

Notice 2015-16

MAY 13 2015



Chickaloon Village Traditional Council (Nay'dini'aa Na')

May 12, 2015

Chief Gary Harrison,
Chairman

Rick Harrison,
Vice-Chairman

Penny Westing,
Secretary/Elder

Albert Harrison,
Treasurer/Elder

Doug Wade,
Elder Member

Shawna Larson,
Member

Karl Shaginoff,
Member

Lisa Wade,
Member

Gary Hay,
Executive Director

CC:PA:LPD:PR (Notice 2015-16)
Internal Revenue Service
Room 5203
Ben Franklin Station, P.O. Box 7604
Washington, D.C. 20044

RE: Notice 2015-16 on Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage

I. INTRODUCTION.

I write to the Internal Revenue Service (IRS) on behalf of **Chickaloon Village Traditional Council** in response to IRS Notice 2015-16 (the Notice), in which the IRS solicits comments on potential regulatory approaches for implementing Section 4980I of the Tax Code.¹ Section 4980I establishes an excise tax on certain employer-sponsored health benefits under which covered employers must pay a tax on employee plans that exceed certain statutory cost thresholds.² Thank you for the opportunity to comment on the Notice.

Chickaloon Village Traditional Council

We believe that Indian Tribal employers are exempt from the excise tax altogether according to the plain language of Section 4980I. This interpretation is further supported as a matter of policy, as applying the excise tax to Tribal employers can significantly burden their ability to recruit and retain employees and provide adequate health benefits to Tribal members. We therefore urge the IRS to recognize the statutorily mandated Tribal exemption in any eventual implementing regulations.

To the extent that the IRS ultimately construes Section 4980I as applying to Tribal employers, notwithstanding the statutory provisions discussed below, **Chickaloon Village Traditional Council** believes that the regulations must recognize the unique nature of Tribal benefits and maximize employer flexibility and retain options when structuring their plans. This would include distinguishing between Tribal member employees and non-Tribal member employees, excluding various benefit types from the scope of the tax, allowing employers to narrowly tailor their grouped employees when calculating plan value, and clarifying the applicability of the controlled group rules to Tribal entities. We

¹ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001, 124 Stat. 119, 793 (2010), codified as amended at 26 U.S.C. § 4980I. Unless otherwise noted, references to "Sections" of statutes within this comment refer to sections of the Tax Code in chapter 26 of the United States Code.

² The thresholds are \$10,200 for self-only coverage and \$27,500 for non-self-only coverage, subject to certain adjustments specified in the statute. 26 U.S.C. § 4980I(b)(3)(C).

elaborate on all of these points below.

II. DISCUSSION.

1. Longstanding rules of statutory interpretation indicate that Section 4980I excludes Indian Tribal employers from the excise tax.

Section 9001 of the Patient Protection and Affordable Care Act (ACA), which established Tax Code section 4980I, applied the excise tax to excess benefits provided under "applicable employer-sponsored coverage," as defined in subsection 4980I(d)(1). That subsection includes a provision specific to governmental employers, which states that "applicable employer-sponsored coverage" includes "coverage under any group health plan established and maintained primarily for its civilian employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any such government."³ This government plan provision does not specify or even mention anything about plans established or maintained by an Indian Tribe or Tribal organization.⁴

Under well-recognized rules of statutory interpretation, Congress's exclusion of Tribal governments from Section 4980I must be considered deliberate. First, statutes of general applicability that interfere with rights of self-governance, such as the relationship between Tribal governments and on-reservation Tribal businesses and their employees, require "a clear and plain congressional intent" that they apply to Tribes before they will be so interpreted.⁵ Although Congress repeatedly referenced Indian Tribes in the ACA,⁶ and specifically discussed governmental entities in Section 4980I, it did not include Tribes at all in the statutory provision concerning the coverage of this excise tax. This indicates that the Section 4980I does not apply of its own force to Tribal employers.⁷

³ 26 U.S.C. § 4980I(d)(1)(E).

