Notice 2015-16

National Indian Health Board

May 15, 2015

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 the National Indian Health Board (NIHB)[1] in response to IRS Notice 2015-16 (the Notice), in which the IRS solicited comments on potential regulatory approaches for implementing Section 4980I of the Tax Code.[2] Section 4980I establishes an excise tax on certain employer-sponsored health benefits under which coverage providers, including health insurance issuers and employers who administer self-funded plans, must pay a tax on employee plans that exceed certain statutory cost thresholds.[3] Thank you for the opportunity to comment on the Notice.

We believe that the plain language of Section 4980I exempts Indian Tribal employers who administer self-funded plans from the excise tax altogether.[4] This interpretation is further

[1] Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

[2] *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.

[3] 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).

[4] Tribal employers who purchase group health insurance for their employees would not be liable for the tax, as liability for the tax is limited to "coverage providers," which in those cases would be the health insurance issuer rather than the employer itself. 26 U.S.C. § 4980I(c). Any reference to Tribal employers in this comment is therefore limited to those employers administering self-funded plans.

supported as a matter of policy, as applying the excise tax to Tribal employers can significantly burden their ability to provide adequate health benefits to Tribal members and to recruit and retain employees. 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, the NIHB believes that the regulations must recognize the unique nature of Tribal benefits and maximize employer flexibility 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 elaborate on all of these points below.

II. DISCUSSION.

a. 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)(l). 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."[5] This government plan provision does not mention anything about plans administered by an Indian Tribe or Tribal organization, despite specifically addressing state governments and the federal government.[6]

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

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[5] 26 U.S.C. § 4980I(d)(1)(E).

[6] 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 any 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).

interpreted.[7] Although Congress repeatedly referenced Indian Tribes in the ACA,[8] and specifically discussed governmental entities in Section 4980I, it did not include Tribes at all in the statutory provision concerning the coverage of the excise tax. This indicates that the Section 4980I does not apply of its own force to Tribal employers who administer their own plans.[9]

Second, there are numerous provisions in the Tax Code that explicitly mention Tribal governmental entities,[10] include Tribally-sponsored benefits within the definition of "governmental plans" in various contexts,[11] or specifically note when Tribal governmental entities are to be treated identically to State governments for the purposes of a given rule.[12] 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 and amended.[13] So, even though Congress applied numerous provisions in the ACA to Indian

[7] *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").

[8] *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).

[9] To whatever extent that there is uncertainty on this front, the 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).

[10] *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.").

[11] *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. . . .").

[12] *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").

[13] *See* ACA 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).

Tribes, clearly knows how to include Tribal governments or health plans within the scope of a particular Tax Code provision,[14] and in the ACA explicitly amended the Tax Code section that includes a commonly-cited definition of "Tribal government,"[15] 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."[16] Section 4980I must be construed to exclude Tribal plans from the excise tax.

b. Policy considerations support the statutory exclusion of Tribal employers who administer their own plans from the excise tax.

Congress has recognized both 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."[17] Applying the excise tax to Tribal employers that administer their own plans, in addition to running counter to Section 4980I's statutory language, also undercuts Congress's national policy towards Indian health.

Many areas with a high concentration of Tribal entities also have some of the steepest insurance prices in the United States. For example, the United Benefits Advisors' 2014 Health Insurance Cost Survey determined that the average cost of insurance in Alaska was $12,584.00 per employee, far exceeding the $10,200 excise tax threshold.[18] At least one

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[14] *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).

[15] *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).

[16] *Dean v. United States*, 556 U.S. 568, 573 (2009).

[17] 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: IHS is only funded at approximately 56% of need, and a 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).

[18] Peter Freska, United Benefits Advisors, *The State of Healthcare Insurance – The Top Five Highest and Lowest Costs of Health Insurance* (May 7, 2015),

Tribal employer in Alaska has examined its own benefits packages 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 associated with providing coverage in remote portions of Alaska, factors over which Tribal employers have little control.

Rather than fulfilling the government's trust responsibility towards Indian health, applying the excise tax to Tribal employers would force the employers 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 IRS. This circuitous process will essentially result in the Tribe receiving federal funding to provide member services and then paying it back to the United States in the form of the excise tax. The Tribe might then be forced to increase employee contribution amounts or cost-sharing in its self-funded plan to make up a portion of the difference.[19]

- **Option 2:** Replace its existing plan, which has been carefully tailored according to the needs of the Tribal workforce and the realities of market pressures, with lower-cost insurance. The replacement coverage may be less comprehensive, include fewer in-network providers, or have higher costs for the individual employee. This will result in dissatisfaction and potentially lower health outcomes for the employee and difficulties for the Tribe in employee recruitment and retention.

