

Part III. Administrative, Procedural, and Miscellaneous

Health Savings Accounts—Transition Relief for State Mandates

Notice 2004-43

PURPOSE

This notice provides transition relief for individuals in states where high deductible health plans (HDHPs) as described in section 223(c)(2) are not available because state laws require health plans to provide certain benefits without regard to a deductible or below the minimum annual deductible of section 223(c)(2)(A)(i). The transition relief covers months before January 1, 2006, for state requirements in effect on January 1, 2004.

BACKGROUND

Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, added section 223 to the Internal Revenue Code to permit eligible individuals to establish health savings accounts (HSAs) for taxable years beginning after December 31, 2003. An "eligible individual" under section 223(c)(1) must be covered by a "high deductible health plan" (HDHP). An HDHP under section 223(c)(2) must satisfy certain requirements with respect to minimum annual deductibles and maximum out-of-pocket expenses. However, section 223(c)(2)(C) permits a safe harbor for the absence of a preventive care deductible. An eligible individual may also have certain permitted insurance and permitted coverage under section 223(c)(1)(B).

Notice 2004-23, 2004-15 I.R.B. 725, describes a safe harbor for preventive care benefits that may be provided by an HDHP without a deductible or with a deductible below the minimum annual deductible for an HDHP. In addition, the notice indicates that whether health care required by state law without regard to a deductible is "preventive" will be based on the standards set forth in Notice 2004-23 and other guidance issued by the IRS, rather than on how the benefits are characterized by state law.

Several states currently require that health plans provide certain benefits without regard to a deductible or with a deductible below the minimum annual deductible requirements of section 223(c)(2) (e.g., first-dollar coverage or coverage with a low deductible). These health plans are not HDHPs under section 223(c)(2) and individuals covered under these health plans are not eligible to contribute to HSAs. Because of the short period between the enactment of HSAs and the effective date of section 223, these states have had insufficient time to modify their laws to conform to the standards of section 223. Thus, it is appropriate to provide transition relief that treats HDHPs as qualifying under section 223(c)(2) when the sole reason the plans are not HDHPs is because of state-mandated benefits. During the transition period, otherwise eligible individuals covered under these plans will be treated as eligible individuals for purposes of section 223(c)(1) and may contribute to an HSA.

APPLICATION

For months before January 1, 2006, a health plan which would otherwise qualify as an HDHP under section 223(c)(2), except that it complies with state law requirements that certain benefits be provided without a deductible or below the minimum annual deductible of section 223(c)(2)(A)(i), will be treated as an HDHP for purposes of section 223(c)(2), if the disqualifying benefits are required by state law in effect on January 1, 2004.

DRAFTING INFORMATION

The principal author of this notice is Shoshanna Tanner of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Tanner at (202) 622-6080 (not a toll-free call).

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, § 42; 1.42-5.)

Rev. Proc. 2004-38

SECTION 1. PURPOSE

This revenue procedure informs owners of qualified low-income housing projects how to obtain the waiver from the Internal Revenue Service of the annual recertification of tenant income (waiver) provided in § 42(g)(8)(B) of the Internal Revenue Code.

SECTION 2. BACKGROUND

Section 1.42-5 of the Income Tax Regulations provides the minimum requirements that a housing credit agency's (Agency's) compliance monitoring procedure must contain to satisfy its compliance monitoring duties under § 42(m)(1)(B)(iii). Section 1.42-5(b)(1)(vi) provides that an Agency must require an owner to keep records for each qualified low-income building in the project that show for each year in the compliance period the annual income certifications of each low-income tenant per unit. Section 1.42-5(b)(1)(vii) provides that an Agency must require an owner to keep documents for each qualified low-income building in its project for each year in the compliance period that support each low-income tenant's income certification. Section 1.42-5(c)(1)(iii) provides that an Agency must require an owner to certify at least annually that, for the preceding 12-month period, the owner has received an annual income certification from each low-income tenant and documentation supporting that certification.