⁴ The IRS has recognized that the government-specific clause must be read as an integrated whole with the introductory language in 26 U.S.C. § 4980I(d)(1)(A), noting that the fact that the government clause only mentions "civilian" governmental plans implicitly means that Congress intended that military governmental plans are not subject to the excise tax. Notice at 8. This interpretation, and the government clause generally, would not make sense if Congress had intended that the excise tax apply to government plans other than those specified in paragraph (d)(1)(E). See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a[] harmonious whole'" (citation omitted)).

⁵ *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (Age Discrimination in Employment Act did not apply to employment discrimination action involving member of Indian Tribe, Tribe as employer, and reservation employment); accord *Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (Fair Labor Standards Act did not apply to dispute between Navajo and non-Navajo Tribal police officers and Navajo Nation over "work [done] on the reservation to serve the interests of the tribe and reservation governance").

⁶ See, e.g., Section 1402(d)(2) (referring to health services provided by an Indian Tribe); Section 2901(b) (referring to health programs operated by Indian Tribes); Section 2951(h)(2) (referring to Tribes carrying out early childhood home visitation programs); Section 2953(c)(2)(A) (discussing Tribal eligibility to operate personal responsibility education programs); Section 3503 (discussing Tribal eligibility for quality improvement and technical assistance grant awards).

⁷ To whatever extent that there is uncertainty on this front, the so-called Indian canons of statutory construction require that statutes relating to Indians be "construed liberally in favor" of tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Second, there are numerous provisions in the Tax Code that explicitly mention Tribal governmental entities,⁸ include Tribal benefits within the definition of “governmental plans” in various contexts,⁹ or explicitly note when Tribal governmental entities are to be treated identically to State governments for the purposes of a given rule.¹⁰ Notably, these provisions almost all cite the definition of “Indian tribal government” set out in Section 7701 of the Tax Code, a provision which the ACA repeatedly referenced or amended.¹¹ So, even though Congress applied numerous provisions in the ACA to Indian Tribes, and clearly knows how to draft language including Tribal governments or governmental plans within the scope of a particular Tax Code provision,¹² and explicitly amended the Tax Code section that includes a commonly-cited definition of “Tribal government,”¹³ it did not mention Tribes in Section 4980I’s discussion of governmental entities. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposeful in the disparate inclusion or exclusion.”¹⁴ Therefore, Section 4980I must be construed to exclude tribal plans from the excise tax.

2. Policy considerations support the statutory exclusion of Tribal

⁸ See, e.g., 26 U.S.C. § 54F(d)(4) (including “Indian tribal governments (as defined in [Tax Code] section 7701(a)(40))” as qualified bond issuers for certain projects); 26 U.S.C. § 401(k)(4)(B)(iii) (“An employer which is an Indian tribal government (as defined in [Tax Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.”).

⁹ See, e.g., 26 U.S.C. § 414(d) (“The term ‘governmental plan’ includes a plan which is established and maintained by an Indian tribal government (as defined in [Tax Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either. . .”).

¹⁰ See, e.g., 26 U.S.C. § 168(h)(2)(A)(i), (iv) (defining “tax-exempt entities” as including both “the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing,” and “any Indian tribal government described in section 7701(a)(40),” and then explicitly noting that “any Indian tribal government . . . shall be treated in the same manner as a State”).

¹¹ See Section 9010(d)(2) (incorporating definitions from Section 7701); Section 1409(a) of the Health Care and Education Reconciliation Act of 2010 (adding new subsection (o) to Section 7701)

¹² See, e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 n.22 (1981) (“The dissent refers to our reading as ‘extremely strained,’ but the dissent, in relying on § 505(e) as evidence of Congress’ intent to preserve the federal common-law nuisance remedy, must read ‘nothing in this section’ to mean ‘nothing in this Act.’ We prefer to read the statute as written. Congress knows how to say ‘nothing in this Act’ when it means to see, e. g., Pub.L. 96–510, § 114(a), 94 Stat. 2795.”); accord *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014) (“[W]here Congress knows how to say something but chooses not to, its silence is controlling.”) (citations omitted).

¹³ See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 105, 88 Stat. 2203, 2208-09 (1975) (codified as amended at 42 U.S.C. § 215(d), 42 U.S.C. § 2004b) (federal law required to explicitly include Indian Tribes within the scope of statutory benefits previously limited to state and local governments).

¹⁴ *Dean v. United States*, 556 U.S. 568, 573 (2009).

employers from the excise tax.

