Section 45R – Relief with Respect to the Tax Credit for Employee Health Insurance Expenses of Certain Small Employers for 2017 and Later Years

Notice 2018-27

I. PURPOSE

This notice provides guidance on section 45R of the Internal Revenue Code (Code). Specifically, this notice provides relief for employers that properly claimed a credit under section 45R (the credit) for all or part of the 2016 taxable year, or that properly claim the credit for all or part of a later taxable year, but are unable to offer employees a qualified health plan (QHP) through a Small Business Health Options Program (SHOP) Exchange for all or part of the remainder of the credit period (as defined in section 45R(e)(2) and the regulations thereunder) because the employer's principal business address is in a county in which a QHP through a SHOP Exchange is not available. This notice provides that such employers may calculate the credit for such subsequent portion of the credit period by treating health insurance coverage provided for that portion of the credit period as qualifying for the credit if that coverage would have qualified for the credit under the section 45R rules applicable before January 1, 2014.

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) previously have issued notices providing transition relief under section 45R for certain small employers with a principal business address in a county in which no QHPs were offered through a SHOP Exchange for 2014, 2015, and 2016. See Notice 2014-6, 2014-2 I.R.B. 279, Notice 2015-08, 2015-1 I.R.B. 589, and Notice 2016-75, 2016-51 I.R.B. 832. Nothing in this notice is intended to modify or otherwise affect the transition relief provided in those notices.

II. BACKGROUND

Section 45R was added to the Code by section 1421 of the Patient Protection and Affordable Care Act, enacted March 23, 2010, Pub. L. No. 111-148 (PPACA). Section 45R offers a tax credit to certain small employers that provide health insurance coverage to their employees (eligible small employers). The credit was first available for taxable years beginning after December 31, 2009.

For taxable years beginning after December 31, 2013,[1] the credit is available only for the credit period, which is the two-consecutive-taxable year period beginning with the first taxable year that an eligible small employer claims the credit. In addition, the credit is available only with respect to premiums paid by an eligible small employer for a QHP offered by the employer to its employees through a SHOP Exchange. An eligible small employer claims the credit by filing a federal income tax return and attaching Form 8941, "Credit for Small Employer Health Insurance Premiums" (or for eligible small employers that are tax-exempt organizations, by filing Form 990-T, "Exempt Organization Business Income Tax Return," and attaching Form 8941).

The Treasury Department and the IRS issued final regulations under section 45R on June 30, 2014 (79 FR 36640). The regulations provide guidance on determining eligibility for the credit and calculating and claiming the credit.

[1] Certain provisions of section 45R differ depending on whether the employer's taxable year began on or before December 31, 2013, or after December 31, 2013. In 2010, the Treasury Department and the IRS published two notices addressing the application of section 45R upon which taxpayers may rely for taxable years beginning before 2014: (1) Notice 2010-44, 2010-22 I.R.B. 717 (addressing the eligibility requirements and the process for calculating and claiming the credit, and providing transition relief for taxable years beginning in 2010 for qualifying arrangements); and (2) Notice 2010-82, 2010-51 I.R.B. 857 (further guidance on the eligibility requirements, the uniform percentage requirement, and the application of the average premium cap).

The Department of Health and Human Services (HHS) advised the Treasury Department and the IRS that for calendar years 2014, 2015, and 2016, in certain counties, SHOP Exchanges would not have any QHPs available for eligible small employers to offer to employees. Under HHS regulations governing employer eligibility for SHOP Exchanges, an employer may either (1) offer coverage to all of its full-time employees through the SHOP whose service area includes the employer's principal business address, or (2) offer coverage to each eligible employee through the SHOP whose service area includes that employee's primary worksite. 45 CFR 155.710(b)(3). As a result, absent transition relief for these years, an otherwise eligible small employer with its principal business address in a county without any QHP available through the SHOP Exchange may have been unable to claim the credit.