- **Option 3:** Eliminate employer-sponsored coverage altogether. The Tribe will then become potentially liable for the ACA's employer mandate penalty, which would again force the Tribe to divert funding back to the federal government. The Tribe will also be placed at a significant disadvantage from a human resources standpoint.

None of these options respect either the trust responsibility or the fact that Tribal design of employee benefits packages is itself an exercise in sovereignty. The NIHB believes that

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http://rss.ubabenefits.com/tabid/2835/Default.aspx?art=prOFd2v2yq4%3D&mfid=ybBRLsooTzo%3D (calculating the average total amount that an employer can expect to pay to provide insurance for a given employee in a given state or profession, across plan variations and coverage types).

[19] Such an increase could potentially eliminate the Tribal plan's grandfathered status under the ACA, if applicable. *See* 45 C.F.R. § 147.140(g)(1).

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.

c. 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 who administer their own plans,[20] we note that the tax applies to the excess benefit provided to any employee covered under any "applicable employer-sponsored coverage." The term "applicable employer-sponsored coverage" means coverage "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)."[21] 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.[22]

Coverage for Tribal member employees, however, is not excluded from income pursuant to Section 106, but rather by virtue of Section 139D, which excludes from an individual's gross income the value of:

- Any health service or benefit provided or purchased, directly or indirectly, by IHS through a grant to or a contract or compact with a Tribe or Tribal organization, or through a third-party program funded by IHS;
- Medical care provided, purchased, or reimbursed by a Tribe or Tribal organization for, or to, a Tribal member (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 a Tribe or Tribal organization for a Tribal member (including the member's spouse or dependent); and
- Any other medical care provided by a Tribe or Tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the federal government to Tribes or Tribal members.[23]

[20] For the remainder of this comment, we will assume *arguendo* that the excise tax rules will apply to Tribal employers who administer their own plans. Tribal employers who purchase coverage for their employees from a plan issuer would not be liable for the tax.

[21] 26 U.S.C. § 4980I(d)(1)(A).

[22] 26 U.S.C. § 106(a).

[23] 26 U.S.C. § 139D(b). This Tax Code provision was implemented pursuant to Section 9021 of the ACA.

Because coverage for Tribal member employees is excludable under Section 139D rather than section 106, it is not included in the definition of "applicable employer sponsored coverage" for purposes of Section 4980I. This is an important distinction, as Tribes may 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 remain outside the scope of the tax. Any proposed rule issued by the IRS should clarify this fact as a definitional matter in order to ensure that the tax is not levied against benefits provided by a Tribal employer to a Tribal member employee.[24] We request that the IRS consult with the NIHB and the Tribal Technical Advisory Group (TTAG)[25] 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.

d. The NIHB 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;[26] and (3) self-insured dental and vision coverage.[27] The NIHB 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,

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[24] In addition, 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 such 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.

[25] The TTAG advises CMS and other federal agencies on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care program funded (in whole or in part) by CMS. In particular, the TTAG focuses on providing policy advice regarding improving the availability of health care services to AI/ANs under federal health care programs.

[26] Generally, EAPs 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.

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

and not retirees or dependents; and (4) are provided with no charge to the employee.[28] The IRS is seeking comment on whether it should also exclude more complex benefits from the tax.[29]

As an initial matter, we note that Section 139D exempts medical care provided by a Tribe to its members and their spouses and dependents from taxable income. It would be incongruous, to say the least, to implement Section 4980I in a manner that would count the value of such services towards an employee's total compensation package. This is particularly true given that Section 139D, which was enacted to implement federal trust responsibility, is designed to confirm that when a Tribe provides IHS-funded health service to their members, spouses and dependents under the ISDEAA, the value of such services is not considered income to the receiving individual. Section 4980I should not be interpreted in a manner that would nonetheless penalize a Tribe for providing ISDEAA-mandated health care to its members simply because those members are employees covered under a self-funded plan.

In addition, we believe that the IRS should exempt from the excise tax any medical services provided to any 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 the local Indian health program, regardless of where it is specifically situated, 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 an Indian health facility to treat employee conditions. The IRS should accordingly extend the workplace exception to care provided to employees at the nearest appropriate facility, even if it is technically not on the employer's campus.[30]

Second, and as discussed above, Section 139D encourages Indian health programs 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 tax-exempt 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 NIHB and the TTAG concerning the

[28] Notice at 8-9.