Congress has recognized that “[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people,” and that it is a “major national goal . . . to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.”¹⁵ Applying the excise tax to Tribal employers, in addition to running counter to Section 4980I’s statutory language, also undercuts Congress’s national policy towards Indian health.

Tribes face many hurdles in maintaining a viable workforce. For example, Tribes in more remote areas often have trouble recruiting and retaining employees (particularly health care professionals or other individuals with advanced degrees), while ongoing funding disparities and the non-profit status of many Tribal entities can make it difficult for Tribes to offer competitive wages. As an alternative, many Tribes structure their employee benefits packages to be comparatively generous in order to attract applicants. These non-salary benefits, which can be virtually the only way for a Tribal employer to compete with non-Tribal counterparts, are a necessary cost for Tribes to do business despite seeming inflated in a vacuum.

The cost of these packages is increased further by the fact that many areas with high concentration of Tribal entities have some of the highest insurance prices in the United States. For example, the United Benefits Advisors’ 2014 Health Insurance Cost Survey determined that the average cost of a benefits package in Alaska was \$12,584.00 per employee, far exceeding the \$10,200 excise tax threshold.¹⁶ At least one Tribal employer in Alaska has examined its own benefits and determined that current costs are \$11,880.84 per employee for self-only coverage (\$1,680.84 over the statutory threshold) and \$36,236.64 for family coverage (\$8,736.64 over the statutory threshold). These costs do not mean that the Tribe is encouraging irresponsible overuse of health care by offering “Cadillac” plans to their employees. Rather, the high expenses are driven by the necessity of employee recruitment in rural areas and the market forces in Alaska, factors over which Tribal employers have little control.

Rather than fulfilling the government’s trust responsibility towards Indian health, then, applying the excise tax to Tribal employers would force them into one of the following scenarios:

- **Option 1: Pay the tax.** Tribes must then divert their limited and finite funding away from necessary services such as law enforcement, health care, and other governmental requirements in order to “pay” the federal

¹⁵ 25 U.S.C. § 1601(1)-(2). We note that the federal government’s budgeting and expenditures do not come close to meeting the requirements of the trust responsibility: the Indian Health Service (IHS) is only funded at approximately 56% of need, and the most recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP’S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

¹⁶ Peter Freska, United Benefits Advisors, *The State of Healthcare Insurance – The Top Five Highest and Lowest Costs of Health Insurance* (May 7, 2015), <http://rss.ubahenefits.com/tabid/2835/Default.aspx?art=prOFd2y2yq4%3D&nfid=ybBRLsooTzo%3D>.

government. This circuitous process will essentially result in the Tribe receiving federal funding to provide member services and then paying it back to the IRS in the form of the excise tax. The Tribe might then be forced to increase employee contribution amounts or cost-sharing to make up a portion of the difference.¹⁷

- **Option 2:** Eliminate the Tribe's existing plan and offer lower-cost insurance through another source, forcing the Tribe to reject the benefits package that it tailored according to the needs of its workforce and the realities of market pressures. Replacement coverage may be less comprehensive, include fewer in-network providers, or have higher costs for the individual employee, resulting in lower employee health outcomes and difficulties for the Tribe in employee recruitment and retention.
- **Option 3:** Eliminate employer-sponsored insurance altogether. The Tribe will now be liable for the ACA's employer mandate penalty and will again be required to divert federal funding back to the federal government.

None of these options fulfill the trust responsibility or respect the fact that Tribal design of employee benefits packages is itself an exercise in Tribal sovereignty. **Chickaloon Village Traditional Council** believes that these policy considerations strongly support the statutory exclusion of Tribes from the excise tax, and we request that the IRS acknowledge that fact in any ultimate regulations.

3. Even if it does not construe the statute as entirely excluding tribal plans, the IRS should exclude coverage provided to Tribal member employees from the definition of "applicable employer-sponsored coverage."

