



Submitted electronically via: Notice.comments@irs.counsel.treas.gov

September 30, 2015

CC:PA:LPD:PR (Notice 2015-52)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station, Room 5203
Washington, DC 20044

RE: IRS Notice 2015-52 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 Alaska Native Tribal Health Consortium (ANTHC)¹ in response to IRS Notice 2015-52 (Notice 2015-52). In Notice 2015-52, the IRS solicits comments on potential regulatory approaches for implementing Section 4980I of the Tax Code,² which establishes an excise tax on certain employer-sponsored health benefits under which coverage providers must pay a tax on employee plans that exceed certain statutory cost thresholds (the excise tax).³

ANTHC previously submitted comments on the excise tax in response to Notice 2015-16, the IRS's February 26, 2015 solicitation of input on various aspects of the tax's implementation.⁴ In these previous comments, ANTHC noted that benefits provided by Tribes and Tribal organizations are excluded from the scope of the excise tax:

¹ ANTHC is a statewide tribal health organization that serves all 229 tribes and 150,000 Alaska Natives and American Indians (AN/AI) in Alaska. ANTHC and Southcentral Foundation co-manage the Alaska Native Medical Center, the tertiary care hospital for all AN/AI in Alaska. ANTHC also provides a wide range of statewide public health, community health, environmental health and other programs and services for Alaska Natives and their communities.

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 These comments are included as an attachment to this current response.

- In the context of government-provided benefits, the excise tax only applies to “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 Because this government plan provision does not list or even mention plans administered by an Indian Tribe or Tribal organization, despite specifically addressing state and federal government plans,⁶ well-recognized rules of statutory interpretation require that Tribal plans be considered exempt from the excise tax.⁷
- In the event that the IRS construes Section 4980I as applying to Tribal employers who administer their own plans,⁸ the statute taxes excess benefit provided to

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 2015-16 at 8. This interpretation, and the government plan 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).

⁷ For example, statutes relating to Indians must be “construed liberally in favor” of Tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In addition, 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. See, e.g., *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 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.

employees covered “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).”⁹ Because coverage for Tribal member employees is not excluded from income pursuant to Section 106, but rather by virtue of Section 139D, it is not included in the scope of taxable benefits for purposes of Section 4980I and should accordingly be exempt from the excise tax.

ANTHC hereby incorporates by reference its previous comments on the excise tax, and reiterates its request that the IRS expressly recognize that plans offered by Tribes and Tribal organizations are exempt from the tax pursuant to the plain language of Section 4980I.

To the extent that the IRS ultimately construes Section 4980I as applying to Tribal employers, notwithstanding the statutory provisions noted above, ANTHC offers the following comments regarding a matter of particular concern on which the IRS solicits input. Specifically, we believe that Notice 2015-52’s proposed excise tax payment/reimbursement methodology, under which the “administrator” of a self-insured plan (if determined to be an entity other than the employer itself for purposes of Section 4980I) would pay the tax on the employer’s behalf and then bill the employer for the cost after grossing up the amount of the entity’s non-deductible excise tax to account for income tax on the reimbursement, is impermissible as a matter of statutory interpretation and very problematic as a matter of tax policy. We elaborate below.

II. DISCUSSION.

Section 4980I(c)(1) states that the “coverage provider” is liable for paying the excise tax. In the context of self-insured plans, the coverage provider is “the person that administers the plan benefits.”¹⁰ According to Notice 2015-52, because the latter phrase is undefined in the Code or related statutes:¹¹

[T]he excise tax will be paid . . . by the “person that administers the plan benefits” (which may, in some instances, be the employer) in the case of self-insured coverage. It is expected that, if a person other than the employer is the coverage provider liable for the excise tax, that person may pass through all or part of the amount of the excise tax to the employer in some instances. If the coverage provider does pass through the excise tax and receives reimbursement for the tax

⁹ 26 U.S.C. § 4980I(d)(1)(A).

¹⁰ 26 U.S.C. § 4980I(c)(2)(C).

¹¹ *But see infra* for a discussion of why this interpretation is not accurate.

(the excise tax reimbursement), the excise tax reimbursement will be additional taxable income to the coverage provider. Because § 4980I(f)(10) provides that the excise tax is not deductible, the coverage provider will experience an increase in taxable income (that is not offset by a deduction) by reason of the receipt of the excise tax reimbursement. As a result, it is anticipated that the amount the coverage provider passes through to the employer may include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur (the income tax reimbursement).¹²

In the context of self-insured plans, the IRS accordingly proposes that (1) the employer will calculate its excise tax liability; (2) pass that information to “the person that administers the plan benefits,” which the IRS believes may be the employer, a third party administrator (TPA), or some other entity as determined on a case-by-case basis; (3) that third party (if not the employer) will pay the excise tax; (4) the third party will then bill the cost onto the employer; (5) the employer will reimburse the third party the amount of the Section 4980I excise tax; and (6) in addition, the third party (either as part of the excise tax pass-through or as a separate process) will bill the employer an additional sum to reflect the third party’s increase in taxable income in the form of the excise tax reimbursement that it receives from the employer and the grossed up amount of the income tax reimbursement itself. We do not believe that this convoluted scenario is permissible as a matter of reasonable statutory interpretation and the clear statutory intent.