Section 42(g)(8)(B) provides that on application by the taxpayer, the Secretary may waive any annual recertification of tenant income for purposes of § 42(g) if the entire building is occupied by low-income tenants (a 100 percent low-income building). Low-income tenants are individuals occupying a rent-restricted unit in a qualified low-income housing project whose

combined income satisfies the § 42(g)(1) income limitation elected by the owner of the project.

SECTION 3. SCOPE

This revenue procedure applies to Agencies and owners of qualified low-income housing projects that consist entirely of 100 percent low-income buildings.

SECTION 4. PROCEDURE FOR OBTAINING A WAIVER UNDER § 42(g)(8)(B)

An owner applying for the waiver for its 100 percent low-income building must (1) complete and sign the applicable portions of the Form 8877, *Request for Waiver of Annual Recertification Requirement for the Low-Income Housing Credit*, (2) have the Agency responsible for monitoring the building for compliance with § 42 sign the applicable portion of the form, and (3) file the form with the Service pursuant to the instructions accompanying the form. A copy of the 2004 version of Form 8877 is included in the appendix to this revenue procedure. The Service will notify the owner whether the request for waiver has been approved or denied. See section 5.02 of this revenue procedure for the period the waiver is in effect.

SECTION 5. EFFECT OF OBTAINING A WAIVER UNDER § 42(g)(8)(B)

.01 If an owner of a 100 percent low-income building obtains a waiver of the annual income recertification from the Service, the owner will be exempt from the recertification requirements of § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii). As a result, the owner is not required under those sections to (1) keep records that show an annual income recertification of all the low-income tenants in the building who have previously

had their annual income verified, documented, and certified; (2) maintain documentation to support that recertification; or (3) certify to the Agency responsible for monitoring the building for compliance with § 42 that it has received this information.

.02 The waiver takes effect on the date the Service approves the waiver. Once the waiver takes effect, it remains in effect until the end of the 15-year compliance period (defined in § 42(i)(1)), unless the waiver is revoked, in which case the waiver ceases to be in effect on the date of revocation. See sections 5.04 and 5.05 of this revenue procedure regarding revocations.

.03 Obtaining the waiver will not prevent an owner from having to produce documentation to verify the owner's compliance with § 42 upon an examination of the owner's federal income tax return. Thus, for example, the owner must keep records and documentation that show the income of tenants upon initial occupancy of any residential unit in the building. In addition, except as provided in section 5.01 of this revenue procedure, obtaining the waiver will not prevent an owner from having to satisfy the requirements of the compliance monitoring procedure adopted by the Agency responsible for monitoring the building for compliance with § 42.

.04 The Service may revoke the waiver if the building ceases to be a 100 percent low-income building or if the Service determines that an owner has violated § 42 in a manner that is sufficiently serious to warrant revocation. In any case, the Service will revoke the waiver if the Agency requests, in accordance with the instructions to Form 8877, that the Service revoke the waiver.

.05 A waiver will be automatically revoked if there is a change in the ownership for federal tax purposes of the 100 percent low-income building (including a

change resulting from a termination of a partnership under § 708). In this case, the owner that received the waiver must notify the Service of the revocation in accordance with the instructions to Form 8877. The new owner may apply for a waiver.

.06 An Agency's compliance monitoring procedure will not fail to satisfy § 42(m)(1)(B)(iii) solely because the 100 percent low-income buildings to which the waiver applies have been exempted from the recertification requirements of § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii). Nonetheless, the Agency's compliance monitoring procedure must continue to require that an owner satisfy the requirements in § 1.42-5(b)(1)(vi) and (vii) and § 1.42-5(c)(1)(iii) upon a tenant's initial occupancy of any residential rental unit in the building.

.07 A 100 percent low-income building to which the waiver applies continues to be subject to the review requirements of § 1.42-5(c)(2).

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 94-64, 1994-2 C.B. 797, is superseded. Waivers obtained under Rev. Proc. 94-64 are not affected by this revenue procedure.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for applications filed on or after July 6, 2004.

DRAFTING INFORMATION

The principal author of this revenue procedure is David Selig of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Selig at (202) 622-3040 (not a toll-free call).

APPENDIX

2004 Version of Form 8877