

The Anticipated Impact of the Health Insurance Tax in 2020

Tax and Finance Practice Group • December 2, 2019

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—From a declaration of the American Bar Association.

The Internal Revenue Service (IRS) recently issued a notice establishing the aggregate health insurance fee to be paid by providers of U.S. health insurance for 2020 at just over \$15.5 billion.¹ Section 9010(a) of the Patient Protection and Affordable Care Act (ACA),² as amended by section 10905 of the ACA and by section 1406 of the Health Care and Education Reconciliation Act of 2010,³ imposes this fee, known as the health insurance tax (HIT), on certain entities engaged in the business of providing health insurance to a U.S. health risk (Covered Entities).

The first calendar year in which the HIT was due (Fee Year) was 2014,⁴ and the IRS collected \$8 billion from the tax in that year.⁵ The IRS collected \$11.3 billion from the HIT in 2015 and 2016.⁶ In 2018, the HIT brought in \$14.3 billion of revenue to the federal government.⁷ Congress placed a moratorium on the HIT for 2017⁸ and collection of the HIT was again suspended for 2019⁹ in an attempt to prevent higher health insurance premiums and costs for insurers.¹⁰

In January and February 2019, two bipartisan bills by the same title, the Health Insurance Tax Relief Act of 2019, were introduced in the U.S. Senate and House.¹¹ The Health Insurance Tax Relief Act of 2019 proposed to delay the HIT for 2020 and 2021.¹² While bipartisan support exists for these bills, the legislation is not predicted to be voted on before 2020.¹³ Representative Earl Blumenauer (D-OR), who sits on the House Ways and Means Committee's tax policy and health panels, opined, "[t]here's a big agenda in terms of trying to deal with tax issues, and I think you don't want to deal with

¹ IRS Notice 2019-50, 2019-37 I.R.B. 700.

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (cited herein as ACA).

³ Pub. L. No. 111-152, 124 Stat. 1029 (2010).

⁴ ACA § 9010(j)(1).

⁵ 26 C.F.R. § 57.4(a)(3).

⁶ *Id.*

⁷ *Id.*

⁸ Pub. L. No. 114-113, 129 Stat. 3037, Div. P, Title II, § 201 (2015).

⁹ Pub. L. No. 115-120, 132 Stat. 38, § 4003 (2018).

¹⁰ Robert Sheen, *IRS Renews Insurer Fees*, THE ACA TIMES (Sept. 9, 2019); Kelsey Waddill, *Health Insurance Tax May Rise \$1.2 Billion Due to New CMS Payment Rule*, HEALTHPAYER INTELLIGENCE (Sept. 16, 2019).

¹¹ S. 172, 116th Cong. (2019); H.R. 1398, 116th Cong. (2019).

¹² *Id.*

¹³ Susannah Luthi & Shelby Livingston, *Likely Return of the Health Insurance Tax to Impact MA Profits*, MODERN HEALTHCARE (Feb. 28, 2019).

these things piecemeal until we find out where we're at, because they all interrelate."¹⁴

Absent legislative action, the HIT is set to resume in 2020.¹⁵ Thus, health insurers that are Covered Entities are well advised to plan now for the anticipated reporting requirements and HIT payments to be made under section 9010 of the ACA for the 2020 tax year.

Covered Entities

Only Covered Entities are subject to the HIT. Covered Entities include the following: (i) health insurance issuers within the meaning of section 9832(b)(2) of the Internal Revenue Code of 1986, as amended (I.R.C.); (ii) health maintenance organizations (HMOs) within the meaning of I.R.C. section 9832(b)(3); (iii) insurance companies subject to tax under Parts I or II of Subchapter L of the I.R.C. (or that would be subject to such tax but for being tax-exempt); (iv) entities that provide health insurance under Medicare Advantage, Medicare Part D, or Medicaid; and (v) certain multiple employer welfare arrangements (MEWAs).¹⁶ An entity treated as a disregarded entity for federal income tax purposes may still be a Covered Entity, since final regulations promulgated under section 9010 of the ACA (Regulations)¹⁷ do not adopt any special entity classification rules and such an entity will not be treated as a corporation simply by reason of the HIT.¹⁸

Self-insured employers are excluded from being treated as a Covered Entity,¹⁹ as are

¹⁴ *Id.*

¹⁵ See ACA § 9010(j)(3).