First, the IRS’s interpretation would impose an effective tax rate on an employer that exceeds the rate specified in Section 4980I. In the event that an employer provides excess benefits, Section 4980I(a) imposes an excise tax “*equal to 40 percent of the excess benefit.*”¹³ But by authorizing a TPA to pay the excise tax and bill the employer, and to additionally bill a grossed up income tax amount to cover the TPA’s own income tax liability with respect to the reimbursement payment, the employer’s liability for tax does not *equal* forty percent of the excess benefit; it *exceeds* it. For example, in the event of an employer’s \$2,500 excess benefit, and assuming an effective income tax rate on the TPA of twenty percent, the TPA would pay the excise tax of \$1,000, and then bill the employer for that amount, plus the \$250 the TPA will owe in income tax on the reimbursement of the non-deductible excise tax and related reimbursement of the income tax itself. That would mean that a Tribe, or any other tax-exempt entity operating a self-insured plan through a taxable TPA, would actually pay \$1,250 of tax on an excess benefit of \$2,500, or an effective tax rate of fifty percent.¹⁴

¹² Notice 2015-52 at 7.

¹³ 26 U.S.C. § 4980I(a) (emphasis added).

¹⁴ See Notice 2015-52 at 8-9 (explaining tax calculation formula under the scenario envisioned by the drafters of the Notice).

In addition, the application of this proposed methodology leads to a vicious cycle of increasing excise tax liability for the employer. In determining the cost of applicable coverage subject to the excise tax, Section 4980I(d)(2)(A) provides that “any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account.” While the drafters acknowledge in the Notice that the computation of the excess benefit under the employer’s plan will not include the excise tax reimbursement, the Notice indicates that reimbursement of the TPA’s income tax most likely will be added to the cost of coverage subject to the Section 4980I tax.¹⁵

In practice, this means that should any ultimate implementing regulations treat the TPA as the person administering the plan benefits, and implicate the proposed pay-and-reimburse model, employers will be stuck in a cycle through their reimbursement of the TPA’s income tax expenses will subsequently increase the employer’s own cost of coverage. Unless the employer amends its plan, this increase in coverage cost will subsequently increase the employer’s excise tax liability and its TPA income tax reimbursement obligation. This itself will once again increase the deemed cost of coverage and further gross up the employer’s excise tax liability, thus triggering the entire cycle in perpetuity.

This has the potential to drastically compound an employer’s effective liability under the statute *without any increase of benefits under its plan*. For instance, one Tribe has calculated that it would be liable for approximately \$250,000 in penalties on an excess benefit of \$625,000. Applying the IRS’s “income tax liability” formula would result in an additional \$62,500 owed to a TPA with a marginal income tax rate of 20%, which would then increase the Tribe’s cost of coverage to \$712,500 and its excise tax payment to \$275,000: a \$25,000 increase in liability. In imposing the Section 4980I excise tax as being “equal” to forty percent of the excess benefit, Congress simply did not leave room for an interpretation under which the end-result is an effective tax rate will almost always exceed this stated statutory amount if a TPA is responsible for administration of the plan under the terms established by the employer.

Second, and as noted above, the IRS states that this payment and reimbursement process is necessary because “Section 4980I does not define the term ‘person that administers the plan benefits’” who is liable to pay the tax.¹⁶ But this is not accurate: Section 4980I(f)(6) defines the “person that administers the benefits” as the “plan sponsor if the plan sponsor administers

¹⁵ Notice 2015-52 at 7-8. However, this interpretation is at odds with the plain language of Section 4980I(d)(2)(A) noting that any portion of cost of coverage “which is attributable to the tax imposed under this section shall not be taken into account.” The income tax should be considered to be “attributable to the tax imposed under” Section 4980I and subsequently excluded; if not, the IRS is essentially admitting that it has created the income tax payments *sua sponte*, without statutory authorization, and in violation of the statutory forty percent excise tax responsibility.

