



## Employee Benefits & Executive Compensation ADVISORY ■

**FEBRUARY 13, 2015**

### Notices of Employee Eligibility for Exchange Subsidies – What They Are and What You Should Do About Them

---

The Affordable Care Act<sup>1</sup> requires the ACA Exchanges (both state and federal) to send notices (“Exchange Notices”) to employers regarding employees who purchase coverage through the Exchange and qualified for a subsidy.<sup>2</sup> To clarify from the outset, the Exchange Notices are not directly related to employer excise taxes under Section 4980H of the Internal Revenue Code. More specifically, the Exchange Notices, although they may make mention of such taxes, are not by themselves notification that the employer will be assessed excise taxes or other penalties of any kind.<sup>3</sup> Instead, the Exchange Notices are a part of the Exchanges’ verification process regarding eligibility for subsidies. (For example, even small employers, to which excise taxes under Code Section 4980H do not apply, will receive these notices if they have employees who qualify for an Exchange subsidy.)

#### **Who Will Receive Exchange Notices?**

While the Department of Health and Human Services (HHS) has not provided specific guidance as to where the Exchange Notices will be sent (e.g., which employer location), it appears that the Exchange Notices will be sent to the employers at the addresses provided by employees during the Exchange coverage application process. Acknowledging that employees may provide incorrect contact information, the HHS has indicated that it will work with Exchanges and employers to develop a solution to ensure that Exchange Notices reach the correct employer.<sup>4</sup> The specific method by which the correct employer address is verified by the Exchanges (if at all) is yet unknown.

The HHS has also noted that for efficiency reasons, Exchanges can either send the Exchange Notices on an employee-by-employee basis as subsidy eligibility determinations are made or send it to employers for groups of employees.<sup>5</sup>

---

<sup>1</sup> Section 1411(e)(4)(B)(iii) of the Affordable Care Act; 45 C.F.R. 155.310(h).

<sup>2</sup> That is, qualified for an advance payment of premium tax credit.

<sup>3</sup> The “Section 1411 Certification” referenced in the regulations regarding Code Section 4980H excise taxes is a separate notice, to come from the IRS pursuant to 45 C.F.R. 155.310(i). See 26 C.F.R. 54.4980H-4(a) and -5(a); 26 C.F.R. 54.4980H-1(a)(40).

<sup>4</sup> 77 Fed. Reg. 18356 (March 27, 2012).

<sup>5</sup> 78 Fed. Reg. 54113 (August 30, 2013).

## Content of Exchange Notices

Each Exchange Notice will:

- Identify the employee;
- Indicate that the employee has been determined eligible for an Exchange subsidy (i.e., advance payment of the premium tax credit);
- Indicate that, if the employer has 50 or more full-time employees, the employer may be liable for the excise tax assessed under Code Section 4980H; and
- Notify the employer of the right to appeal the determination<sup>6</sup>

## Should Employers Request an Appeal?

If an employee is determined eligible for Exchange subsidies, the employer appeal is the opportunity for an employer to correct information about employer-sponsored coverage offered to the employee (e.g., that an employee should not be entitled to an Exchange subsidy because he or she was offered the opportunity to enroll in minimum essential coverage that is affordable and provides minimum value) and for the Exchange to use such information to confirm (or refute) that the employee's eligibility determination for Exchange subsidies is correct.

The potential benefits of filing an appeal are two-fold: it can minimize the employee's potential liability to repay Exchange subsidies that he or she was not eligible to receive<sup>7</sup> and can help protect the employer from being incorrectly assessed an excise tax under Code Section 4980H.

## Employer Appeal Process

Each State Exchange may create its own appeal process or choose not to establish an appeal process and have the HHS conduct the appeal in accordance with the Federal Exchange appeal process. In either case, the relevant Exchange must:

- Allow employers 90 days (from the date of the Exchange Notice) to request an appeal;
- Accept appeal requests by telephone, by mail, via the Internet or in person (if the Exchange is capable of receiving in-person appeal requests) and provide assistance in making the appeal request if such assistance is requested;
- Allow employers to submit relevant evidence to support the appeal; and
- Not limit or interfere with the right to make an appeal request<sup>8</sup>

---

<sup>6</sup> 45 C.F.R. 155.310(h).

<sup>7</sup> The HHS indicated that employers can develop policies to allow an employee to enroll in employer-sponsored coverage outside an open enrollment period when the employee is redetermined as ineligible for Exchange subsidies as a result of an employer appeal decision.

<sup>8</sup> 45 C.F.R. 155.555(c).

Upon receipt of a timely appeal request, the Exchange conducting the appeal (the “appeals entity”) is required to timely acknowledge the receipt of the request and provide an explanation of the appeals process and to inform the employee of the appeal and provide the employee with instructions for submitting any additional evidence for consideration by the appeals entity.<sup>9</sup> In addition, the appeals entity must provide the employer the opportunity to review information regarding whether the employee’s income is above or below the threshold by which “affordability” is measured, as well as certain other data used to make the determination that the employee qualifies for an Exchange subsidy.<sup>10</sup> The appeals entity’s decision is required to be provided to both the employer and employee generally within 90 days of the date the appeal request is received.<sup>11</sup>

Importantly for the employer, HHS regulations clarify that an appeal decision (e.g., that the employee is in fact entitled to Exchange subsidies) does not foreclose any appeal rights the employer may have under the Code for excise tax liabilities under Code Section 4980H.<sup>12</sup> Thus, while an appeal may be beneficial, employers are not necessarily required to appeal an award determination to preserve their rights against the assessment of excise tax.

