GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

May 4, 2015 www.groom.com

Authors: Katie Bjornstad Amin, Jon W. Breyfogle, Thomas F. Fitzgerald, Christine L. Keller, Seth T. Perretta, Brigen L. Winters

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

Katie Bjornstad Amin
kamin@groom.com
(202) 861-2604

Sravya Boppana
sboppana@groom.com
(202) 861-6338

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Seth T. Perretta
sperretta@groom.com
(202) 861-6335

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

Expatriate Health Coverage Exemption Enacted in Omnibus Spending Bill

On December 16, 2014, President Obama signed into law a $1.1 trillion omnibus spending bill (H.R. 83, the Consolidated and Further Continuing Appropriations Act; Pub. Law No. 113-235) that includes important relief from the Affordable Care Act for certain health plans provided to expatriate employees. The spending bill incorporates the Expatriate Health Coverage Clarification Act (the "Act"), which broadly exempts "expatriate health plans," employers that sponsor such plans, and "expatriate health insurance issuers" with respect to coverage under such plans from most otherwise applicable provisions of the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act of 2010 ("HCERA") (together, the "ACA").

Some important highlights of the Act are –

- Expatriate health plans are exempt from most of the ACA insurance market reforms.
- Expatriate health plans are exempt from the transitional reinsurance fee and the Patient Centered Outcomes Research Institute ("PCORI") fee.
- After 2015, expatriate health plans are exempt from the health insurer fee ("HIF") (with special transition rules applying in 2014 and 2015).
- Employer-sponsored coverage for expatriates generally is exempt from the 40% high-cost plan excise tax in Code section 4980I, except for coverage provided to certain expatriates who are "assigned" to work in the U.S.
- The employer "shared responsibility" mandate rules continue to apply, but expatriate health plans with respect to certain foreign employees working in the U.S. and certain U.S. expatriates working abroad are treated as "minimum essential coverage" under an "eligible employer-sponsored plan" for purposes of the employer and individual mandates.
- The Code sections 6055 and 6056 reporting requirements continue to apply (with certain relief from the electronic delivery consent rules for individual statements).

Unless otherwise specified in the Act, the Act is effective on the date of enactment and applies only to expatriate health plans issued or renewed on or after July 1, 2015.

The agencies have not yet issued generally applicable guidance on the Act. However, on March 30, 2015, the IRS issue Notice 2015-29, which gives guidance on the Act solely for purposes of the HIF calculations for the 2014 and 2015 fee years.

Below we describe key definitions and relief provided in the Act and the recent IRS guidance on HIF calculations for the 2014 and 2015 fee years

Expatriate Health Insurance Issuer

An "expatriate health insurance issuer" means a health insurance issuer that issues expatriate health plans. "Health insurance issuer" is defined by reference to PHSA section 2791, which requires that the issuer be licensed to engage in the business of insurance in a U.S. state and be subject to state law that regulates insurance.

Groom note: An earlier version of the legislation (H.R. 4414) passed by the House of Representatives earlier last year defined the term health insurance issuer to also include a foreign insurer subject to tax under subchapter L of chapter 1 of the Code as if it were a domestic corporation, but this provision was not included in the final version in the Act. Thus, the provisions of the Act that apply to "expatriate health insurance issuers" generally will only apply to issuers that are licensed in a U.S. state (except see below under the ACA section 9010 health insurer provider fee section with respect to the 2014 and 2015 fee calculations).

Expatriate Health Plan

To be an "expatriate health plan" eligible for the relief, the plan must be (1) a group health plan, (2) health insurance coverage offered in connection with a group health plan, or (3) health insurance coverage offered to certain groups of similarly situated individuals (and their spouses and dependents or other individuals enrolled in the plan) that meets each of the following requirements –

- Substantially all of the primary enrollees must be "qualified expatriates." In applying this test, a primary enrollee does not include an individual who is not a national of the United States (defined as the 50 states, DC, and Puerto Rico) and resides in his/her country of citizenship. "Qualified expatriates" means –
    - Certain employees transferred or assigned to the U.S. for a specific and temporary employment purpose or assignment ("Inpats");
    - Individuals working outside of the U.S. for a period of at least 180 days in a consecutive 12-month period that overlaps with the plan year ("Expats"); and
    - Individuals who are members of a group of similarly situated individuals that is formed for the purpose of traveling or relocating internationally in service of one or more of the purposes listed in Code section 501(c)(3) or (4) or similarly situated organizations or groups (*e.g.*, students or religious missionaries) and meets certain other requirements ("Other Expats").

- Substantially all of the benefits provided under the plan or coverage must not be excepted benefits.

- The plan or coverage must provide coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services that satisfy certain requirements in the following locations –
    - For Inpats, both in the U.S. and in the country/ies from which the individual was transferred or assigned (and any other country the Department of Health and Human Services ("HHS") designates);
    - For Expats, in the country/ies in which the individual is present in connection with the individual's employment (and any other country HHS designates);
    - For Other Expats, in the country/ies that HHS designates.

- The plan sponsor must reasonably believe that the benefits provided by the plan satisfy a standard at least actuarially equivalent to the level in the minimum value requirements in the Code section 36B tax credit rules.

