UNITEDHEALTH GROUP

9900 Bren Road East, MN000-T000, Minnetonka, MN 55343

October 1, 2015

Submitted via Email: Notice.comments@irscounsel.treas.gov.

CC:PA:LPD:PR
Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: ***Section 4980I—Excise Tax on High Cost Employer-Sponsored Coverage (IRS Notice 2015-52***)

Dear Sir or Madam:

UnitedHealth Group appreciates the opportunity to provide the Treasury Department and Internal Revenue Service (IRS) (the Agencies) with our comments in response to Notice 2015-52, Section 4980I--Excise Tax on High Cost Employer-Sponsored Coverage.

UnitedHealth Group is dedicated to helping people live healthier lives and making our nation's health care system work better for everyone through two distinct business platforms – UnitedHealthcare, our health benefits business, and Optum, our health services business. Our workforce of more than 190,000 people serves the health care needs of more than 100 million people worldwide, funding and arranging health care on behalf of individuals, employers and government. As America's most diversified health and well-being company, we not only serve many of the country's most respected employers, but we are also the nation's largest Medicare health plan - serving nearly one in five seniors nationwide - and one of the largest Medicaid health plans, supporting underserved communities in 24 states and the District of Columbia. Recognized as America's most innovative company in our industry by Fortune magazine for six years in a row, we bring innovative health care solutions to scale to help create a modern health care system that is more accessible, affordable and personalized for all Americans.

Below please find our specific recommendations.

III. PERSONS LIABLE FOR THE SEC 4980I EXCISE TAX

B. Person That Administers the Benefits

Issue: The agencies have asked for comments on how to identify the "coverage provider" in the case of self-funded coverage, which is important because it identifies the party responsible for paying the excise tax. The issue arises under section 4980I because while the law identifies the coverage provider in the case of group health insurance or a Health Savings Account (HSA), it uses the undefined term "the person that administers the plan benefits," to describe the coverage provider in the case of all other applicable coverage. In Notice 2015-52, the Agencies suggest that "the person that administers the plan benefits" could either be the third party administrator or the person with ultimate authority under the plan, which is generally the plan sponsor.

Recommendation: We believe Congress intended that the "coverage provider" in the case of self-funded coverage should be the "plan sponsor" as that term is used under the Employee Retirement Income Security Act (ERISA).

The above recommendation is consistent with the Joint Tax Committee Report that accompanied the Affordable Care Act (ACA): "In the case of a self-insured group health plan, a Health Flexible Spending Account (FSA) or a Health Reimbursement Account (HRA), the excise tax is allocated to the plan administrator." [1]

Under ERISA, the plan administrator is the employer sponsoring the plan (or Joint Board in the case of a multiemployer plan), the entity with the ultimate authority with respect to the benefits provided under the plan and capable of gathering all of the information required to calculate the excise tax.

There are also a number of practical reasons why the third party administrator (TPA) should not be considered the "coverage provider." First, the plan sponsor is the entity that makes decisions with respect to the benefits offered under the plan and has ultimate authority over the plan. The TPA typically does not have control over the benefit design and, therefore, would have financial liability (via the excise tax) over decisions for which it has little or no control. Second, the TPA may not have access to information about the full range of health benefits being provided by the group health plan as plan sponsors often utilize multiple TPAs. Third, section 4980I does not contain a provision allowing for the allocation of the excise tax among different TPAs.

IV. EMPLOYER AGGREGATION

Issue: The Agencies have requested comments on whether the section 414 controlled group rules should apply to the section 4980I excise tax provisions so that members of a controlled group (as well as other arrangements) would be treated as a single employer for purposes of the excise tax.

Recommendation: Since aggregate groups can be created in so many different ways and have very different health benefit plan structures (single group health plan v. multiple plans), we do not see this as a "one size fits all" situation. Rather, we would urge the Agencies to give employer groups flexibility in terms of aggregation for excise tax purposes. We believe that this is workable provided the manner of aggregation is properly disclosed on the required reporting forms.

V. COST OF APPLICABLE COVERAGE

B. Determination Period

Issue: The Agencies have requested comments on any issues raised by the anticipated need to determine the cost of applicable coverage for a taxable period reasonably soon after the end of that taxable period. Coverage providers need to understand their potential for excise tax liability before the start of the taxable period, not afterwards.