¹⁶ Treas. Reg. § 57.2(b)(1). To qualify as a Covered Entity under category (i), such an entity must be licensed to engage in the business of insurance in a state (with "state" defined as any of the 50 states, the District of Columbia or any United States possession), though an entity under any of the other categories is not required to be so licensed to qualify as a Covered Entity. Treas. Reg. § 57.2(b)(4); Health Insurance Providers Fee, 78 Fed. Reg. 71,476, 71,477 (Nov. 29, 2013).

¹⁷ See Treas. Reg. § 57.1, *et seq.*

¹⁸ See Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71481 (Nov. 29, 2013). However, a Covered Entity that is an insurance company under I.R.C. sections 816(a) and 831(c) is automatically taxed as a corporation and cannot elect to be treated as a disregarded entity. *Id.*; see also Treas. Reg. § 301.7701-2(b)(4) and Rev. Rul. 83-132, 1983-2 C.B. 270.

¹⁹ ACA § 9010(c)(2)(A); Treas. Reg. § 57.2(b)(2)(i).

governmental entities,²⁰ certain nonprofit corporations,²¹ and certain voluntary employees' beneficiary associations (VEBAs), except for MEWAs.²²

If an entity claims an exclusion from the HIT, it must qualify for the exclusion in its test year, which can be either the Fee Year or the year preceding the Fee Year (Data Year).²³ If it qualifies for an exclusion in its test year, then it is not considered a Covered Entity and need not follow the reporting requirements of Covered Entities discussed below for such Fee Year. The same test year used for the Covered Entity's first Fee Year beginning after December 31, 2014 must be used for each subsequent Fee Year.²⁴ However, if the entity uses the Fee Year as its test year and ends up not qualifying for an exclusion, then it must subsequently use the Data Year as its test year in all future Fee Years.²⁵

Controlled Groups

A group of two or more persons, including at least one person that is a Covered Entity, is defined as a controlled group under section 9010(c)(3) of the ACA if such group is treated as a single employer under I.R.C. section 52(a) or (b) (including a foreign entity subject to tax under I.R.C. section 881 or I.R.C. section 414(m) or (o)) (Controlled Group).²⁶ A Controlled Group is treated as a single Covered Entity for purposes of the HIT.²⁷ A person is treated as a member of a Controlled Group if it is a member of such group on December 31 of the Data Year.²⁸ All members of a Controlled Group are jointly and severally liable for the HIT.²⁹

²⁰ ACA § 9010(c)(2)(B); Treas. Reg. § 57.2(b)(2)(ii).

²¹ Treas. Reg. § 57.2(b)(2)(iii). One requirement for exclusion is that the nonprofit derive more than 80% of its gross revenues from certain government programs under the Social Security Act that target low-income, elderly, or disabled populations.

²² Treas. Reg. § 57.2(b)(2)(iv).

²³ Treas. Reg. § 57.2(b)(3)(i).

²⁴ Treas. Reg. § 57.2(b)(3)(ii).

²⁵ Treas. Reg. § 57.2(b)(3)(iii).

²⁶ See also Treas. Reg. § 57.2(c)(1) and (c)(3)(i).

²⁷ ACA § 9010(c)(3)(A); Treas. Reg. § 57.2(c)(2).

²⁸ Treas. Reg. § 57.2(c)(3)(ii).

²⁹ Treas. Reg. § 57.7(e).