In the event that the IRS construes Section 4980I as applying to Tribal employers,¹⁸ we note that the tax covers benefits "under any group health plan made available to the employee by an employer which is excludable from the employee's gross income under section 106 [of the Tax Code], or would be so excludable if it were employer-provided coverage (within the meaning of such section 106)."¹⁹ With certain exceptions, Section 106 generally excludes the value of "employer-provided coverage under an accident or health plan" from an employee's gross income.²⁰

This may pose unique complexities in the context of Tribal employers. Section 9021 of the ACA added a new Section 139D to the Tax Code, which excludes from an individual's gross income the value of:

¹⁷ Such an increase could also eliminate the Tribal plan's grandfathered status, if applicable. See 45 C.F.R. § 147.140(g)(1).

¹⁸ For the remainder of this comment, we will assume *arguendo* that the excise tax rules will apply to Tribal employers.

¹⁹ 26 U.S.C. § 4980I(d)(1)(A).

²⁰ 26 U.S.C. § 106(a).

- Any health service or benefit provided or purchased, directly or indirectly, by IHS through a grant to or a contract or compact with an Indian Tribe or Tribal organization, or through a third-party program funded by the Indian Health Service;
- Medical care provided, purchased, or reimbursed by an Indian Tribe or Tribal organization for, or to, a member of an Indian Tribe (including the member's spouse or dependent);
- Coverage under accident or health insurance (or an arrangement or plan having the effect of accident or health insurance) provided by an Indian Tribe or Tribal organization for member of an Indian Tribe (including the member's spouse or dependent); and
- Any other medical care provided by an Indian Tribe or Tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian Tribes or Tribal members.²¹

It is therefore likely that situations will arise in which Tribes provide members with health insurance as an extension of or in association with an employee plan (whether as a group plan, through premium sponsorship in an ACA Marketplace, etc.). While these benefits might at first glance seem to "mimic" a Section 106 plan to which the excise tax would apply, the coverage would instead be exempt under Section 139D and stay outside the scope of the tax. This distinction could be difficult for Tribal employers or the IRS to recognize, and could lead to confusion or misapplication of the rules by either party. Alternatively, Tribes whose employees are predominantly or exclusively Tribal members might offer employer-based coverage as a proxy for member-specific coverage, thus technically exposing the Tribe to liability for the Section 4980I excise tax merely because of the form of health coverage chosen for a population that is eligible for the Section 139D exclusion.

We believe that the regulations should recognize that applying the excise tax to Tribal member plans will frustrate one of the key goals in enacting Section 139D, as Tribes will be less likely to provide newly tax-exempt benefits to their members (employee or otherwise) if they are concerned that doing so could subject the Tribal fisc to liability under Section 4980I. Tribes may similarly face difficulties in determining which of their member-employees are subject to the excise tax and may calculate their liability incorrectly, which in turn could subject such Tribes to additional penalties under Section 4980I.²²

There are several avenues through which the IRS could address this issue, the most beneficial being a regulatory exemption of Tribal member-employees from the scope of Section 4980I altogether. A second option would be IRS recognition in its ultimate employee disaggregation regulations that Tribes may group member-employees separately from non-members when calculating "similarly situated" employees, and even

²¹ 26 U.S.C. § 139D(b).

²² See 26 U.S.C. § 4980I(e) (establishing penalties for employees who inaccurately calculate their excise tax liability).

then within separate subgroups.²³ Ultimately, we request that the IRS consult with the Tribal Technical Advisory Group of the Centers for Medicare and Medicaid Services (TTAG) concerning specific approaches and language for reconciling any overlap between Section 4980I and Section 139D, and to generally address the application of the excise tax to Tribes.

4. Chickaloon Village Traditional Council supports the IRS's proposed benefit exclusions from the definition of "applicable employer-sponsored coverage."

The Notice seeks comment on whether or not the IRS should exclude the following benefits when calculating the value of an employee's total compensation package: (1) certain types of on-site medical coverage; (2) Employee Assistance Program (EAP) benefits;²⁴ and (3) self-insured dental and vision coverage.²⁵ Chickaloon Village Traditional Council supports the exclusion of all three sets of benefits from the tax.

