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Re: MEC, MEC Plus and MEC Plus Advantage

Dear Broker Partner:

Our firm was asked by Apex Management Group to review the MEC, MEC Plus and MEC Plus Advantage Healthcare plans (the "Plans") to determine whether the "Plans", if offered by an Applicable Large Employer, meaning an employer with 50 or more Full Time Equivalent Employees (an "ALE"), would qualify as providing Minimum Essential Coverage ("MEC") as defined by the Patient Protection and Affordable Care Act (the "PPACA") so that the ALE could avoid the "A Penalty" set forth in Section 4980H(a) of the Internal Revenue Code. We were also asked to comment on the applicability of the "B Penalty", set forth in Section 4980H(b) of the Internal Revenue Code, to the Plans. Finally, we were also asked to determine whether the Plans would qualify as Minimum Essential Coverage as defined by the Individual Mandate for California residents created by California SB78, effective January 1, 2020 and after, the individual mandate contained within the New Jersey Health Insurance Market Preservation Act (A3380) and the Washington DC.

Federal Affordable Care Act Mandate.

After review of the Plans, we can confirm that the Plans provide the Minimum Essential Coverage required by the ACA so that if the ALE offers any of these Plans to at least 95% of its fulltime or fulltime equivalent employees, in any given calendar month, the ALE **WOULD NOT** be subject to the "A Penalty". The "A Penalty" can be avoided under this circumstance even though the Minimum Essential Coverage offered by these plans themselves do not provide "minimum value coverage" or are not be determined to be "affordable" to the employee under the ACA. (The IRS stated that this "A penalty" for 2022 will be $2750.)

Note: The Federal "A Penalty" shared responsibility assessment has been reduced to $0 by the Federal Tax Cuts and Jobs Act for the 2019 tax year going forward (for tax returns filed in 2020 and later), and that remains the case today for the year 2022. We are watching to see if this changes under the new administration. Be aware, however, that some states have enacted variations of the shared responsibility penalties applicable to residents in those States. See, the California mandate discussion below. And some of these State and District of Columbia mandates are still collectible even though the Federal penalty is not.

After review, and as to the Federal "B Penalty", our opinion is that the plans **WOULD NOT** protect the ALE from the "B Penalty" set forth in Section 4980H(d) of the Internal Revenue Code. (For 2022, the B Penalty is $4,120.00 annualized for each fulltime employee who

purchases insurance on the exchange and receives subsidy). This excise tax, if applicable, is not deductible.

Additionally, if an eligible employee actually elects an Apex MEC, MEC Plus or the MEC Plus Advantage Plan the group plan offered by the employer, the employee can no longer go to the marketplace exchange for health insurance coverage and get a subsidy. If the employee does not accept the employer offered group MEC plan, however, and does enroll in health insurance coverage through the marketplace exchange, and if the MEC plan does not meet either the "affordability" or the "minimum value coverage" tests of the ACA, then the employee could get the subsidy and the employer would be subject to the "B Penalty" for that employee.

California Individual Mandate.

Effective January 1, 2020, pursuant to California SB78, California residents must obtain and maintain Minimum Essential Coverage or pay a tax penalty to the California Franchise Tax Board, effectively enacting its own version of the ACA's individual mandate. The California penalty for not having coverage will be at least $800 per adult and $400 per dependent Child under 18. The California Mandate Law defines Minimum Essential Coverage to have the same meaning as stated in the IRS Code Sec. 5000A, which is how it is defined for purposes of the ACA individual mandate.

Because the Plans meet the ACA definition of Minimum Essential Coverage, they also meet the definition of Minimum Essential Coverage required under the new California Individual Mandate Law. Consequently, if these Plans are offered by the ALE to 95% of their full time or full time equivalent employees in a given calendar month, the ALE **WOULD NOT** be subject to the new California tax penalty.

New Jersey Individual Mandate.