To permit otherwise eligible small employers with principal business addresses in counties in which no QHP was available through a SHOP Exchange for 2014, 2015, and 2016 to claim the credit, the Treasury Department and the IRS provided relief under which those employers were permitted to calculate the credit by treating health insurance coverage provided for the plan year beginning in 2014, 2015, or 2016, as applicable, as qualifying for the credit, provided that the coverage would have qualified for the credit under the rules applicable before January 1, 2014.

HHS has advised the Treasury Department and the IRS that, for calendar years 2017 and 2018, SHOP Exchanges in an increasing number of counties across the United States do not have any QHPs available for otherwise eligible small employers to offer to employees. However, given the number of years for which small employers may already have been eligible for the credit and the period of time since the enactment of section 45R, the Treasury Department and the IRS have determined that a more limited type of relief, as described in section III of this notice, is appropriate for otherwise eligible small employers in counties with no SHOP Exchange coverage available after 2016.

III. RELIEF FOR 2017 AND LATER YEARS

This notice provides relief for an eligible small employer that properly claimed or claims the credit for all or part of a taxable year beginning after December 31, 2015, but that for all or part of the remainder of the credit period has a principal business address in a county in which a QHP through a SHOP Exchange is not available. To properly claim the credit, the employer must offer coverage through a SHOP Exchange or coverage meeting the requirements for relief under Notice 2016-75, if applicable, and must comply with all other applicable guidance. Except as provided in section IV of this notice, such an employer may calculate the credit for the remainder of the credit period by treating health insurance coverage provided for the plan year(s) in which a QHP is not available through a SHOP Exchange as qualifying for the credit, provided that the coverage would have qualified for the credit under the section 45R rules applicable before January 1, 2014. This relief does not alter the credit period under section 45R; that is, even if a plan year to which the relief applies extends into a third taxable year, the employer may not claim the credit for a third taxable year.

To see whether a particular county had coverage available through a SHOP Exchange for 2017, see https://www.irs.gov/newsroom/small-business-health-care-tax-credit-questions-and-answers-who-gets-the-tax-credit. To see whether a particular county has coverage available through a SHOP Exchange for 2018 and beyond, employers may refer to the See Plans and Prices Tool on www.healthcare.gov/small-business. When employers arrive at www.healthcare.gov/small-business, they should select “Get Coverage” and then “See Plans and Prices”. Employers in states operating a State-based SHOP may visit their State-based SHOP’s website directly, or use the See Plans and Prices Tool on www.healthcare.gov/small-business to be redirected to their State-based SHOP to see whether a particular county has coverage available for 2018 and beyond.

The following examples illustrate the relief in this notice. The examples assume that the employer is an eligible small employer.

Example 1 (Relief Applies – SHOP Exchange Coverage Provided for First Year of Credit Period). (i) Facts. Employer has a 2016 health plan year and a 2016 taxable year that both begin January 1, 2016, and end December 31, 2016. Employer provides health insurance coverage through a SHOP Exchange from January 1, 2016, through December 31, 2016, that qualifies Employer for the credit. Employer claims the credit for taxable year 2016. On January 1, 2017, Employer’s principal business address is in a county that has no QHPs available through a SHOP Exchange. From January 1, 2017, through December 31, 2017, Employer provides health insurance coverage to its employees that would have qualified Employer for the credit under the rules applicable to taxable years beginning before January 1, 2014.

(ii) Conclusion. Employer may claim the credit for coverage provided for the entire 2017 taxable year. The 2017 taxable year is the second, and final, year of the credit period.

Example 2 (Relief Applies – Relief under Notice 2016-75 Applies for First Year of Credit Period). (i) Facts. Employer has a 2016 health plan year and a 2016 taxable year that both begin January 1, 2016, and end December 31, 2016. Employer’s principal business address is in a county listed in Notice 2016-75 as having no QHPs available on the SHOP Exchange in 2016, and from January 1, 2016, through December 31, 2016, Employer provides health insurance coverage to its employees that would have qualified Employer for the credit under the rules applicable to taxable years beginning before January 1, 2014. Employer claims the credit for the 2016 taxable year based on Notice 2016-75. On January 1, 2017, Employer’s principal business address is in a county that again has no QHPs available on the SHOP Exchange. From January 1, 2017, through December 31, 2017, Employer provides health insurance coverage to its employees that would have qualified Employer for the credit under the rules applicable to taxable years beginning before January 1, 2014.