A Controlled Group is required to select a designated entity to act on its behalf in regards to the HIT (Designated Entity).³⁰ If a Controlled Group (without regard to a foreign entity subject to tax under I.R.C. section 881) “is also an affiliated group the common parent of which files a consolidated return for Federal income tax purposes, the [D]esignated [E]ntity is the agent for the group (within the meaning of [Treas. Reg.] § 1.1502-77 . . .) for the [D]ata [Y]ear.”³¹ The Designated Entity will be responsible for filing the appropriate forms, communicating with the IRS, and paying the HIT.³² If the Controlled Group fails to select a Designated Entity, then the IRS will make the selection and all members of the Controlled Group will be deemed to have consented to such selection.³³ Additionally, the Controlled Group may risk being liable for penalties for failure to meet its filing requirements if it fails to select a Designated Entity.³⁴

Health Insurance

An additional requirement for an entity to qualify as a Covered Entity is that it be in the business of providing health insurance, yet the term health insurance is not actually defined by section 9010 of the ACA. Instead, the section only defines the term in the negative, providing that “[t]he term ‘health insurance’ shall not include insurance for long-term care or disability.”³⁵

The regulations provide greater detail on the term health insurance. Under the regulations, health insurance is generally defined as having the same meaning as health insurance coverage under I.R.C. section 9832(b)(1)(A), i.e., it is defined as “benefits consisting of medical care . . . under any hospital or medical service policy or certificate, hospital or medical service plan contract, or [HMO] contract,” when offered by one of the five covered entities listed above (Health Insurance).³⁶ Health Insurance

³⁰ Treas. Reg. § 57.2(e)(1).

³¹ Treas. Reg. § 57.2(e)(2)(ii).

³² Treas. Reg. § 57.2(e)(1).

³³ Treas. Reg. § 57.2(e)(2)(iii).

³⁴ Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71485 (Nov. 29, 2013).

³⁵ ACA § 9010(h)(3).

³⁶ Treas. Reg. § 57.2(h)(1).

includes limited scope dental and vision benefits and retiree-only health insurance.³⁷

The regulations also list several exclusions to Health Insurance, such as fixed indemnity insurance, Medicare supplemental health insurance, travel insurance, and indemnity reinsurance, among others.³⁸

United States Health Risk

A Covered Entity is one that provides Health Insurance to a United States health risk. A United States health risk (Health Risk) is defined as “the health risk of any individual who is (1) a United States citizen, (2) a resident of the United States . . . , or (3) located in the United States, with respect to the period such individual is so located.”³⁹ The United States includes all 50 states, the District of Columbia, and its possessions.⁴⁰

Rules promulgated by the IRS in 2013 provided that expatriate policies were not excluded since “[a]n insurer that issues a policy to a U.S. citizen or resident living abroad is still providing coverage for a [Health Risk], despite the fact that the individual may not be currently residing in the United States.”⁴¹ However, subsequent legislation excludes qualified expatriates enrolled in expatriate health plans from being considered a Health Risk beginning after 2015.⁴²

Calculation of the HIT, Reporting Requirements, and Payment

The amount of the HIT due is based on a Covered Entity’s market share of net premiums written during a Data Year.⁴³ The Covered Entity’s market share is represented by a fraction equal to the Covered Entity’s net premiums written during a Data Year over all Covered Entities’ net premiums written during the same Data Year,

³⁷ *Id.*

³⁸ Treas. Reg. § 57.2(h)(2).

³⁹ ACA § 9010(d); Treas. Reg. § 57.2(n).

⁴⁰ ACA § 9010(h)(2); Treas. Reg. § 57.2(m).

⁴¹ Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71486 (Nov. 29, 2013).

⁴² Expatriate Health Coverage Clarification Act of 2014, Pub. L. 113-235, Div. M. § 3(c)(1).