With regard to on-site medical services, the IRS states that it already plans on excluding such services from the excise tax so long as they (1) are provided at a facility that is located on the premises of an employer or employee organization; (2) consist primarily of first aid that is provided during the employer's working hours for treatment of a health condition, illness, or injury that occurs during those working hours; (3) are available only to current employees, and not retirees or dependents; and (4) are provided with no charge to the employee.²⁶ The IRS is seeking comment on whether it should also exclude more complex benefits, and, if so, whether the standard should be based on the nature and scope of the benefits, denominated as a specific dollar limit on the cost of services provided, or some combination of those two standards.²⁷

We strongly believe that the IRS should exempt from the excise tax any medical services provided to an employee by an I/T/U program for workplace-related health issues, and should expand the exemption even to services provided at the nearest appropriate Tribal health program (whether or not on-site). First, with regard to the on-site requirement, employees in urban areas may have fairly easy access to urgent care centers, hospitals, or other health facilities should they not want to obtain services at an on-site clinic. By comparison, the remote location of many Tribal businesses means that a local I/T/U program might be the only geographically viable option for treating work-related injury or illness, or for providing other necessary care during the workday. Requiring that the facility be located on-site ignores this reality and might automatically exclude Tribal employers that (rightfully) rely on their local I/T/U to treat employee conditions or provide basic care. The IRS should accordingly extend the workplace

²³ We discuss the disaggregation rules in further depth *infra*.

²⁴ Generally, EAP programs offer free and confidential assessments, counseling, referrals, and follow-up services to employees who have personal and/or work-related issues affecting mental and emotional well-being, such as alcohol and other substance abuse, stress, grief, family problems, marital distress, workplace issues, and psychological disorders.

²⁵ Fully-insured dental and vision coverage are statutorily excluded from the calculation. 26 U.S.C. § 4980I(d)(1)(B)(ii).

²⁶ Notice at 8-9.

²⁷ *Id.* at 9.

exception to care provided to employees at the nearest appropriate facility, even if it is technically not on the employer's campus.

Second, and as discussed above, Section 139D encourages Indian Tribes and I/T/Us to provide health services to Tribal members by excluding the value of such services from the individual's gross income. If the cost of this care is then counted towards the excise tax, Tribes (especially those with large populations of employee-members) may be forced to reconsider the scope of certain services they can afford to provide to their member-employees as a workplace benefit. This will run counter to congressional intent by "punishing" the Tribe for seeking to provide quality care and benefits to its employees. Again, we believe that the IRS should consult with the TTAG concerning the potential scope of an Indian-specific exclusion with regard to the treatment of workplace health issues.

We also believe that EAP benefits should not count towards the excise tax. AN/AIs suffer from a disproportionate level of substance abuse,²⁸ violence against women,²⁹ and suicide,³⁰ and have one of the highest rates of unemployment of any ethnic group.³¹ These are precisely the types of issues that EAP programs seek to address, with benefits extending to the individual employee, his or her family, the Tribal workplace, and the community at large.³² Tribal employers can also tailor their EAP programs to provide culturally-appropriate services, which may be an employee's only opportunity to receive such benefits. Subjecting EAP programs to the excise tax will discourage Tribal employers from continuing to offer these opportunities to their workforce and will disproportionately disadvantage AN/AI communities.³³

Finally, we support the IRS's proposal to exclude self-insured dental and vision plans from the excise tax.³⁴ This will assist the ability of Tribal employers to provide quality coverage to their employees without incurring additional costs under Section 4980I.

5. Chickaloon Village Traditional Council supports flexible disaggregation rules.

In most cases, the IRS will determine the value of a health care plan for the

²⁸ U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, THE TEDS REPORT: AMERICAN INDIAN AND ALASKA NATIVE SUBSTANCE ABUSE TREATMENT ADMISSIONS ARE MORE LIKELY THAN OTHER ADMISSIONS TO REPORT ALCOHOL ABUSE 1 (NOV. 18, 2014).

²⁹ NATIONAL CONGRESS OF AMERICAN INDIANS, NCAI POLICY RESEARCH CENTER, POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 2-3 (FEB. 2013).

³⁰ SUICIDE PREVENTION RESOURCE CENTER, SUICIDE AMONG RACIAL/ETHNIC POPULATIONS IN THE U.S.: AMERICAN INDIANS/ALASKA NATIVES I (2013).

³¹ Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are Living in Poverty*, PEW RESEARCH CENTER (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>.

³² While this is particularly notable in the Tribal context, this is also generally true among workplaces nationwide.

