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No Surprise Billing Act Interim and Proposed Regulations

NPRM REG-107706-21; T.D. 9951

The Departments of the Treasury, Labor, and Health and Human Services (the Departments), have issued interim final rules and identical proposed regulations to implement provisions of the No Surprises Act. On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA), which included the No Surprises Act, was signed into law. The No Surprises Act provides federal protections against surprise billing and limits out-of-network cost sharing under many of the circumstances in which surprise bills arise most frequently. The regulations are generally applicable for plan years (in the individual market, policy years) beginning on or after January 1, 2022.

Application of No Surprises Rules

The interim and proposed Treasury regulations implement the rules under the new Code Sec. 9816 regarding the prevention of surprise medical bills, Code Sec. 9817 regarding surprise ambulance bills, and Code Sec. 9822 regarding the choice of health care professional. The regulations apply to group health plans, including grandfathered plans. They do not apply to excepted benefits, short-term, limited-duration insurance, or health reimbursement arrangements or other account-based group health plans.

The interim regulations also include largely overlapping HHS and DOL regulations that apply to health insurance issuers offering group or individual health insurance coverage, and carriers in the Federal Employees Health Benefits Act (FEHB) Program to provide protections against balance billing and out-of-network cost sharing with respect to emergency services, non-emergency services furnished by nonparticipating providers at certain participating health care facilities, and air ambulance services furnished by nonparticipating providers of air ambulance services.

The new regulations prohibit nonparticipating providers, health care facilities, and providers of air ambulance services from balance billing participants, beneficiaries, and enrollees in certain situations, and permit these providers and facilities to balance bill individuals if certain notice and consent requirements in the No Surprises Act are satisfied. They also require certain health care facilities and providers to provide disclosures of federal and state patient protections against balance billing.

The regulations recodify certain patient protections that initially appeared in the Affordable Care Act and provide that the No Surprises Act applies to grandfathered plans. They also set forth complaints processes with respect to violations of the protections against balance billing and out-of-network cost sharing under the No Surprises Act.

These new rules protect individuals from surprise medical bills for emergency services, air ambulance services furnished by nonparticipating providers, and non-emergency services furnished by nonparticipating providers at participating facilities in certain circumstances. Among other requirements, they require emergency services to be covered without any prior authorization, without regard to whether the health care provider furnishing the emergency services is a participating provider or a participating emergency facility with respect to the services, and without regard to any other term or condition of the plan or coverage other than the exclusion or coordination of benefits or a permitted affiliation or waiting period.

Additionally, emergency services include certain services in an emergency department of a hospital or an independent freestanding emergency department, as well as post-stabilization services in certain instances.

Effective Dates and Comments

The regulations are generally applicable for plan years (in the individual market, policy years) beginning on or after January 1, 2022. However, the HHS-only regulations that apply to health care providers, facilities, and providers of air ambulance services are applicable beginning on January 1, 2022. The OPM-only regulations that apply to health benefits plans are applicable to contract years beginning on or after January 1, 2022.

Comments must be received no later than 5 p.m. on September 7, 2021. Comments, including mass comment submissions, must be submitted in one of the following three ways: electronically at https://www.regulations.gov by entering the file code in the search window and then clicking on "Comment"; by regular mail to the Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-9909-IFC, P.O. Box 8016, Baltimore, MD 21244-8016; or by express or overnight mail to the Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-9909-IFC, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

IRS and SARS Cooperate on Criminal Investigations

The IRS Criminal Investigation Division (IRS-CI) and the South African Revenue Service (SARS) enforcement divisions announced cooperating to identify, investigate and bring to justice criminals with a nexus to both countries. The crimes include international public corruption, cyber fraud, and money laundering. The partnership already uncovered emerging schemes perpetrated by promoters, professional enablers and financial institutions.

"SARS welcomes the collaboration with the IRS, particularly with our renewed focus on non-compliant high wealth individuals and offshore holdings. One of our strategic objectives is to make it easy for taxpayers to comply with their tax obligations and hard and costly for those who willfully do not comply," said SARS Commissioner, Edward Kieswetter. "We trust that this partnership will yield results, both in terms of augmenting our internal skill sets as we clamp down on illegal activities affecting both our countries," he added.

The partnership between IRS-CI and SARS is part of the U.S. tax agency's Global Operations program. A major component of the collaborative effort between the two countries includes an ongoing training initiative led by IRS-CI. IRS-CI has special agent attachés strategically stationed in 11 foreign countries.