Recommendation: We believe that coverage providers need to understand their tax liability in advance of the taxable period. Consequently, we recommend that the Agencies look to other sources of published guidance in determining the cost of applicable coverage and consider adopting the Form W-2 cost of coverage regulations for purposes of the excise tax.

---

[1] Technical Explanation of the Revenue Provisions of the Reconciliation Act of 2010, as amended, in Combination with the Patient Protection and Affordable Care Act, issued by the Joint Committee on Taxation on March 21, 2010, at page 65

Sound tax policy requires that coverage providers know with certainty whether or not their health benefit plans or policies will be subject to the tax prior to the first day of the plan year. Employers and labor organizations with expected excise tax liability will need to budget and set aside assets to pay for the tax. Issuers of group health plans will need to know their excise tax liability well in advance so they can include such amounts prospectively in premiums to avoid reserve deficiencies.[2]

The failure to adopt an approach that provides some degree of certainty with respect to excise tax liability in advance of the taxable period will inevitably result in a number of potential harms to coverage providers and consumers, including, but not limited to:

- A potential for a greater number of issuer insolvencies as a result of unexpected tax liability.
- Higher premiums required not only to address the excise tax itself, but also, reserve requirements, income tax reimbursement, and administrative expenses.
- Elimination of benefit plan offerings in platinum and gold metal tiers and higher AV values created by the ACA.

Under section 4980I, the cost of coverage subject to the excise tax "shall be determined under rules similar to the rules of section 4980B(f)(4)3". This statutory language affords the Agencies discretion in establishing rules that align generally both with COBRA but also with sound tax policy. Accordingly, we urge the Agencies to look to other sources of published guidance and adopt the Form W-2 cost of coverage regulations for purposes of the excise tax.

The W-2 approach to coverage valuation was formulated under section 6051(a)(14) (Notice 2012-9). The IRS' W-2 guidance is far more detailed and workable than COBRA guidance issued by the IRS to date. The W-2 method streamlines the calculation process by excluding amounts in HSAs and FSAs from the cost of coverage. The W-2 method also provides greater predictability in advance of the taxable period allowing coverage providers to understand their tax liability at the time they are making coverage purchasing decisions.

C. Exclusion from the Cost of Applicable Coverage of Amounts Attributable to the Excise Tax

Issue: The Agencies are considering whether some or all of the income tax reimbursement could also be excluded from the cost of applicable coverage and have requested comments on whether such exclusion could be administered.

Recommendation: We support the exclusion of any income tax reimbursement from the cost of applicable coverage, and we believe that there are several approaches that could be administratively feasible. We believe the most efficient method would be for the issuer to project the excise tax expense and income tax reimbursement needed in advance as part of the premium rates. The issuer could then simply disclose the amount added to premium for these expenses (e.g. 1% of premium represents expenses added to premium based on projected 4980I excise tax and income tax reimbursement). The employer would then rely upon the amount disclosed in performing its calculation. As an aside, it should not be necessary to separately bill for either the excise tax or income tax reimbursement provided the amount included in the premium is properly disclosed.

---

[2] The ACA Cadillac tax: A primer for employers, Benefits Perspectives, Milliman, May 2015, Rob Pipich and Chris Ruff

[3] Section 4980B(f)(4) is the COBRA section setting standards to be used in estimating the cost of coverage.

Issue: Notice 2015-52 provides that, *[S]separately billed amounts in excess of the excise tax reimbursement or the income tax reimbursement …. could not be excluded from the cost of applicable coverage.*

Recommendation: Employers should be able to exclude from the cost of applicable coverage any portion of premium that the issuer has indicated is related to excise tax and income tax reimbursement. An alternative approach would penalize employers from issuer projections of necessary premium that overestimate the excise and/or income tax reimbursement. We believe that there are currently adequate competitive and regulatory safe guards in rating rules to protect against potential abuses in this area.

Issue: The Agencies request comments on any practical issues or legal barriers to passing through any or all of these amounts or separately identifying these amounts, such as federal rating rules or state insurance laws

Recommendation #1: With respect to practical issues, an issuer needs to be able to recoup expenses (both excise tax and income tax reimbursement) during the policy period that corresponds to the taxable period. To do this, the issuer will need to build into the premium a projection of these expenses. If the issuer is required to wait until the end of the taxable period (potentially long after the employer was covered under the policy) it may have no premium from which to recoup such expenses in a future period. Moreover, if the issuer cannot recoup these expenses during the policy period that relates to the taxable period it will incur a liability without a corresponding receivable creating negative reserve and potential solvency concerns.