(ii) Conclusion. Employer may claim the credit for coverage provided for the entire 2017 taxable year. The 2017 taxable year is the second, and final, year of the credit period.

Example 3 (Relief Does Not Apply). (i) Facts. Employer has a 2016 health plan year and a 2016 taxable year that both begin January 1, 2016, and end December 31, 2016. Employer does not qualify for, or claim, the credit for the 2016 taxable year. On January 1, 2017, Employer's principal business address is in a county with no QHPs available on the SHOP Exchange. From January 1, 2017, through December 31, 2017, Employer provides health insurance coverage to its employees that would have qualified for the credit under the rules applicable to taxable years beginning before January 1, 2014.

(ii) Conclusion. Employer may not claim the credit for the 2017 taxable year.

Example 4 (Application of Relief to Non-Calendar Year Plan Year). (i) Facts. Employer has a 2016 taxable year that begins January 1, 2016, and ends December 31, 2016, and a 2016 health plan year that begins April 1, 2016, and ends March 31, 2017. From April 1, 2016 through March 31, 2017, Employer provides health insurance coverage through the SHOP Exchange that qualifies Employer for the credit. On April 1, 2017, Employer's principal business address is in a county that has no QHPs available on the SHOP Exchange. Employer provides health insurance coverage to its employees from April 1, 2017, through March 31, 2018, that would have qualified Employer for the credit under the rules applicable to taxable years beginning before January 1, 2014.

(ii) Conclusion. Employer may claim the credit for coverage provided from April 1, 2016, through December 31, 2016, and for coverage provided from January 1, 2017 through December 31, 2017, but may not claim the credit for any portion of 2018, including the part of the 2017 plan year that ends in 2018, because the credit period ends on December 31, 2017. The relief provided in this notice applies to the credit claimed for coverage provided from April 1, 2017, through December 31, 2017.

Example 5 (Applicability of Relief to New Employer). (i) Facts. Employer is a new employer, first in existence on January 1, 2017. Employer has a health plan year and a taxable year that both begin January 1, 2017 and end December 31, 2017. Employer's principal business address is in a county that has no QHPs available on the SHOP Exchange for 2017. From January 1, 2017, through December 31, 2017, Employer provides coverage to its employees that would have qualified Employer for the credit under the rules applicable to taxable years beginning before January 1, 2014.

(ii) Conclusion. Employer may not claim the credit for the 2017 taxable year.

IV. AFFORDABLE CARE ACT SECTION 1332 WAIVERS

Section 1332 of the PPACA permits a state to waive certain PPACA provisions, including the requirement to operate a SHOP Exchange, as part of an application for a State Innovation Waiver to pursue innovative strategies for providing their residents with access to high quality, affordable health insurance while retaining the basic protections of the PPACA. To fund their reforms, states may receive the aggregate amount of subsidies, including the credit, that would have otherwise gone to the state's residents.

On December 30, 2016, Hawaii's application for a 5-year State Innovation Waiver was approved. As a result, Hawaii is not required to operate a SHOP Exchange for 2017-2021 and employers in Hawaii may not claim the credit for plan years beginning during this five-year period. For more information on the waiver, visit www.cms.gov.

This notice does not affect the Hawaii State Innovation Waiver and, therefore, Hawaii is not required to operate a SHOP Exchange and employers in Hawaii continue to be unable to claim the credit for plan years beginning in calendar years 2017-2021. In addition, any future State Innovation Waivers that provide that a state is not required to operate a SHOP Exchange and that employers in the affected state may not claim the credit will supersede the relief provided in this notice.

V. EFFECTIVE DATE

This notice is effective as of April 27, 2018 and applies to periods after December 31, 2016.

VI. DRAFTING INFORMATION

The principal author of this notice is Stephanie Caden of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Stephanie Caden at (202) 317-5500 (not a toll-free call).