IRS Criminal Investigation and SARS join forces to fight international crimes

Treasury Secretary Yellen Addresses Support for Corporate Global Minimum Tax

Secretary of the Treasury Janet L.Yellen addressed the support for a global minimum tax for corporations at a press conference at the close of the G20 Finance Ministers and Central Bank Governors Meetings, on July 11, 2021, see https://home.treasury.gov/news/press-releases/jy0270. Secretary Yellen stated that now 132 countries, representing more than 90 percent of global GDP have agreed to the outline of a global tax deal. Secretary Yellen praised what she sees as a "revival of multilateralism" on taxation and other issues. She stated, "we continue to see consensus around – and enthusiasm for – a global corporate minimum tax rate of at least 15%, as well as a partial reallocation of taxing rights to reflect the realities of the modern business world. … This deal will end the race to the bottom. Instead of asking the question: 'Who can offer the lowest

REFERENCE KEY

USTC references are to ***U.S. Tax Cases***
Dec references are to ***Tax Court Reports***

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tax rate?,' it will allow all of our countries to compete on the basis of economic fundamentals – on the skill of our workforces, our capacity to innovate, and the strength of our legal and economic institutions. And this deal will give our nations the ability to raise the necessary funding for important public goods like infrastructure, R & D, and education."

Implementation in the United States

In response to a question on OECD Pillar One (nexus and source rules), Secretary Yellen said the details of Pillar One remain to be negotiated, and she would say that OECD Pillar Two is further along. Secretary Yellen stated, "Pillar Two [the minimum tax rate], we're hoping to have incorporated in the coming budget resolution and reconciliation bill the changes that are necessary to put it into effect, but Pillar One will be on a slightly slower track. We will work with Congress. Maybe it will be ready in the Spring of 2022 and we will try to determine at that point what's necessary for implementation."

IRS Provides Answers to Question Pertaining to Treasury Grants and Related Taxes

IR-2021-145

The IRS has provided answers to questions that certain transportation companies may have regarding Treasury grants and related taxes, https://www.irs.gov/newsroom/coronavirus-economic-relief-for-transportation-services-certs-frequently-asked-questions. These companies must largely prioritize the use of the grants for payroll costs, though grants may be used for operating expenses, including the acquisition of services and any equipment needed to protect workers and customers from COVID-19. In addition, the funds may also be used for the repayment of debt accrued to maintain payroll. The IRS reminded the companies that funds not used for eligible activities within one year of receipt of the grant, must be returned to the Treasury.

The Service reminded the companies that the Coronavirus Economic Relief for Transportation Services (CERTS) Act (P.L. 117-24) authorizes the Treasury to provide grants to transportation service providers that experienced annual revenue losses of 25 percent or more as a result of COVID-19. Under which, the IRS posted answers to two questions:

- are the grants taxable? Yes, the receipt of a CERTS Act grant is not excluded from the recipient's gross income under the Code and therefore is taxable; and
- are costs for which the grants are used deductible? Yes, the costs are deductible to the extent that they are otherwise deductible under the law. The tax law generally permits the payment of wages, salaries, and benefits to employees and other amounts paid to carry on a trade or business to be deducted as ordinary and necessary business expenses.

IRS Guidance for Multiemployer Plans Getting Special Financial Assistance

Notice 2021-38; IR-2021-148

The IRS issued guidance under Code Sec. 432(k) to sponsors of multiemployer defined benefit pension plans that are required to reinstate certain previously suspended benefits as a condition of receiving special financial assistance under ERISA Sec. 4262. Guidance is also provided on whether make-up payments with respect to previously suspended benefits are eligible to be rolled over to another eligible retirement plan, and on how to apply the rule under which any special financial assistance received by the plan is not taken into account in determining contributions required under Code Sec. 431.

Code Sec. 432(k) and ERISA Sec. 4262 of were enacted by Act Sec. 9704 of the American Rescue Plan Act of 2021, P.L. 117-2 (March 11, 2021). ERISA Sec. 4262 provides that the sponsor of an eligible multiemployer plan may apply to the Pension Benefit Guaranty Corporation (PBGC) to receive special financial assistance, provided certain conditions are satisfied. Code Sec. 432(k) provides rules relating to an eligible multiemployer plan that applies to PBGC for special financial assistance.