Recommendation #2: With respect to legal barriers, Notice 2015-52 does not provide guidance on how excise tax and income tax reimbursement are to be recouped by an issuer for small group adjusted community rated business. Consequently, we request that the Agencies consider carefully the implications of the excise tax on small employers and provide explicit guidance on how the excise tax and income tax reimbursement should be recouped by issuers.

Under the ACA, small group adjusted community rated business premium rates are in general based on the aggregate experience of all small employers within the single risk pool. The individual small employer rates can only vary for a particular plan design by: (i) whether such plan or coverage covers an individual or family; (ii) rating area; (iii) age, and (iv) tobacco usage (ACA Sec. 2701).

Since ACA Sec. 2701 does not include the excise tax as a separate rating factor, a legal question exists as to whether the excise tax and income tax reimbursement expenses can be added as a separate premium amount to individual small employers or whether it should be treated like other taxes and spread across all small employers. If the latter, a corollary issue exists as to whether the excise tax and income tax reimbursement should be considered a market level index rate adjustment or plan level index rate adjustment. Moreover, small group rating rules do not afford issuers the ability to change premium rates after the coverage period (i.e. experience rate) so recoupment of excise tax and or income tax reimbursement after the coverage period on a group specific basis may raise other legal concerns.

The excise tax presents a number of issues when applied to small group adjusted community rated business. This is because issuers have legal limitations on their ability to adjust premium rates at a group specific level or make adjustments after the coverage period. Moreover, issuers must comply with guaranteed availability requirements and offer any plan design available in the marketplace to any employer even if that employer's demographic, HSA contribution strategy, or other benefit design choices could trigger excise tax liability. Thus, consistent with our prior comments, we believe it is of particular importance to have clear rules regarding how to calculate and recoup the excise tax and income tax reimbursement in advance of the taxable period. The lack of such clarity in advance of rate setting will require issuers to be very conservative in the design of the

benefit plan offerings in the marketplace, removing all higher metal level options that have any possibility of triggering the tax.

D. Income Tax Reimbursement Formula

Issue: The Agencies are considering two possible approaches for applying the income tax reimbursement formula described in Notice 2015-52. The first approach would use the coverage provider's actual marginal rate in the formula. The second approach would prescribe, for purposes of applying the income tax reimbursement formula, a standard marginal rate.

Recommendation: We support provisions in Notice 2015-52 that provide for the exclusion of any excise tax reimbursement from the cost of applicable coverage, as well as the tax gross-up proposal. With respect to the income tax reimbursement, the formula should also take into account the federal health insurance provider's fee, state and local income taxes and state premium taxes. In addition, we propose that the Agencies consider a third option, namely, the use of the issuer's average marginal tax rate for the past three years. Issuers that have not been in existence for three years could use the standard marginal tax rate as discussed in the notice. This approach will not advantage or disadvantage certain organizational structures while at the same time addressing some of the concerns raised in the Notice.

E. Allocation of Contributions to HSAs, Archer MSAs, FSAs, HRAs

Issue: Treasury and IRS are considering an approach under which contributions to account based plans would be allocated on a pro-rata basis over the period to which the contribution relates (generally, the plan year), regardless of the timing of contributions during the period.

Recommendation: With respect to HSAs, we would like to refer you to UnitedHealth Group's comment letter submitted to the Agencies on May 15, 2015, in response to Notice 2015-16. In that comment, we pointed out that the excise tax should only apply to those HSAs, if at all, that are subject to ERISA since those are the only ones that are group health plans.[4] That interpretation is supported by the text of the section 4980I(d)(C) which makes clear that Congress only intended for the excise tax to apply to employer sponsored coverage.

More generally, we believe that there are compelling policy reasons to consider excluding HSA, as well as, FSA contributions from the cost of applicable coverage either temporarily (initial years of the program) or on a more permanent basis. The inclusion of these employer and employee contribution amounts creates great uncertainty in the ability to predetermine the excise tax expense for the various coverage providers. As noted throughout our comments, this uncertainty may require abrupt changes in product offering (in particular among issuers in the small group marketplace). The exclusion of HSA and FSA contributions or a delay in implementation of this component of the tax could greatly reduce marketplace disruption.