³³ In the alternative, if the IRS ultimately includes EAP benefits within the scope of the excise tax, [INSERT NAME OF PROGRAM] requests that such programs be exempt if offered by a Tribe or Tribal organization.

³⁴ Notice at 9-10.

purposes of the excise tax by evaluating the average plan cost among all "similarly situated beneficiaries."³⁵ While Section 4980I requires that employers group self-only coverage enrollees separately from non-self-only coverage when determining which beneficiaries are "similarly situated,"³⁶ the IRS has broad discretion to consider other methods of permissible employee groupings.³⁷ The IRS is accordingly considering whether to promulgate "permissive disaggregation" rules under which employers would be able to designate plan beneficiaries as "similarly situated" based on either "a broad standard (such as limiting permissive disaggregation to bona fide employment-related criteria, including, for example, nature of compensation, specified job categories, collective bargaining status, etc.) while prohibiting the use of any criterion related to an individual's health)," or else a "more specific standard (such as a specified list of limited specific categories for which permissive disaggregation is allowed)," including current and former employees or bona fide geographic distinctions.³⁸

Chickaloon Village Traditional Council urges the IRS to adopt broad permissive disaggregation rules that maximize employer flexibility to group plan beneficiaries according to the unique needs of the employer's workforce.³⁹ Determining who is "similarly situated" with respect to the cost of health care will require a nuanced understanding of the nature of the employer's business, the specific health statuses and needs of the employee population, geographic considerations concerning cost of care, etc. Forcing employees into very broad, general categories may artificially skew the actual cost of coverage to the disadvantage of employers.

This is particularly apparent in the case of Tribal government employers. Tribes employ individuals to perform a broad spectrum of commercial and governmental functions, and might simultaneously be insuring physicians, timber cutters, office employees, policemen, and sanitation workers, all of whom might have position-specific needs in a health plan. In addition, insurance plans in frequently-remote Tribal areas tend to be expensive, have high cost-sharing amounts, or be less comprehensive than plans available in urban settings.⁴⁰ Requiring a Tribal employer to institute a "one size fits all" approach would not work well in these circumstances, and the excise tax rules may be better and more rationally applied if Tribes (and other employers with diverse workforces) have the flexibility to treat disparate groups of employees as covered by different plans.

6. Chickaloon Village Traditional Council supports a flexible application

³⁵ *Id.* at 4.

³⁶ 26 U.S.C. § 4980I(d)(2)(A).

³⁷ Section 4980I merely requires that the IRS establish rules "similar" to those governing employee aggregation when determining COBRA premiums. 26 U.S.C. § 4980I(d)(2)(A) (referring to the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272 (1986)).

³⁸ Notice at 14.

³⁹ Congress has equally recognized the necessity for adjusting patient pools by including specific statutory considerations based on age and gender, retirement status, and plan costs for individuals engaged in high-risk professions. *See* 26 U.S.C. § 4980I(b)(3)(C)(iii), (f).

⁴⁰ *See, e.g.,* Letter from Monica J. Linden, Commissioner, Montana Department of Securities and Insurance, to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services (Mar. 10, 2014) (recognizing practical difficulties for Tribal employers in finding and offering adequate coverage).

of the past cost methodology for calculating plan value.

An additional area in which the IRS seeks comment is the manner in which self-insured plans would calculate actual plan values. The agency has proposed three primary options: the actuarial method, under which the cost of applicable coverage for a given determination period would be calculated using "reasonable actuarial principles and practices," the past cost method, under which the cost of coverage would be equal to the cost to the plan for similarly situated beneficiaries for the preceding determination period adjusted by the percentage increase or decrease in the implicit price deflator of the gross national product, or the actual cost method, under which the cost of coverage would be equal to the actual costs paid by the plan to provide health coverage for the preceding determination period.⁴¹

With the caveat that Chickaloon Village Traditional Council supports whichever methodology that maximizes flexibility for Tribal employers, we believe that some version of the past cost methodology will ultimately prove preferable. Compliance with an actuarial methodology (currently an undefined term) may require Tribes to expend significant resources on accountants, benefits administrators, or similar expert services in order to comply with the specifics of the methodology. By comparison, a past cost methodology is far more likely to correspond with existing Tribal budgeting practices and will require less disruption to their business. We agree, though, with the IRS's recognition in the Notice that the specifics of determining plan costs under any such methodology are complex enough to warrant specific attention at a later date,⁴² and request that the IRS consult with the TTAG in the interim for a more in-depth examination of methods that would prove most conducive for Tribal employers.