- If the plan or coverage provides dependent coverage for children, it must generally offer coverage for adult children until age 26.

- The plan or coverage must offer reimbursements for items or services in the local currency of at least eight countries and be issued by an expatriate health plan issuer, or be administered by an administrator, that, together with any other entity in the expatriate health plan issuer's or administrator's controlled group, has licenses to sell insurance in more than two countries, and, with respect to such plan or coverage –
    - maintains network provider agreements that generally provide for direct claims payments (directly or through third party contracts) with healthcare providers in eight or more countries,
    - maintains call centers (directly or through a third party contracts) in three or more countries and accepts calls from customers in eight or more languages,
    - processes (in the aggregate, together with other plans or coverage it issues or administers) at least $1,000,000 in claims in foreign currency equivalents each year,
    - makes available (directly or through third party contracts) global evacuation/repatriation coverage, and
    - maintains legal and compliance resources in three or more countries.

- The plan or coverage, and the plan sponsor or expatriate health insurance issuer with respect to such plan or coverage, satisfies the pre-ACA group health plan provisions of Title XXVII of the PHSA, chapter 100 of the Code, and part 7 of subtitle B of title I of ERISA (*e.g.*, the mental health parity provisions and HIPAA nondiscrimination rules).

Limitations on Exemptions

The Act limits the general ACA exemption for expatriate health plans, employers that are plan sponsors of expatriate health plans, and expatriate health insurance issuers with respect to the following ACA provisions –

- *Code section 4980H employer mandate* – Applicable large employers that are plan sponsors of expatriate health plans remain subject to the employer mandate requirements in Code section 4980H. However, an expatriate health plan offered to Inpats or Expats is treated as minimum essential coverage under an eligible employer-sponsored plan and thus satisfies the employer (and individual) mandate requirements. An expatriate health plan offered to Other Expats is treated as minimum essential coverage as a plan in the individual market for purposes of the Code section 36B tax credit, the Code section 5000A individual mandate penalty, and Code section 6055 reporting.

- *Code sections 6055 and 6056 reporting* – Entities that provide minimum essential coverage must still comply with the information reporting requirements in Code section 6055, and applicable large employers must still comply with the reporting obligations in Code section 6056. However, the Act relaxes the electronic delivery consent requirements by allowing the entity to provide the statements to individuals and employees through electronic media with the primary insured deemed to have consented to receive the statements in electronic form unless he/she explicitly refuses such consent.

- *Code section 4980I Cadillac tax* – Applicable employer-sponsored coverage of an Inpat who is assigned (rather than transferred) to work in the U.S. must still be taken into account in applying the 40% high-cost plan excise tax. (Applicable employer-sponsored coverage of Inpats who are transferred to work in the U.S. and Expats are exempt from the 40% high-cost plan excise tax.)

- *ACA section 9010 health insurance provider fee –*
    - Calendar years 2014 and 2015 - The Act provides a special transition rule to reduce the fee owed by an expatriate health insurance issuer with respect to expatriate health plans for calendar years 2014 and 2015. In general, the special transition rule will result in an expatriate health insurance issuer being subject to a reduced fee amount that does not reflect premiums for expatriate health plans in these
    - other health insurers; rather, the total amount collected by the IRS will be less than the "applicable amount" for these two years.

Groom note: In Notice 2015-29, the IRS issued guidance on the HIF adjustment for the 2014 and 2015 fee years. Among other things, the Notice --

- defines "expatriate health plans" eligible for the fee adjustment for these years based on the definition of "expatriate policies" in Notice 2014-24 (based on the definition in the final rule on the medical loss ratio (MLR)) rather than the definition in the Act. The final MLR rule defines expatriate policies as group health insurance policies that provide coverage to employees, substantially all of whom are: (1) working outside their country of citizenship; (2) working outside their country of citizenship and outside the employer's country of domicile; or (3) non-U.S. citizens working in their home country. 45 CFR § 158.120(d)(4). This definition appears limited to employees and does not appear to encompass international student coverage.
- does not limit the relief for these years to "expatriate health insurance issuers," as defined in the Act (which is limited to insurers licensed in a U.S. state) and instead just refers to covered entities (which are not limited to issuers licensed in a state). Thus, it appears that covered entities that are not licensed in a state are eligible for the HIF adjustment for 2014 and 2015, including foreign insurers subject to tax under subchapter L of chapter 1 of the Code as if it were a domestic corporation.
- provides that to recoup overpaid fee amounts for the 2014 fee year, the IRS will adjust the 2015 fee amount rather than issue refunds.
- clarifies that the 50% exclusion for expatriate health plans in Notice 2014-24 is no longer available.
- provides that to claim the fee adjustment, a covered entity must attach a statement to its 2015 Form 8963 certifying certain facts to show it is eligible for the relief.

Calendar years 2016 and later – A qualified expatriate (and any spouse, dependent or other individual enrolled in the plan) enrolled in an expatriate health plan is not considered a U.S. health risk for calendar years after 2015. This means that premiums received by health insurers for expatriate health plans will generally not be taken into account in calculating the fee.