May 15, 2015

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station, Washington, DC 20044

Attention: CC:PA:LPD:PR (Notice 2015-16)

Dear Sirs and Madams,

I am writing on behalf of seven Minnesota Service Cooperatives to submit comments on Notice 2015-16, regarding the excise tax on high cost employer-sponsored health coverage under Section 4980I of the Internal Revenue Code. Minnesota Service Cooperatives are cooperative units of government organized as public corporations and governmental agencies authorized to provide cooperative purchasing services under Minnesota Statutes Section 123A.21. The SCs provide group health coverage through joint powers agreements to over 600 cities, counties and school districts.

1. Background

SC member employers are subject to collective bargaining agreements with public employee unions. These agreements have historically provided for relatively rich group health benefits with low cost-sharing in the form of premiums, deductibles, co-payments or coinsurance. As a result, a significant percentage of group health plans offered by cities, counties and school districts in Minnesota will be subject to the excise tax in 2018.

Under Minnesota Statutes Sec. 471.6161, Subd. 5, a public employer may not reduce the aggregate value of benefits provided by a group insurance contract for employees covered by a collective agreement, unless the exclusive representative of the employees agrees to the reduction.[1] Public employee unions do not typically agree to reduce aggregate health plan benefits, and in Minnesota at least, they hold a veto power over efforts of employers to modify group health plans to reduce the cost of coverage. As a result, the excise tax will have little impact on group health plans offered by public employers, and they may simply have to absorb the cost.

[1] *And see West St. Paul Federation of Teachers vs. Independent School District No. 197*, 713 N.W.2d 366 (Minn. App. 2006) (school district required to pay damages in the amount of savings realized from reducing health plan benefits without consent of the teacher's union).

Most of the SC member-employers are located in rural Minnesota. Public employers in rural areas have a relatively thin tax base, and school districts in particular must rely on uncertain referendums for a significant portion of their funding. Due to these constraints, and state law that limits the ability of employers to reduce health plan benefits, the excise tax and other costs under the Affordable Care Act are more likely to cause a reduction in public services or layoffs than a change in plan designs.

That said, the SCs have made significant progress encouraging employees to move from first-dollar coverage plans by offering high deductible health plans with HRAs or HSAs. Because of the restriction on reducing aggregate benefits, these plans are offered alongside existing, more costly plans.

For these reasons, we ask that the IRS consider interpretations of Section 4980I that reflect the concerns of cities, counties and school districts in Minnesota, which we believe are similar to concerns of public employers nationwide.

2. Allow Permissive Aggregation of Benefit Plan Options

The United States Department of Labor (DOL) permits plan sponsors to combine their health and welfare benefit plans into single plan documents that act as a "wrap" document for the purpose combining their health and welfare plans into a single entity for Form 5500 reporting purposes. Although governmental plans are not subject to ERISA, they may also treat multiple plans as a single arrangement. Many have introduced optional high deductible health plans, and use HRA or HSA contributions to encourage voluntary migration from higher cost options. They offer a "ladder" to lower cost plans, along with incentives and education, because the employer has no discretion to eliminate higher cost plans altogether.

Section 4980I applies by its terms to the *aggregate* cost of employer-sponsored coverage. The applicable dollar limit in Section 4980I applies to self-only coverage and "other than" self-only coverage. It would not be administratively burdensome for employers to determine the aggregate cost of self-only (and other) coverage by adding together the pro rata share of costs based on enrollment in each of the employer's benefit options. If enough employees can be encouraged to enroll in lower-cost plans, and all of the plans offered by an employer can be considered a single plan, the aggregate cost can be reduced below the dollar limits subject to the excise tax.

Section 4980I(a) provides that if "an employee is covered under any applicable employer-sponsored coverage of an employer" during a taxable period and "there is an excess benefit with respect to the coverage," an excise tax applies. The phrase "any applicable employer-sponsored coverage" simply refers to whether coverage is offered by the employer or not; it does not state that the excise tax must be calculated separately for each benefit option.

Section 4980I(b) provides further that the "excess benefit" is the excess of "(A) the aggregate cost of the applicable employer-sponsored coverage of the employee for the month, over (B) an amount equal to 1/12 of the annual limitation" for the employee for the applicable calendar year. The term "aggregate cost" strongly suggests that individual benefit options within the plan may

be aggregated for purposes of determining the excise tax. The cost of each plan option may be determined using rules "similar to" the rules of section 4980B(f)(4) (used to determine rates for COBRA continuation coverage). But the "similar to" language indicates that Congress did not intend to require that aggregate cost be determined in an identical manner.

Notice 2015-16 states that Sections 4980I(a) and (b) "*explicitly provide*" that the applicable coverage that is compared to the dollar limit for purposes of determining the excise tax is the applicable coverage in which the employee is enrolled, rather than coverage offered to the employee. We disagree that Sections 4980I(a) and (b) are explicit on this point, and we assume the IRS is clarifying that employers will not be taxed on plans in which their employees do not enroll, which is appropriate and helpful. These same provisions can be interpreted to allow plans with multiple options to be aggregated into average costs for self-only and other than self-only coverage. Such an interpretation, if allowed to be utilized by employers on a permissive basis, would permit employers will little or no flexibility to eliminate high-cost options to avoid or mitigate the impact of the excise tax by offering incentives to encourage employees to chose lower-cost options.

3. Reduce Administrative Burdens in Calculating the Excise Tax

Section 4980I(c)(1) and (2) specify that the entity that "shall pay" the excise tax under § 4980I is (1) the "health insurance issuer" in the case of applicable coverage provided under an insured plan, (2) "the employer" if the applicable coverage "consists of coverage under which the employer makes contributions to" an HSA or Archer MSA, and (3) "the person that administers the plan." The statute then contemplates that employers will calculate the "applicable share" of such excess benefit for each coverage provider, and notify the coverage provider of their obligation to pay the tax. Section 4980I(c)(3). As a practical matter, the coverage provider will require the employer to reimburse it for the excise tax paid, for related administrative expenses, and possibly for the cost of additional income taxes due to the nondeductible nature of the expense.

This wasteful and circular billing process can be eliminated for self-insured employers by recognizing that "the person that administers the plan" is the plan sponsor, even when the plan sponsor retains a third party administrator. The term "plan administrator" is defined in Section 3(16) of ERISA as "the person named in the plan document, or if no one is named, the plan sponsor." Although Congress distinguishes in 4980I(c)(2) and (3) between payments of the excise taxes by the "employer" and "the person who administers the plan," the employer is not acting as a plan administrator when it makes contributions to HSAs and Archer MSAs. HSAs and MSAs are generally not employee welfare benefit plans, as described in DOL Field Assistance Bulletins 2004-1 and 2006-02.

3. The Excise Tax should not Apply Based on Claims Experience in Low-Cost Plans

We applaud the IRS for requesting comments on whether the cost of applicable coverage for an employee could be determined by reference to the cost of similar coverage available elsewhere (for example, through an Affordable Insurance Exchange, also known as a Health Insurance

Marketplace). Without such an object reference that takes into account actuarial values, plan sponsors that offer group health plans designed to offer lower cost coverage may be penalized for unusual, large claims incurred by participants, spouses or dependents. An employer facing cost increases due to a premature baby, for example, may be more inclined to terminate coverage altogether if, in additional to rate increases, the employer is required to pay an excise tax. This approach should be permissive, rather than mandatory, and it does not appear unreasonable to require an employer to obtain an actuarial adjustment of plan values to reflect differences from reference plans, such as plans with metal levels (silver, bronze, etc.).

Please feel free to contact me if you have any questions regarding the above.

Sincerely,

Mark Kinney

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