⁴³ ACA § 9010(b); Treas. Reg. § 57.4(a)(2).

and this fraction is multiplied by the applicable amount for the Fee Year (Applicable Amount) to determine the HIT due.⁴⁴ For Fee Years 2019 and after, the Applicable Amount equals the Applicable Amount in the preceding Fee Year increased by the rate of premium growth, as defined under I.R.C. section 36B(b)(3)(A)(ii).⁴⁵ The Applicable Amount for Fee Year 2020 is \$15,522,820,037.⁴⁶

Net premiums written of \$25 million or less are not taken into account,⁴⁷ meaning Covered Entities within this category are not subject to the HIT for that Fee Year, though such Covered Entities must still report these amounts to the IRS, as discussed below.⁴⁸ Only 50% of net premiums written that are more than \$25 million but equal to or less than \$50 million are taken into account, while 100% of net premiums written that are more than \$50 million are taken into account.⁴⁹

Net premiums written means “premiums written, including reinsurance premiums written, reduced by reinsurance ceded, and reduced by ceding commissions and medical loss ratio (MLR) rebates with respect to the [D]ata [Y]ear.”⁵⁰ It includes assumption reinsurance but not indemnity reinsurance.⁵¹ MLR rebates are computed on an accrual basis.⁵²

When reporting its aggregate net premiums written, a Controlled Group will not take into account the net premiums written of a member of such Controlled Group that is a nonprofit corporation or VEBA that would be exempted from the definition of a Covered Entity on its own.⁵³ Additionally, after taking into account the reductions outlined above, if a Covered Entity or member of a Controlled Group is exempt from federal income tax under I.R.C. section 501(a) and is one of the entities described in I.R.C. section 501(c)(3), (4), (26), or (29) as of December 31 of the Data Year, then only 50% of its

⁴⁴ Treas. Reg. § 57.4(d).

⁴⁵ Treas. Reg. § 57.4(a)(3).

⁴⁶ IRS Notice 2019-50, 2019-37 I.R.B. 700.

⁴⁷ ACA § 9010(b)(2)(A); Treas. Reg. § 57.4(a)(4).

⁴⁸ Treas. Reg. § 57.3(a).

⁴⁹ ACA § 9010(b)(2)(A); Treas. Reg. § 57.4(a)(4).

⁵⁰ Treas. Reg. § 57.2(k).

⁵¹ *Id.*

⁵² Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71484 (Nov. 29, 2013).

⁵³ See *supra* notes 21 and 22; see also Treas. Reg. § 57.4(a)(4)(ii).

remaining net premiums written that are attributable to its exempt activities are taken into account.⁵⁴ Whether an entity qualifies as tax-exempt under I.R.C. section 501(a) and as one of the entities described in I.R.C. section 501(c)(3), (4), (26), or (29) will be determined under the I.R.C. provisions applicable to those organizations.⁵⁵ For a Controlled Group in which not all of the members qualify for this partial exclusion, the exclusion applies first to each member on a pro rata basis and then only to eligible members.⁵⁶

A Covered Entity is required to report its net premiums written for Health Insurance of Health Risks during the Data Year by April 15 of the Fee Year on Form 8963 even if it receives less than \$25 million in net premiums written and is therefore not liable for the HIT.⁵⁷ Based on this report and other available information, the IRS will calculate the HIT owed as detailed above.⁵⁸ “Other available information” includes a Supplemental Health Care Exhibit (SHCE); if a Covered Entity files an SHCE with the National Association of Insurance Commissioners, then the entire amount reported as direct premiums written minus MLR rebates with respect to the Data Year will be considered to be for Health Insurance of Health Risks unless the Covered Entity demonstrates otherwise.⁵⁹ The instructions to Form 8963 provide Covered Entities additional information on how to determine net premiums written using the SHCE and any equivalent forms.

The IRS will make a preliminary calculation of the HIT owed and send notice of this calculation to the Covered Entity by June 15 of the Fee Year.⁶⁰ If any errors in the calculation are noticed, the Covered Entity may submit a new and corrected Form 8963,

⁵⁴ Treas. Reg. § 57.4(a)(4)(iii); see also Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71483 (Nov. 29, 2013).