We also wish to respond to the IRS's request for comment on whether various individual costs should or should not be included in the overall value of employee plans when using the past cost methodology.⁴³ Specifically, the IRS should not include overhead expenses, which it defines as "salary, rent, supplies, and utilities . . . being ratably allocated to the cost of administering the employer's health plans" within the calculation.⁴⁴ We believe that this may disproportionately yield higher average overhead costs for Tribal employers, which frequently have increased overhead associated with attempts to retain employees and do business in remote locations (particularly in Alaska, which has far higher costs of living and conducting business than in most of the lower 48 states).⁴⁵ Limiting the calculation to direct costs would be a fairer and better-grounded approach from a Tribal perspective.

7. The IRS should acknowledge the good faith standard applicable to government entities when implementing controlled group rules.

Section 4980I states that for the purposes of calculating benefit plan costs, "[a]ll

⁴¹ Notice at 15-20.

⁴² *Id.* at 20.

⁴³ *Id.* at 17.

⁴⁴ *Id.*

⁴⁵ This does not even consider the practical difficulty, if not impossibility, of determining what proportion of general employer overhead applies to health plan administration.

employers treated as a single employer under subsection (b), (c), (m), or (o) of section 414 [of the Tax Code] shall be treated as a single employer."⁴⁶ These provisions, known as the "controlled group rules," are part of the Employee Retirement Income Security Act of 1974 (ERISA) and generally govern circumstances in which employees of commonly controlled corporations, trades, or businesses will be treated as employees of a single, common entity.

However, the IRS has yet to explain its stance concerning the application of these rules to state, local, and Tribal governments.⁴⁷ Most recently, in the context of promulgating regulations implementing the ACA's employer mandate, the IRS explicitly reserved sections relating to governmental employers and stated that government entities may "apply a reasonable, good faith interpretation" of the controlled group rules.⁴⁸ To our knowledge, the IRS has not since provided additional guidance on this point.

Chickaloon Village Traditional Council requests that the IRS recognize either in subsequent Notices or regulations that a Tribe's good faith determination of its controlled group status applies for the purposes of both the employer mandate and the excise tax, and that satisfying the standard in one context will equally satisfy the standard in the other. If not, Tribes will be forced to treat its enterprises differently under related ACA compliance requirements, which will be costly, administratively burdensome, and increase the risk of accidental failures in calculating excise tax or employer mandate liability.

III. CONCLUSION.

Section 4980I has the potential to seriously affect Tribes' ability to structure employee benefit packages in accordance with Tribal-specific needs. Because the statute excludes Tribes from the list of covered governmental entities, and in light of the numerous other places in which the Tax Code explicitly applies to Tribes, **Chickaloon Village Traditional Council** does not believe that Tribal employers should be subject to the excise tax (both as a matter of law and policy). Should the IRS disagree on this point, however, it should at least recognize the distinctions between member and non-member employees and implement regulations maximizing employer flexibility in plan design. **Chickaloon Village Traditional Council** also requests that the IRS consult with the TTAG in order to ensure that the excise tax regulation properly reflect these concerns.

Thank you for the opportunity to engage with the IRS on this matter. **Chickaloon Village Traditional Council** stands ready to work with the IRS on any necessary follow up issues and looks forward to a continued open dialogue on the ACA excise tax.

May Creator Guide Our Footsteps,


Penny Westing
Council Secretary

⁴⁶ 26 U.S.C. § 4980I(f)(9).

⁴⁷ For example, whether a Tribal hospital and a casino would be considered a single entity for the purposes of the rules because they are both ultimately operated by the Tribe, or whether they would each count as separate employers.

⁴⁸ Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans, 79 Fed. Reg. 13,231, 13,234 n.3 (Mar. 10, 2014).

P. O. BOX 1105 Chickaloon, Alaska 99674
e-mail: cadmin@chickaloon.org

Phone (907) 745-0707 Fax (907) 745-0709
Home Page: <http://www.chickaloon.org>