

OFFICE OF THE GOVERNOR

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BILL ANOATUBBY
GOVERNOR

Notice 2015-16

MAY 26 2015

May 19, 2015

Ms. Karen Levin
Office of Associate Chief Counsel
Internal Revenue Service
Room 5203
Ben Franklin Station, P.O. Box 7604
Washington, D.C. 20044

Dear Ms. Levin:

We wish to provide you with our input and recommendations regarding the IRS Notice 2015-16 on Section 49801 – Excise Tax on High Cost Employer-Sponsored Health Coverage due on May 15, 2015. Our comments are included with this letter.

If you have any questions please contact Ms. Jalinda Kelley, secretary for the Chickasaw Nation Department of Interior Services, at (580) 436-7247 or at Jalinda.Kelley@chickasaw.net.

Sincerely,

Bill Anoatubby
Bill Anoatubby, Governor
The Chickasaw Nation

Enclosures

ON HIGH COST EMPLOYER-SPONSORED HEALTH COVERAGE

The Chickasaw Nation (the "Nation") respectfully submits the following in response to your request for potential comments regarding IRS Notice 2015-16. Please consider these potential comments, and let us know if you have any questions.

1. The Section 4980I tax should not apply to Indian tribal employers

The excise tax on high cost employer-sponsored health coverage under Internal Revenue Code Section 4980I ("Section 4980I") should not apply to Indian tribal governments acting in their capacity as employers.

Section 4980I applies to "applicable employer-sponsored coverage" of an employer.¹ "Applicable employer-sponsored coverage" is generally defined as coverage under any "group health plan" within the meaning of Code § 5000(b)(1). At first glance, these terms might appear to include coverage provided by an Indian tribal government as an employer to its employees under, for example, a self-funded health plan. However, Section 4980I specifies which "governmental plans" are included within the definition of "applicable employer-sponsored coverage" by specifically providing that such 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."² Noticeably absent from this list is any specific reference to Indian tribal governments. In other statutory and regulatory provisions affecting benefit plans, where there is an intent to include Indian tribal governments within the definition of a governmental entity or a governmental plan, there is a specific reference to such sovereign governmental entities.³ The absence of a specific reference to Indian tribal governments

¹ Code § 4980I(a)(1). The Internal Revenue Code is referred to in this letter as the "Code," and the Employee Retirement Income Security Act of 1974 is referred to as "ERISA."

² Code § 4980I(d)(1)(E).

³ See, e.g., ERISA § 4(b)(1) (exempting governmental plans from ERISA and thus, for example, the PHSA mandates in the Affordable Care Act); Code § 9831(a)(1) ("The requirements of this chapter shall not apply to . . . any governmental plan."); ERISA § 3(32) ("The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either . . ."); Code § 414(d) ("The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in 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 . . ."); Treas. Reg. § 54.4980H-1(a)(23) ("The term governmental entity means the government of the United States, any State or

apply to any *governmental plan* sponsored by such an employer for its governmental employees.

The lack of a specific reference to Indian tribal employers in Section 4980I(d)(1)(E) - and the inapplicability of the excise tax to those employers - makes sense because of some of the policy reasons behind the Affordable Care Act (the "ACA"). When Congress passed the ACA, it permanently reauthorized the Indian Health Care Improvement Act (the "IHCIA") to meet the severe and unmet health needs of Indian tribes and tribal members.⁴ Congress's intent in passing the IHCIA was to provide tribes and tribal members with the *maximum* quantity and quality of health services and opportunities possible to eliminate the health disparities between Indians and the general population of the United States.⁵

Many Indian tribal governmental employers have a significant number of tribal member employees. And many self-funded Indian tribal governmental employers provide generous health care to all of their employees so as to simultaneously (a) provide the maximum quantity and quality of health services to their Native employees (consistent with the IHCIA); and (b) not risk a violation of Code § 105(h) by providing generous benefits to Native employees and not-as-generous benefits to their non-Native employees. Thus, if the Section 4980I excise tax applies to Indian tribal governmental employers, the tax would effectively be punishing Indian tribal employers for following the letter and the spirit of the ACA/IHCIA by providing the *maximum* quantity and quality of health services to tribal members.

We respectfully request that any proposed or final regulations specifically provide that the Section 4980I excise tax does not apply to Indian tribal governments acting in their capacity as employers and sponsors of employer-provided health care plans.⁶

political subdivision thereof, any Indian tribal government (as defined in section 7701(a)(40)) or subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or any agency or instrumentality of any of the foregoing.") (emphasis added); Treas. Reg. § 1.45R-2(a) ("[A]n employer that is an agency or instrumentality of the federal government, or of a State, local or *Indian tribal government*, is not an eligible small employer if . . .") (emphasis added).

⁴ 25 U.S.C. 18 § 1601(2).

⁵ See 25 U.S.C. 18 § 1601(2).

