded solely by taxpayers. It is on behalf of these pools, and the public employers they serve, that we are submitting these comments.

OUR CONCERNS

Our principal concern with regard to the opt-out arrangements discussed in Q & A No. 9 is that the proposed rules discussed by the agency may needlessly impose an undue burden on the reporting responsibilities of large employers under Section 6056 of the Internal Revenue Code by requiring them to re-calculate an employee's required contribution where an employee is offered a sum certain in exchange for opting out of employer-sponsored coverage. We wish to share our comments with a view toward minimizing the administrative burden imposed on our large employer members who offer opt-out arrangements to their employees, without compromising the agency's enforcement-related policy concerns. As to Q & A No. 12 we fully agree with an adjustment of the 9.5% affordability threshold as proposed by the agency as well as amendment of the regulations under Section 6056 which provide alternative reporting methods for "qualifying offers of coverage".

COMMENTS RELATING TO NOTICE 2015-87

1. Question & Answer No. 9

The agency has requested comments as to how unconditional and conditional "opt-out" arrangements should be factored into an employee's required contribution under Sections 36B, 5000A and 4980H(b) of the Internal Revenue Code. Our comments on this issue focus on the treatment of *conditional* opt-out arrangements which should not require re-calculation of an employee's required contribution. We also request guidance from the agency as to the legality of certain conditional opt-out arrangements which may or may not raise compliance issues under the Affordable Care Act.

A. Treatment of Certain Conditional Opt-Out Arrangements

Although we do not necessarily endorse the method proposed by the agency to include an *unconditional* opt-out payment in an employee's required contribution, we do believe that certain *conditional* opt-out arrangements should not require an adjustment to the employee's required contribution.

Specifically, we believe that the proposed rules should exclude from an employee's required contribution a sum certain paid pursuant to an arrangement whereby an employer offers its employees an opt-out payment in exchange for not enrolling in the employer's health plans where the opt-out payment is conditioned on the employee's enrollment in health coverage other than an individual market policy obtained through an Exchange. This relief would allow employers to offer certain conditional opt-outs without having to reconfigure their information systems to adjust an employee's required contribution on a piecemeal basis should the employee elect to receive a sum certain to enroll in, for example, health coverage through his or her spouse's employer. Calling on employers to re-calculate an employee's required contribution in such situations is tedious, burdensome and of questionable value to the federal government because the affordability information obtained from Section 6056 reporting is used to determine whether an employer should be penalized for having an employee enroll in a subsidized individual Exchange plan. Individuals who receive a sum certain upon opting out of their employer-sponsored coverage and enrolling in coverage other than an individual Exchange plan are not eligible for a federal subsidy, and re-calculating affordability is superfluous. Acceptance of our recommendation may also alleviate the need for the agency to issue guidance on how employers should allocate an opt-out payment for an enrollee in the "other than self-only" coverage tier for these conditional opt-out arrangements because affordability is limited to self-only coverage.

Acceptance of our recommendation therefore does not undermine the agency's enforcement-related policy objectives and will relieve certain large employers of an unnecessarily burdensome administrative requirement under Section 6056.

B. The Legality of Certain Conditional Opt-Out Arrangements

While we have no doubt that the above-described conditional opt-out arrangements are fully compliant with all applicable ACA requirements, there is some uncertainty about the compliance status of arrangements where (i) an employer offers its employees an opt-out payment (but short of a 100 percent reimbursement) expressly conditioned on their purchase of an individual market policy through or outside of the Exchange; or (ii) an opt-out arrangement otherwise encourages, expressly or impliedly, employees to apply the opt-out payment toward the purchase of such policies. This question implicates the legality of certain premium reimbursement arrangements under the Public Health Service Act, as further addressed in IRS Notice Nos. 2013-54, 2015-17 and FAQs (Parts XI and XXII) issued by the DOL on January 24, 2013 and November 6, 2014. Specifically, would opt-out

payments under the aforementioned scenarios be viewed as an impermissible “employer payment plan” or “cash reimbursement” within the context of such guidance? We therefore ask the agency for further guidance on this issue so that our members will know where the line is drawn on the legality of such arrangements.

2. Question & Answer No. 12

We agree with the agency’s proposed adjustment of the 9.5% affordability threshold and the alternative reporting methods contemplated by the agency for certain “qualifying offers of coverage”. The agency’s proposal provides needed clarity with respect to the affordability safe harbors under Section 4980H.

Thank you for considering our comments. If you have any questions or would like to discuss these comments further, please do not hesitate to contact me at (518) 220-0336 or agergen@agrip.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Gergen", with a long horizontal flourish extending to the right.

Ann Gergen
Executive Director
Association of Governmental Risk Pools