---

<sup>9</sup> 45 C.F.R. 155.555(d).

<sup>10</sup> 45 C.F.R. 155.555(g).

<sup>11</sup> 45 C.F.R. 155.555(k).

<sup>12</sup> See 45 C.F.R. 155.555(k)(1)(ii).

If you would like to receive future *Employee Benefits & Executive Compensation Advisories* electronically, please forward your contact information to [employeebenefits.advisory@alston.com](mailto:employeebenefits.advisory@alston.com). Be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

## Members of Alston & Bird’s Employee Benefits & Executive Compensation Group

Robert A. Bauman 202.239.3366 <a href="mailto:bob.bauman@alston.com">bob.bauman@alston.com</a>	John R. Hickman 404.881.7885 <a href="mailto:john.hickman@alston.com">john.hickman@alston.com</a>	Craig R. Pett 404.881.7469 <a href="mailto:craig.pett@alston.com">craig.pett@alston.com</a>	Michael L. Stevens 404.881.7970 <a href="mailto:mike.stevens@alston.com">mike.stevens@alston.com</a>
Saul Ben-Meyer 212.210.9545 <a href="mailto:saul.ben-meyer@alston.com">saul.ben-meyer@alston.com</a>	H. Douglas Hinson 404.881.7590 <a href="mailto:doug.hinson@alston.com">doug.hinson@alston.com</a>	Earl Pomeroy 202.239.3835 <a href="mailto:earl.pomeroy@alston.com">earl.pomeroy@alston.com</a>	Jahnisa P. Tate 202.239.3670 <a href="mailto:jahnisa.tate@alston.com">jahnisa.tate@alston.com</a>
Stacy C. Clark 404.881.7897 <a href="mailto:stacy.clark@alston.com">stacy.clark@alston.com</a>	Emily C. Hootkins 404.881.4601 <a href="mailto:emily.hootkins@alston.com">emily.hootkins@alston.com</a>	Jonathan G. Rose 202.239.3693 <a href="mailto:jonathan.rose@alston.com">jonathan.rose@alston.com</a>	Daniel G. Taylor 404.881.7567 <a href="mailto:dan.taylor@alston.com">dan.taylor@alston.com</a>
Emily Seymour Costin 202.239.3695 <a href="mailto:emily.costin@alston.com">emily.costin@alston.com</a>	James S. Hutchinson 212.210.9552 <a href="mailto:jamie.hutchinson@alston.com">jamie.hutchinson@alston.com</a>	Syed Fahad Saghir 202.239.3220 <a href="mailto:fahad.saghir@alston.com">fahad.saghir@alston.com</a>	Elizabeth Vaughan 404.881.4965 <a href="mailto:beth.vaughan@alston.com">beth.vaughan@alston.com</a>
Patrick C. DiCarlo 404.881.4512 <a href="mailto:pat.dicarlo@alston.com">pat.dicarlo@alston.com</a>	Johann Lee 202.239.3574 <a href="mailto:johann.lee@alston.com">johann.lee@alston.com</a>	Thomas G. Schendt 202.239.3330 <a href="mailto:thomas.schendt@alston.com">thomas.schendt@alston.com</a>	Kerry T. Wenzel 404.881.4983 <a href="mailto:kerry.wenzel@alston.com">kerry.wenzel@alston.com</a>
Meredith Gage 404.881.7953 <a href="mailto:meredith.gage@alston.com">meredith.gage@alston.com</a>	Blake Calvin MacKay 404.881.4982 <a href="mailto:blake.mackay@alston.com">blake.mackay@alston.com</a>	John B. Shannon 404.881.7466 <a href="mailto:john.shannon@alston.com">john.shannon@alston.com</a>	Kyle R. Woods 404.881.7525 <a href="mailto:kyle.woods@alston.com">kyle.woods@alston.com</a>
Ashley Gillihan 404.881.7390 <a href="mailto:ashley.gillihan@alston.com">ashley.gillihan@alston.com</a>	Emily W. Mao 202.239.3374 <a href="mailto:emily.mao@alston.com">emily.mao@alston.com</a>	Richard S. Siegel 202.239.3696 <a href="mailto:richard.siegel@alston.com">richard.siegel@alston.com</a>	
David R. Godofsky 202.239.3392 <a href="mailto:david.godofsky@alston.com">david.godofsky@alston.com</a>	Steven Mindy 202.239.3816 <a href="mailto:steven.mindy@alston.com">steven.mindy@alston.com</a>	Carolyn E. Smith 202.239.3566 <a href="mailto:carolyn.smith@alston.com">carolyn.smith@alston.com</a>	

# ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2015

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260  
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001  
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333