The New Jersey Health Insurance Market Preservation Act (A3380) contains an individual mandate that mirrors the language of the Federal Individual Mandate under the Internal Revenue Code 5000A. In determining whether the MEC, MEC Plus and MEC Plus Advantage Health Care Plans (the "Plans") qualify as providing Minimum Essential Coverage under the New Jersey Health Insurance Market Preservation Act (A3380), when offered by an Applicable Large Employer ("ALE"), defined as an employer with 50 or more Full Time Equivalent Employees, we find that the term Minimum Essential Coverage has the same definition as in the ACA.

Because the ACA definition of Minimum Essential Coverage is the same as the definition in the New Jersey Health Insurance Market Preservation Act, it is our opinion that the Plans would meet the Minimum Essential Coverage requirement stated within the New Jersey Health Insurance Market Preservation Act (A3380), as long as they are as offered to at least 95% of the ALE's Full Time or Full Time Equivalent Employees in any given calendar month. If these

Plans are offered by the ALE to 95% of their full time or full time equivalent employees in a given calendar month, the ALE **WOULD NOT** be subject to the New Jersey penalty.

Please note the New Jersey Health Insurance Market Preservation Act also imposes a reporting requirement on every entity that provides MEC to an individual during a calendar year, similar to the ACA's reporting requirement under Internal Revenue Code Everest Section 6055. Under this requirement, entities that provide MEC will be required to separately report to covered individuals and the New Jersey State Treasurer.

District of Columbia ("DC") Mandate

The DC City Council's proposed Budget Support Act of 2018 included an individual mandate, with a penalty for non-compliance, effective as of January 2019 in DC. The city council approved the budget in June of 2019, with the individual mandate intact. The mandated, dubbed the "Individual Taxpayer Health Insurance Responsibility Requirement," took effect in January 2019. This is reflected in Chapter 51 of the Code of the District of Columbia.

The "Individual Taxpayer Health Insurance Responsibility Requirement" contains an individual mandate that mirrors the language of the Federal Individual Mandate under the Internal Revenue Code 5000A (the "DC Mandate"). In determining whether the MEC, MEC Plus and MEC Plus Advantage Health Care Plans (the "Plans") qualify as providing Minimum Essential Coverage under the Individual Taxpayer Health Insurance Responsibility Requirement, we find that the term Minimum Essential Coverage has the same definition as in the ACA except as it relates to multiple employer welfare arrangements that come in to effect **after** December 15, 2017. The DC Mandate also applies to other types of employers including all employers who sponsor self-insured group health plans that covered at least one employee who was a DC resident during the applicable year.

The DC Mandate penalty is the same amount as the federal mandate penalty was in 2018 ($695 per uninsured adult, half that amount for a child), with a maximum penalty of $2,085 or 2.5 percent of household income, whichever is greater, with the maximum penalty tied to the average cost of a bronze plan in DC, as opposed to the average nationwide cost of a bronze plan. (Be sure to check and see if this amount is updated for inflation for the year 2022).

To avoid the D.C. tax penalty, you must have what the District considers "minimum essential coverage" or prove your eligibility for an exemption. It does appear to us that the Apex MEC, MEC Plus or the MEC Plus Advantage Plans meet the minimum essential coverage requirement so an ALE **WOULD NOT** be subject to the D.C. tax penalty.

If the federal penalty is ever reinstated, people in DC would not be subject to two penalties. If that were to happen, the amount of the DC penalty would be reduced by the amount that the person owes under the federal penalty.

The opinions in this letter are provided as of the date of this letter, such that if the law or cases interpreting the law change after the writing of this letter, our opinions could change. Additionally, this letter was written specifically for our client Apex Management Group, consequently we are not your legal counsel. You should have the Plans reviewed by your own legal counsel in order to reach an independent conclusion about compliance with the ACA, the impact on any potential excise tax penalties, and the State and District of Columbia specific mandates. Additionally, where required, be sure to file the necessary reporting with the State or District of Columbia if they apply to you.

Sincerely,

Michael E. Hensley
For the Firm

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