Reinstatement of Suspended Benefits

If an eligible multiemployer plan receiving special financial assistance was previously amended to suspend benefits pursuant to Code Sec. 432(e)(9) or Code Sec. 418E(a), the plan must be amended to reinstate those suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month. Accordingly, that month's benefit payment and any future payment of benefits to a participant or beneficiary must be made as if the amendment suspending benefits had never been adopted. If a plan has been amended to suspend benefits under Code Sec. 432(e)(9), then the benefits that must be reinstated and include all benefits suspended pursuant to that plan amendment, without regard to whether those benefits would have been reduced or eliminated in the absence of the suspension.

If an eligible multiemployer plan receiving special financial assistance had suspended benefits operationally under Code Sec. 418E(a) without adopting a plan amendment, the plan must be amended to reinstate suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month. The reinstatement will apply through the end of the plan year in which the effective date of the special financial assistance occurs. For subsequent plan years, the plan must apply Code Sec. 418E(a) Code Sec. 418E by taking into account all plan assets, including the special financial assistance.

An eligible multiemployer plan that receives special financial assistance must also be amended to provide make-up payments to individuals who are participants or beneficiaries on, and who have commenced benefits by, the date the special financial assistance is paid to the plan. The make-up payments to a participant are equal to the total amount of benefits that were not paid to the participant because of the suspension. Similarly, the make-up payments to a beneficiary are equal to the total amount of benefits that would have been paid to the beneficiary in the absence of the suspension that were not paid to the beneficiary because of the suspension. Thus, without regard to whether the benefits are paid to a participant or to a beneficiary, the make-up payments equal the total amount of benefits that were not paid to that individual on account of the suspension, with no actuarial adjustments (such as for interest).

The make-up payments to a participant or a beneficiary must be paid, as determined by the plan sponsor, either as a lump sum within three months of the date the special financial assistance is paid to the plan or in equal monthly installments over a period of five years, commencing within three months of the date of the special financial assistance is paid. The plan amendment providing for the make-up payments must also specify which distribution form (that is, as a lump-sum payment or as monthly installments) will apply for the make-up payments to a participant or beneficiary. If the make-up payments are paid over five years, then the installments do not include any adjustment for interest and must be paid without regard to whether the participant or beneficiary survives to the end of the five-year period.

Rollover Eligibility of Make-Up Payments

Because a multiemployer plan that receives special financial assistance is required to be amended to provide make-up payments to retirees and beneficiaries in addition to the annuity payments those individuals already receive, these make-up payments are independent payments for rollover purposes unless the payments qualify as supplemental payments that are part of a series of substantially equal periodic payments.

Because the make-up payments vary in size relative to the size of a participant's or beneficiary's annuity payments, a make-up payment could fail to satisfy the maximum payment condition that the aggregate supplement is less than or equal to the greater of 10 percent of the annual rate of payment for the annuity, or $750 or any higher amount prescribed by the Commissioner in guidance of general applicability). Pursuant to this authority to increase the $750 limit, this notice provides that, with respect to a make-up payment that is paid in the form of monthly installments over five years, to the extent that the aggregate supplement exceeds the limit, that limit is increased to the amount of the make-up payment. Accordingly, make-up payments that are paid in the form of monthly installments over five years are treated as part of a series of substantially equal periodic payments and are not eligible rollover distributions.

A make-up payment that is paid in the form of a lump sum is treated as part of a series of substantially equal periodic payments and, accordingly, is not an eligible rollover distribution if the lump sum is less than or equal to the greater of 10 percent of the annual rate of payment for the annuity or $750 (determined without regard to the increase in the preceding paragraph). By contrast, a make-up payment paid in the form of a lump sum that exceeds these limits is not a supplemental payment that is part of a series of periodic payments and retains its character as an independent payment that is an eligible rollover distribution. As a result, the plan administrator must provide the participant or beneficiary who is receiving the make-up payment in the form of a lump sum exceeding that limit with an election to make a direct rollover to an eligible retirement plan as well as Code Sec. 402(f) notice. Unless that participant or beneficiary elects to roll over that payment to an eligible retirement plan, the make-up payment will be subject to withholding at the rate of 20 percent. This notice does not exercise the Commissioner's authority to increase the limit with respect to make-up payments paid as lump sums.

Disregard of Special Financial Assistance

The amounts in the special financial assistance account are not included in the plan's assets for purposes of determining the contributions required under Code Sec. 431. Any benefit or plan expenses paid from the special financial assistance account during a plan year will generate an actuarial gain for that plan year. If the funding method used by the plan includes a determination of an actuarial gain or loss for each plan year, then the actuarial gain generated from any benefit or plan expense paid from the special financial assistance account in a plan year will be included in the actuarial gain or loss for that plan year and amortized over 15 years.