⁵⁵ Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71483 (Nov. 29, 2013).

⁵⁶ Treas. Reg. § 57.4(a)(4)(iii).

⁵⁷ Treas. Reg. § 57.3(a); see also Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71483 (Nov. 29, 2013). A Covered Entity (including a controlled group) reporting more than \$25 million in net premiums written must electronically file the Form 8963. T.D. 9881, RIN 1545-BN57, 84 Fed. Reg. ___ (Nov. 13, 2019).

⁵⁸ Treas. Reg. § 57.4(b)(1).

⁵⁹ Treas. Reg. § 57.4(b)(2); see also Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71484 (Nov. 29, 2013).

⁶⁰ Treas. Reg. § 57.7(a); IRS Notice 2013-76.

with the “Corrected Report” box checked, to the IRS by July 15 of the Fee Year.⁶¹ The corrected form replaces the original form for all purposes, including determining whether an accuracy-related penalty applies, though the Covered Entity will remain liable for any failure to report penalty imposed for the original form.⁶² Penalties are discussed below.

The IRS will provide the Covered Entity notice of its final calculation of the HIT by August 31 of the Fee Year,⁶³ which must be paid by the Covered Entity by September 30 of the Fee Year.⁶⁴ The payment must be made by electronic funds transfer,⁶⁵ and no tax return needs to be filed with the payment.⁶⁶ Any claim for a refund must be made on Form 843.⁶⁷ Each Form 8963, whether original or corrected, will be open for public inspection or available upon request.⁶⁸

Penalties

A Covered Entity that fails to file Form 8963 is liable for a failure to report penalty unless the failure is due to reasonable cause.⁶⁹ The amount of this penalty is \$10,000 plus the lesser of (i) \$1,000 per day for each day the failure continues, or (ii) the amount of the HIT owed.⁷⁰ This penalty is treated as a penalty under Subtitle F of the I.R.C.

A Covered Entity that understates its net premiums written on its Form 8963 is liable for an accuracy-related penalty, and there is no reasonable cause exception.⁷¹ The amount of this penalty equals the difference between (i) the HIT the Covered Entity should have paid had it not made an understatement, and (ii) the HIT calculated by the IRS based on

⁶¹ Treas. Reg. § 57.6(a); IRS Notice 2013-76.

⁶² Treas. Reg. § 57.6(a).

⁶³ Treas. Reg. § 57.7(a) and (b).

⁶⁴ Treas. Reg. § 57.7(d).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Treas. Reg. § 57.9.

⁶⁸ Treas. Reg. § 57.3(a)(3).

⁶⁹ ACA § 9010(g)(2)(A); Treas. Reg. § 57.3(b)(1)(i). “A failure is due to reasonable cause if the [C]overed [E]ntity exercised ordinary business care and prudence and was nevertheless unable to submit the report within the prescribed time.” This is based on “all the facts and circumstances surrounding the failure to submit the report.” Treas. Reg. § 57.3(b)(1)(iii).

⁷⁰ ACA § 9010(g)(2)(A)(i), (ii); Treas. Reg. § 57.3(b)(1)(ii).

⁷¹ Treas. Reg. § 57.3(b)(2)(i).

the understatement.⁷² This penalty is subject to the provisions of Subtitle F, Chapter 68 of the I.R.C. that apply to assessable penalties.⁷³

Each member of a Controlled Group that is required to provide information to such group's Designated Entity for purposes of Form 8963 is jointly and severally liable for any penalties imposed.⁷⁴ A Covered Entity may be liable for both penalties, and the penalties apply in addition to the HIT.⁷⁵