To the extent the Agencies are not able to exclude HSAs/FSAs from the tax threshold, a pro rata approach to allocation of these contribution expenses would present a more administratively feasible option over determining actual contribution amounts on a per employee basis.

[4] See Filed Assistance Bulletin 2004-01 (April 7, 2004) available at: http://www.dol.ebsa/regs/fab2004-1.html.

VI. Age and Gender, Cost of Living, Retiree High Risk Profession Adjustments to the Dollar Limit

Issue: Section 4980I contains adjustments to the threshold dollar limit. The adjustments are: (1) a one-time health cost adjustment based on premium growth in FEHBP; (2) a cost of living adjustment; (3) an age/gender adjustment, and (4) an adjustment for retirees and high risk professions. The adjustments, however, are incomplete and do not adjust for new benefit mandates or for high cost geographic differences.

Recommendation: We are supportive of each of the adjustments, however, neither the statute nor Notice 2015-52 provide adequate details with respect to the timing of the adjustments. Coverage providers will need to know the amount of these adjustments two years in advance in order to know which plans or policies will be subject to the tax. We urge the Agencies to make the threshold adjustment process predictable for coverage providers so the adjustments may be taken into account when designing benefit programs.

Section 4980I gives the Secretary of the Treasury broad discretion to issue regulations to carry out the provision. We urge the Secretary to use its regulatory authority to make upward adjustments to the threshold dollar limit to take into medical cost inflation related to, new benefit mandates (e.g., new required, covered services or cost share requirements, expanded regulatory interpretations of existing benefits or cost share requirements, and removal of traditional benefit exclusions), new high cost drugs, and geographic cost differences. In addition, , new benefit mandates could be excluded from cost determinations in future excise tax calculations.

Issue: The cost-of-living adjustment is tied to the CPI-U, rounded up to the nearest $50, and not medical inflation which historically has risen faster than the CPI-U. Over time this means that this manner of indexing will cause plans with modest benefits to be subject to the excise tax's threshold provisions. Indeed, some have speculated in the not so distant future the disparity between the cost of living adjustment and medical trend will result in a conflict between the excise tax and the employer mandate requirements. That is, for an employer to meet minimum value test under the employer mandate it will have to offer a benefit plan that is subject to the excise tax.

Recommendation: As an alternative, the Agencies should use their regulatory authority to give coverage providers needed flexibility to use either the CPI-U cost-of-living adjustment or an alternative approach tied to medical inflation.

VII. Notice and Payment

We appreciate that much of the excise tax's administrative complexity stems from the statute. We applaud the Agencies for using this request for information as well as the formal rulemaking process to identify ways to reduce the compliance burden associated with this new law.

Section 4980I's provisions create a cumbersome notice and payment process in the case of fully insured coverage. This is because the statute separates the tax calculation from the payment process. The statute requires that an employer subject to the tax determine the cost of coverage, calculate the insurer's share of the excess benefit, and notify the IRS and the insurer of its share of the amount of tax. In response, the issuer will bill the employer for the amount of the tax, including the income tax gross-up amount. Moreover, the issuer in many cases will need to project the excise tax expense in advance not just based on its coverage offerings but also based on coverage offerings outside its control, such as HSA, FSA and HRA accounts. This proposed process builds in unnecessary administrative burden, disclosure requirements, and costs on employers.

While defining the term "person that administers the plan benefits" as the ERISA plan administrator addresses these concerns for self-funded coverage, one way to reduce regulatory burden and protect confidential information for fully insured coverage is to allow employers, on a voluntary basis, to simply calculate the tax and assume liability for all of its benefits offerings. Employers and coverage providers would be free to include tax indemnification provisions as part of their contracts. Under this voluntary approach, notices of excise tax liability would not be issued to the IRS and no premium revenue would need to be recognized by the issuer. The employer would simply report the total excise tax on the Form 720 and pay the tax, without additional paperwork requirements.

Sincerely,

Jeffrey Alter
Chief Executive Officer – Commercial Group
UnitedHealthcare