BGC guidance on the application process for special financial assistance can be found at www.PBGC.gov/arp-sfa.

Credit for Carbon Dioxide Sequestration Discussed

Rev. Rul. 2021-13

The IRS discussed the credit for carbon dioxide sequestration with respect to an industrial facility including an acid gas removal unit. The taxpayer was a methanol plant from petroleum coke in a multistep industrial process. The acid gas removal unit at the facility was placed in service on January 1, 2017 for the purposes of Code Secs. 167 and 168. Since then, the carbon dioxide separated by this acid gas removal unit was released into the atmosphere and no taxpayer claimed a Code Sec. 45Q credit regarding the facility. During the tax year at issue, an investor purchased and installed new components of carbon capture equipment necessary to create a single process train capable of capturing, processing and preparing the transport of carbon dioxide that was being released into the atmosphere by the facility. The investor did not acquire an ownership interest in the acid gas removal unit or the facility.

The IRS stated that, for the purposes of Code Sec. 45Q(a), the acid gas removal unit at the facility was carbon capture equipment within the meaning of Reg. §1.45Q-2(c). Further, the investor was not required to own every component of carbon capture equipment within a single process train at the facility to be the person to whom the Code Sec. 45Q credit was attributable. However, the investor must own at least one component of carbon capture equipment in the single process train of carbon capture equipment at the facility. Solely for the purposes of Code Sec. 45Q(a), the original placed-in-service date of a single process train of carbon capture equipment at the facility that include the existing acid gas removal unit and new components of carbon capture equipment was the date that the single process train was placed in a condition or state of readiness and availability for the capture, processing and preparation of carbon oxide for transport for disposal, injection or utilization. Finally, the original placed-in-service date of the single process train for the purposes of Code Sec. 45Q has no effect on the placed-in-service date of the existing acid gas removal unit or new components of carbon capture equipment for depreciation purposes under Code Secs. 167 and 168, although the placed-in-service date of the new components of carbon capture equipment for depreciation purposes may be the same date as the original placed-in-service date for the single process train.

TAX BRIEFS

Gambling Losses

The Court of Appeals for the Ninth Circuit affirmed that the Tax Court properly upheld the IRS's determination of a deficiency for a tax year at issue. The taxpayer was not allowed to deduct his disastrous compulsive gambling losses as casualty losses, which was a side effect of a prescription drug. The Tax Court noted that a small but noticeable number of patients who took the drug suffered a disastrous loss of inhibition and that the taxpayer compulsively gambled only when his dose was at its maximum. However, the gambling losses incurred by the taxpayer did not qualify as deductible casualty losses. Further, the Tax Court properly concluded that the IRS's acceptance of the taxpayer's amended tax returns for the two tax years prior to the tax year at issue did not preclude the disallowance of the claimed net operating loss carryover deductions.

Mancini, CA-9, 2021-2 USTC ¶50,177

Corporations

The IRS issued rulings on the tax consequences of a proposed transaction. There were several entities involved. The transaction comprised of distributions, contributions, conversions and transfers. The rulings included (1) a subsidiary converting into a disregarded entity; and (2) the parent company repaying its intercompany payable to a subsidiary.

IRS Letter Ruling 202126005

Economic Substance Doctrine

In a highly redacted field attorney advice, the IRS Chief Counsel held that entities' purported transfer of limited liability company (LLC) units lacked economic substance and should be disregarded. The purported transfer of LLC units were disregarded under the economic substance doctrine of Code Sec. 7701(o). This result was consistent under the theory that the donee was not a bona fide partner of the LLC under Code Sec. 704(e). Because the transfer of the units lacked economic substance and the exempt organization was not a member of the LLC, all units were allocated to the taxpayers. Further, the transaction did not fit with the taxpayers' stated reasons for engaging in the transaction. Despite the taxpayers' stated intentions, the structure did not meet those objectives. Taking all the circumstances into account, the taxpayers engaged in the transaction solely to obtain tax benefits.

Field Attorney Advice 20212502F

Liens and Levies

The district court did not abuse its discretion in dismissing an individual's complaint because the factual allegations in his complaint did not state a claim under Code Sec. 7433. The taxpayer alleged that IRS employees had negligently or recklessly seized his Social Security benefit payments in order to pay tax debts that he claimed had been eliminated by operation of the statutory collections period and by the IRS's release of tax liens. Having seized his entire benefit before the expiration of the collection limitations period, the IRS was not required to relinquish it after the period expired.