¹⁶ Notice 2015-52 at 7.

benefits under the plan,” while Section 4980I(f)(7) then defines “plan sponsor” through the incorporation of section 3(16)(B) of the Employee Retirement Income Security Act of 1974. This provision states in relevant part that the plan sponsor in this context is “the employer in the case of an employee benefit plan established or maintained by a single employer.”¹⁷

We believe that the most natural reading of these provisions as a whole is that the employer should be considered the person that “administers benefits” under the plan, in that the employer has the ultimate administrative authority to set the plan terms, pick the TPA and usually make final benefit decisions. If that were the case, the employer itself would calculate and pay the tax, without having to involve third parties. That seems a much more logical application of the tax than the complex TPA reimbursement scenario Notice 2015-52 suggests, particularly with respect to any Tribe or other tax-exempt employer.¹⁸

Third, as a matter of practical implementation and tax policy, requiring that employers coordinate tax payments with a TPA invites a host of administrative difficulties that would not exist if employers simply paid the tax themselves.¹⁹ For example, Section 4980I(e) penalizes the “coverage provider” for failure to properly calculate and pay the tax, which, per the Notice, would mean the TPA. But how will the TPA ensure that the employer has properly calculated the tax amount, which it would then send to the TPA for payment? What recourse would the TPA have if the employer failed to calculate the tax amount accurately and in a timely manner? Would the TPA face a compliance penalty for failure to remit the correct amount of tax based on calculations for which it was not responsible? This would seem to suggest that TPAs would have to oversee or otherwise “check the work” of the employer in order to insulate themselves from liability; would the TPA be authorized to pass through the costs of these added burdens to the employer? Would such pass throughs increase the employer’s cost of coverage?²⁰

¹⁷ 26 U.S.C. § 4980I(f)(7) (incorporating by reference 29 U.S.C. § 1002(16)(B)(i)).

¹⁸ In addition, the Indian canons of construction demand that the agency avoid such an anti-Tribal interpretation of an unclear statute. *See, e.g., Montana, supra.*

¹⁹ The IRS acknowledges this point when it requests comments on a number of difficult issues related to the implementation of this process, such as the manner in which the employer can reimburse the TPA for the income tax-specific portion of the transaction, the discussed issue of whether the income tax payment goes towards cost of coverage, the formula used when calculating the income tax, and other issues. *See* Notice 2015-52 at 7-9.

²⁰ In addition to these tax compliance issues, there would be a number of new contractual issues that would arise out of the employer–TPA relationship once this new tax goes into effect, such as the need to verify the TPA’s marginal income tax rate on which a portion of the claimed reimbursement is based. While those matters are separate from the tax compliance issues themselves, they would result from an unnecessary and questionable interpretation of tax law.

These are just some of the many difficulties and potentially lawsuit-inducing adversarial situations that could arise under Notice 2015-52's pay and reimburse model. As a practical matter, Congress cannot have intended to subject both employers and TPAs to the cost of undertaking such a complex and expensive system, particularly as compared to the relatively straightforward option of simply having the plan sponsor (the employer, in the case of a self-insured plan) calculate and pay the excise tax on its own. Absent any clear statutory direction for doing so, the IRS should not unnecessarily complicate an already complicated calculation.

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 by its terms does not apply to health benefits provided by a Tribe or Tribal organization to a member of an Indian Tribe, ANTHC does not believe that Tribal employers who administer their own plans should be subject to the excise tax. Should the IRS disagree on this point, however, we believe that the Notice 2015-52's proposed pay and reimburse model will impermissibly inflate Tribes' excise and income tax based liabilities far beyond the statutory rate specified in Section 4980I. The IRS should abandon this payment model both as a matter of law and tax policy in favor of allowing employers to calculate and pay the tax themselves on any excess benefits they may provide.

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

Sincerely,



Senior Director of Intergovernmental Affairs

Attachment



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 submit these comments on behalf of the Alaska Native Tribal Health Consortium (ANTHC)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 ANTHC co-manages the Alaska Native Medical Center, including its tertiary care hospital in Anchorage, Alaska that serves Alaska Natives and American Indians (AN/AIs) throughout the state, and is the state's only level II trauma center. ANTHC also provides a wide range of statewide public health, community health, environmental health and other programs and services for AN/AIs and their communities.

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, ANTHC 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)(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.”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

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).

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.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

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

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 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.

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).

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).

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 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:

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: the Indian Health Service (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), <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).

- **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. ANTHC 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.

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

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).

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.

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

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,

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.

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 ANTHC 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. ANTHC 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 ANTHC 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

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 AN/AIs 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).

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 Indian Self-Determination and Education Assistance Act (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

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.

seeking to provide quality care and benefits to its employees. Again, we believe that the IRS should consult with ANTHC and the TTAG concerning the 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. AN/AIs 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 AN/AI 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. ANTHC supports flexible disaggregation rules.

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, ANTHC requests that such programs be exempt if offered by a Tribe or Tribal organization.

³⁷ Notice at 9-10.

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 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

ANTHC 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

³⁸ *Id.* at 4.

³⁹ 26 U.S.C. § 4980I(d)(2)(A).

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).

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. ANTHC 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 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 ANTHC 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 ANTHC 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

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).

⁴⁴ Notice at 15-20.

⁴⁵ *Id.* at 20.

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 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 ANTHC 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.

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.

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.

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, ANTHC 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. ANTHC 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. ANTHC 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,

A handwritten signature in black ink, appearing to read "G. Let Morsh". The signature is fluid and cursive, with the first name "G." and last name "Morsh" being the most legible parts.

Senior Director of Intergovernmental Affairs