Tax Treatment of the HIT

The HIT is treated as an excise tax for purposes of Subtitle F of the I.R.C. and is non-deductible.⁷⁶ If a Covered Entity increases premiums or otherwise collects amounts from its policyholders in order to offset the cost of the HIT, then such amounts are included in the Covered Entity's gross income under I.R.C. section 61(a).⁷⁷ Though the regulations do not require a Covered Entity to disclose to its policyholders any amounts included in premiums to offset the cost of the HIT, such entities are not prohibited from doing so.⁷⁸ A Covered Entity may, however, be subject to state-specific or other federal rules that could require disclosure of these amounts.⁷⁹

Impact of the HIT on Health Insurers and Consumers

As discussed above, section 9010 of the ACA imposes the HIT as a fixed amount to be allocated across Covered Entities roughly proportional to their market share as measured by their total premiums. Advocates for enacting the HIT argued that Covered Entities would make money from increased enrollment due to the ACA and, therefore,

⁷² Treas. Reg. § 57.3(b)(2)(ii).

⁷³ Treas. Reg. § 57.3(b)(2)(iv).

⁷⁴ Treas. Reg. § 57.3(b)(3).

⁷⁵ Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71484 (Nov. 29, 2013).

⁷⁶ See ACA § 9010(f); Treas. Reg. § 57.8(a) and (d).

⁷⁷ Rev. Rul. 2013-27, 2013-51 I.R.B. 676.

⁷⁸ See Health Insurance Providers Fee, 78 Fed. Reg. 71476, 71487 (Nov. 29, 2013).

⁷⁹ *Id.*

should pay more money to the federal government from said profits.⁸⁰ In the past, Covered Entities passed the burden of the HIT to consumers via higher premiums. To prevent an increase in insurance premiums, Congress created a one-year moratorium on collecting the HIT for 2019.⁸¹ Without intervention by Congress, this moratorium will lapse in 2020, and the HIT is projected to yield nearly \$16 billion in revenue for the federal government.⁸² Approximately 142 million consumers and/or their plan sponsors may be impacted by the HIT in 2020.⁸³

As mentioned, the HIT is non-deductible for federal tax purposes for Covered Entities.⁸⁴ Accordingly, more than a dollar in additional premiums must be collected to cover each dollar assessed against a Covered Entity. For example, assuming a 21% federal corporate income tax rate, a Covered Entity would need to increase premiums by \$1.27 for every \$1.00 paid in taxes.⁸⁵

The HIT is anticipated to increase premiums by 2.2% in 2020, amounting to an increase of:

- \$196 per individual in a non-group market;
- \$154 per single contract and \$479 per family contract in the small group market;
- \$158 per single contract and \$458 per family contract in the large group market;
- \$241 per Medicare Advantage member; and
- \$157 per Medicaid managed care enrollee.⁸⁶

While many Covered Entities likely will pass along the HIT through increased premiums,

⁸⁰ See *State of Tex. v. U.S.*, 300 F. Supp. 3d 810, 823 (N.D. Tex. 2018).

⁸¹ Pub. L. No. 115-120, 132 Stat. 38, § 4003 (2018).

⁸² Chris Carlson *et al.*, *Analysis of the Impacts of the ACA's Tax on Health Insurance in Year 2020 and Later*, OLIVER WYMAN ACTUARIAL CONSULTING, Aug. 28, 2018, at 3.

⁸³ *Id.*

⁸⁴ ACA § 9010(f); Treas. Reg. § 57.8(a) and (d).

⁸⁵ Carlson, *supra* note 82, at 3.

⁸⁶ *Id.*

Medicare Advantage Organizations may choose to pay all or a portion of the HIT from the Medicare Advantage Organization's revenue because the Medicare Advantage market is more competitive than the individual market. Medicare Advantage Organizations may prefer to take on the burden of the HIT to prevent the loss of enrollees due to higher premiums.⁸⁷

Application of the HIT on Medicaid Managed Care Organizations

In the past, Medicaid managed care organizations (MCOs) were reimbursed for the HIT by state and federal governments through capitation rates. In a managed care arrangement, the state enters into a contract with an MCO. The MCO agrees to deliver health care services to citizens of the state in return for a fixed monthly fee per covered individual, known as a "capitation rate," paid for by the state.