[29] *Id.* at 9.

[30] In the alternative, the IRS could designate any facility located within the boundaries of a current or former Indian reservation or Alaska Native Village, or otherwise located on Tribal trust land, as being "on-site" for any associated Tribal employer.

potential scope of an Indian-specific exclusion with regard to the treatment of workplace health issues.

We similarly believe that EAP benefits should not count towards the excise tax. AI/ANs suffer from a disproportionate level of substance abuse,[31] violence against women,[32] and suicide,[33] and have one of the highest rates of unemployment of any ethnic group.[34] These are precisely the types of issues that EAPs seek to address, with benefits extending to the individual employee, his or her family, the Tribal workplace, and the community at large.[35] Tribal employers can also tailor their EAPs to provide culturally-appropriate services, which may be an employee's only opportunity to receive such benefits and the difference between whether or not an employee ultimately seeks EAP assistance. Subjecting EAP benefits to the excise tax will discourage Tribal employers from continuing to offer such programs and will disproportionately disadvantage AI/AN communities.[36]

Finally, we support the IRS's proposal to exclude self-insured dental and vision plans from the excise tax.[37] This will assist the ability of Tribal employers to provide quality coverage to their employees without incurring additional costs under Section 4980I.

e. The NIHB supports flexible disaggregation rules.

In most cases, the IRS will determine the value of a health care plan for the purposes of the excise tax by evaluating the average plan cost among all "similarly situated beneficiaries."[38] While Section 4980I requires that employers group self-only coverage enrollees separately from non-self-only coverage when determining which beneficiaries are "similarly situated,"[39]

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[31] 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).

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

[33] SUICIDE PREVENTION RESOURCE CENTER, SUICIDE AMONG RACIAL/ETHNIC POPULATIONS IN THE U.S.: AMERICAN INDIANS/ALASKA NATIVES 1 (2013).

[34] 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/.

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

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

[37] Notice at 9-10.

[38] *Id.* at 4.

[39] 26 U.S.C. § 4980I(d)(2)(A).

the IRS has broad discretion to consider other methods of permissible employee groupings.[40] 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.[41]

The NIHB 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.[42] 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 needs of the employee population, geographic considerations concerning cost of care, etc. Forcing employees into very 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.[43] 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.

f. The NIHB supports a flexible application 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 plan values to compare against the statutory threshold. The agency has

[40] 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)).

[41] Notice at 14.

[42] 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).

[43] *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 employee coverage).

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 for inflation), 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.[44]

With the caveat that the NIHB 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 more likely to correspond with existing Tribal budgeting practices and will result in less disruption to their business. We agree, though, with the IRS's recognition that the specifics of determining plan costs under any such methodology are complex enough to warrant further attention at a later date,[45] and request that the IRS consult with the NIHB and 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 as to whether various individual costs should or should not be included in the overall value of employee plans when using the past cost methodology.[46] 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.[47] We believe that this may disproportionately yield higher 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).[48] Limiting the calculation to direct costs would be a fairer and better-grounded approach from a Tribal perspective.

g. 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 employers treated as a single employer under subsection (b), (c), (m), or (o) of section 414 [of the Tax

[44] Notice at 15-20.

[45] *Id.* at 20.

[46] *Id.* at 17.

[47] *Id.*

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

Code] shall be treated as a single employer."[49] 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 explicitly reserved application of the controlled group rules to governmental employers and has stated that government entities may "apply a reasonable, good faith interpretation" of the rules in other ACA-related contexts, such as the employer mandate.[50] The NIHB requests that the IRS recognize either in subsequent Notices or regulations that a Tribe's good faith interpretation of the controlled group rules 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 errors 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, the NIHB does not believe that Tribal employers who administer their own plans 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 as required by Section 139D, and should implement regulations maximizing employer flexibility in plan design. The NIHB also requests Tribal consultation with the IRS in order to ensure that the excise tax regulations properly reflect these concerns.

Thank you for the opportunity to engage with the IRS on this matter. The NIHB 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.

Sincerely,

Lester Secatero, Chair
National Indian Health Board

[49] 26 U.S.C. § 4980I(f)(9).

[50] 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). To our knowledge, the IRS has not provided any additional guidance on this point.