Dean, CA-11, 2021-2 USTC ¶50,173

Payroll Taxes

The appeals court ruled that an individual willfully failed to pay withheld payroll taxes. The taxpayer owned and operated several dentistry practices. The taxpayer directed payments to other creditors despite knowing about the taxes. Through the taxpayer's deposition statements, he recalled having payroll tax issues and IRS forms bearing his signature that reported a balance due on withheld payroll taxes. The taxpayer drew a salary, paid employees and vendors, and directed the payment of rent and other bills instead of his IRS debt.

Williams, CA-5, 2021-2 USTC ¶50,179

Pension Plans

The IRS ruled that an amendment to a defined benefit plan did not create an employee election constituting a cash or deferred arrangement. The plan was also a defined benefit plan, governmental plan and a qualified plan. The legislative amendment targeted certain retirees. The plan provided for mandatory employee contributions that are picked up by the employer under Code Sec. 414(h)(2). The amended language permitted the hiring of a retiree to be a special employee.

IRS Letter Ruling 202126001

Per Diem Rates

The U.S. State Department has released a listing of maximum travel *per diem* allowances for travel in foreign areas. The rates apply to all government employees and contractors, and are effective as of July 1, 2021.

July Maximum Travel Per Diem Allowances for Foreign Areas

Private Foundations

A proposed grant to a public charity was characterized as an unusual grant. The grant was from a disinterested party. The party was attracted by reason of the taxpayer's publicly supported nature. The grants adversely affected the taxpayer's status as normally being publicly supported. The proposed contributions constituted "unusual grants" under Reg. §1.170A-9(f)(6)(ii). The proposed grant met all the requirements of Reg. §1.509(a)-3(c)(4).

IRS Letter Ruling 202126029

Tax Court Petition

The Tax Court did not have jurisdiction in a matter involving an individual who had failed to file a timely petition with respect to a notice of deficiency for the tax years at issue. The taxpayer's petition was untimely to the extent that it sought a redetermination of his tax deficiencies. The taxpayer had filed his petition well outside the 90-day time limit established in Code Sec. 6213(a).

Mathews, TC, Dec. 61,897(M)

Trade or Business

An individual's notice of deficiency was held to be valid. The taxpayer performed services as an independent contractor for a marketing corporation and an agency and was issued a notice of deficiency for a basic tax liability and self-employment tax, respectively. The taxpayer contended that the payments he received from services performed during the year at issue were not taxable as he did not participate in a trade or business as defined under Code Sec. 7701(a)(26). Specifically, the taxpayer argued that a person is only in a trade business if they perform functions of a public office; earnings therefore received from private companies are not taxable. However, these arguments were regarded as frivolous, common and of no merit; thereby sustaining the notice of deficiency. In addition, the taxpayer received self-employment income from the marketing corporation and agency. The taxpayer made no arguments as to why this income should be excluded from self-employment income. Hence, the self-employment tax set forth in the notice of deficiency was sustained.

Delgado, Dec. 61,896(M)

Underpayment Interest

The IRS Chief Counsel issued a ruling on Code Sec. 6601 underpayment interest and Code Secs. 6651(a)(2) and 6655 additions to tax, in a case of Code Sec. 7507(a) receivership of bank. The taxpayer bank was insolvent and the Federal Deposit Insurance Corporation (FDIC) had taken its receivership. Although the taxpayer bank did not file for title 11 bankruptcy protection, its parent holding company did. The IRS Chief Counsel ruled that Code Sec. 6601 interest accrued from the date fixed for filing the return reporting the tax, until the date the tax was paid. The accrual of Code Sec. 6601 interest is unaffected by Code Sec. 7507(a). Further, the Code Secs. 6651(a)(2) addition to tax did not accrue. The taxpayer bank's failure to pay was due to reasonable cause that existed as of the due date for payment of the tax. Lastly, addition to tax accrued from the applicable date specified in Code Sec. 6655(c)(2), until the date specified in Code Sec. 6655(b)(2). The accrual of the Code Sec. 6655 addition to tax is unaffected by Code Sec. 7507(a).

Chief Counsel Advice Memorandum 202126022

Whistleblower Awards

The IRS Whistleblower Office did not abuse its discretion in denying an individual's claim for an award because the threshold requirements for receiving the award were not met. Further, the IRS's motion for summary judgment was granted.

Peterfreund, TC, Dec. 61,895(M)