In *State of Texas v. United States*, six states brought action alleging that a regulation pertaining to private actuarial certification of Medicaid MCO capitation rates effectively required the states to pay the HIT, despite being exempted from the tax under section 9010(c)(2)(B) of the ACA.⁸⁸ Medicaid MCO capitation rates must be "actuarially sound."⁸⁹ In 2015, the Actuarial Standards Board (a private organization that sets practice standards for private actuaries certified by the American Academy of Actuaries) enacted the Actuarial Standard of Practice Number 49 (ASOP 49). ASOP 49 forbids actuaries certified with the American Academy of Actuaries from certifying any Medicaid contract between a state and a Medicaid MCO unless the contract requires the state to pay the HIT to the Medicaid MCO.⁹⁰ In 2015, the U.S. Department of Health and Human Services (HHS) issued guidance stating that "actuaries are required to follow all Actuarial Standards of Practice," including, but not limited to, the standards set forth in

⁸⁷ Michael Brady, *IRS Says Reinstating ACA Insurance Tax Would Cost Insurers \$15.5B in 2020*, MODERN HEALTHCARE, Sept. 4, 2019; Susannah Luthi & Shelby Livingston, *Likely Return of the Health Insurance Tax to Impact MA Profits*, MODERN HEALTHCARE, Feb. 28, 2019.

⁸⁸ 300 F. Supp. 3d 810 (N.D. Tex. 2018).

⁸⁹ 42 U.S.C. § 1396b(m)(2)(A) (1981).

⁹⁰ ASOP 49 § 3.2.12(d).

ASOP 49.⁹¹ Without certification, the Centers for Medicare & Medicaid Services would not approve a Medicare MCO contract,⁹² making the state ineligible for Medicaid funding.⁹³ The federal judge held that HHS impermissibly delegated the certification power to the Actuarial Standards Board, effectively requiring states to pay the HIT or risk losing Medicaid funding.⁹⁴ Later, the judge held that the states are entitled to “equitable disgorgement” of the HIT.⁹⁵

Accordingly, during 2020, the HIT will not be included in the determination of actuarially sound rates. Medicaid MCOs will not be fully reimbursed by the state and federal governments for the cost of the HIT.

Potential Adverse Consequences of the HIT

The HIT is projected to yield nearly \$16 billion in revenue in 2020.⁹⁶ The tax, however, may also adversely affect consumers and overall health insurance coverage in the United States if Covered Entities merely pass along the burden of the HIT to consumers via higher premiums. The HIT could potentially result in any of the following:

- Increase cost sharing and premiums for Medicare Advantage and Medicare Part D beneficiaries;
- Increase the tax burden on small employers that are fully-insured;
- Increase the cost of fully-insured health care coverage, resulting in individuals and groups delaying purchase of health insurance and increasing the number of uninsured individuals; and
- Exacerbate “adverse selection” in the individual and small group markets if

⁹¹ U.S. DEP’T OF HEALTH AND HUMAN SERVS., *2016 Medicaid Managed Care Rate Development Guide* (Sept. 2015).

⁹² See 42 C.F.R. § 438.6(c)(1)(i)(A)-(C) (2002).

⁹³ See 42 U.S.C. § 1396b(m)(2)(iii).

⁹⁴ 300 F. Supp. 3d at 850.

⁹⁵ *State v. U.S.*, 336 F. Supp. 3d 334 (N.D. Tex. 2018).

⁹⁶ Carlson, *supra* note 82, at 3.

younger, healthier individuals forego coverage, creating a less stable risk pool and higher premiums.⁹⁷

Conclusion

Since the HIT is likely to resume beginning in 2020, it is vital for both inside and outside advisors to Covered Entities to familiarize themselves now with section 9010 of the ACA and to determine the effects the HIT will have on those entities next year and beyond.

⁹⁷ *Id.* at 4.