⁶ Further complicating this issue is the Code's ongoing reference to the controlled group rules of Code § 414(b) and (c). All employers treated as a single employer for purposes of Code Section 414 are treated as a single employer for purposes of the Section 4980I excise tax. To the extent that a given employee receives coverage from more than one controlled group member, it appears that the coverage would need to be aggregated for purposes of applying the statutory dollar thresholds with respect to the employee. Such aggregation will be difficult to administer and will require that employers belonging to the same controlled group work together to determine the cost of aggregated coverage. Unfortunately, if the excise tax applies to Indian tribal governmental employers, those employers will find it even more difficult - more difficult than any other employer - to

permissively disaggregate Native employees from its cost calculations

Section 4980I imposes a 40% excise tax on the excess, if any, of the aggregate cost of the applicable coverage of an employee for a month over the applicable dollar limit for the month. Section 4980I(d)(2)(A) provides that the cost of applicable coverage generally is determined under rules similar to the rules of Code § 4980B(f)(4), which apply for purposes of determining the COBRA applicable premium. Notice 2015-16 identifies potential approaches for determining the cost of applicable coverage. The Notice provides that Treasury and the IRS anticipate issuing rules providing that, for any specific type of applicable coverage, the cost of that applicable coverage for an employee will be based on the average cost of that type of applicable coverage for that employee and all similarly situated employees. The Notice also suggests potential aggregation rules when running these calculations, such as mandatory disaggregation of self-only coverage and other-than-self-only coverage.

As stated above, Indian tribal governmental employers often intentionally provide very generous health benefits to their employees so as to simultaneously (a) provide the maximum quantity and quality of health services to their Native employees (consistent with the IHCA); and (b) not risk a violation of Code § 105(h) by providing generous benefits to Native employees and not-as-generous benefits to their non-Native employees. To the extent the Treasury and the IRS issue rules providing that Indian tribal governmental employers are subject to Section 4980I, the rules should provide very generous permissive disaggregation rules for such employers that might, for example, allow those employers to exclude Native employees - and thus only look at the cost of coverage provided to non-Native employees.

American Indians and Alaska Natives are at a higher risk for health problems including but not limited to diabetes, obesity, and cardiovascular disease than that of the general United States population.⁷ As a result, healthcare costs for such individuals are often higher than costs for non-American Indians or Alaska Natives. Including Indian tribal members among the groups of similarly-situated employees for purposes of determining the cost of applicable employer-sponsored coverage might result in a higher cost of coverage for groups that contain tribal members than for those that do not contain tribal members. As a result, employers that sponsor group health plans on behalf of Indian tribal members may face disproportionate exposure to excise tax penalties than that of their non-Indian tribal employer counterparts. Therefore, any proposed and ultimately final rules should allow Indian tribal governmental employers to exclude Native employees from the calculations, to the extent it is helpful. Indian tribal governmental employers should not be forced to disaggregate - rather, it should be a permitted choice.

calculate the potential excise tax because they have a complete lack of real guidance on how the controlled group rules apply, if at all, to Indian tribal governmental employers.

⁷ See Center for Disease Control and Prevention: *American Indian and Alaska Native Populations* (available at www.cdc.gov/minorityhealth/populations/REMP/aian.html).

Section 4980I provides two baseline per-employee dollar limits for 2018 that will trigger the excise tax (\$10,200 for self-only coverage and \$27,500 for other-than-self-only coverage) but also provides that various adjustments will apply to increase these amounts for certain groups.⁸ One adjustment applies to individuals who participate in an employer-sponsored plan that covers employees, the majority of which are engaged in a "high-risk profession."⁹ Such high-risk professions include law enforcement officers, employees engaged in fire protection, emergency medical technicians, paramedics, first-responders, individuals whose primary work is longshore work, and individuals engaged in the construction, mining, agriculture (not including food processing), forestry, and fishing industries.¹⁰

Because it may cost more for an employer-sponsored group health plan to cover these high-risk employees, plans that primarily cover such employees may use increased dollar limits as a baseline for determining whether the tax applies (for 2018, \$11,850 for self-only coverage and \$27,845 for other-than-self-only coverage). Similarly, Indian tribal members may be subject to increased health costs due to the increased health risks that are more prevalent in groups of American Indians and Alaska Natives than in non-tribal members (see above). Such health risks may result in even greater health insurance costs for tribal members than those for employees engaged in the "high-risk profession" categories listed under Section 4980I. As such, any proposed or final rules should expand the definition of "high-risk profession" to include American Indian and Alaska Native employees.

4. The aggregate cost of coverage should be based on the lowest-cost coverage that is available to the employee

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. Section 4980I(b) provides 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.

Notice 2015-16 indicates that the Treasury and the IRS intend to issue rules providing 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 but in which the employee does not enroll

⁸ See Code § 4980I(b)(3).

⁹ Code § 4980I(b)(3)(C)(iv).

¹⁰ See Code § 4980I(f)(3); see also Notice 2015-16.

calculated) means "with respect to any applicable employer-sponsored coverage *made available* by an employer to an employee during any taxable period, the sum of the excess amounts determined under paragraph (2) for months during the taxable period." Section 4980I(b)(1) suggests that the excise tax is applied based on the coverage simply made available to an individual without regard to whether the individual actually enrolls in such coverage. A rule that determines any "excess benefit" by looking not at an employee's enrolled coverage, but rather at the lowest value option made available to that employee would ensure that the tax is not triggered by an employee so long as the employee has the ability to enroll in a benefits package that is valued below the statutory thresholds.

We appreciate the opportunity to comment on this very important issue.