



AMERICAN
SPEECH-LANGUAGE-
HEARING
ASSOCIATION

Submitted via e-mail to Notice.comments@irs.counsel.treas.gov

September 25, 2015

Karen Levin
Office of Associate Chief Counsel (Tax Exempt and Government Entities)
Internal Revenue Service
Room 5203
Ben Franklin Station
Washington, DC 20044

RE: Section 4980I—Excise Tax on High Cost Employer-Sponsored Health Coverage (Notice 2015-52)

Dear Ms. Levin:

The American Speech-Language-Hearing Association (ASHA) is the national professional, scientific, and credentialing association for 182,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students. In May, ASHA submitted comments on Notice 2015-16 and appreciates the opportunity to provide additional comments through Notice 2015-52.

Notice 2015-16 sought feedback on issues relating to 1) the definition of applicable coverage, 2) the determination of the cost of applicable coverage, and 3) the application of the dollar limit to the cost of applicable coverage to determine any excess benefit subject to the excise tax. Notice 2015-52 addresses the following issues that ASHA would like to comment on.

- Identification of the Taxpayers Who May be Liable for the Excise Tax
- Exclusion from Cost of Applicable Coverage Amounts Attributable to the Excise Tax
- Determination Period
- Allocation of Contributions to HSAs, Archer MSAs, FSAs, HRAs
- Age and Gender Adjustment to the Dollar Limit

While ASHA appreciates the Internal Revenue Service's (IRS) approach to clarifying this section of the Code, we still anticipate that the proposed changes will have significant implications for our members and employees.

Identification of the Taxpayers Who May be Liable for the Excise Tax

Section 4980I(c) (1) of the Internal Revenue Code states that the coverage provider is liable for any applicable excise tax. For fully insured coverage, the excise tax will be paid by the health insurance issuer and for self-insured coverage by the "person that administers the plan benefits." ASHA observed that Section 4980I does not define the term "person that administers the plan benefits." However, Section 4980I(f)(6) provides that the term "person that administers the plan benefits" includes the plan sponsor, if the plan sponsor administers benefits under the plan, which indicates that the plan sponsor of a self-insured arrangement may be, but is not always, the

person that administers benefits under the plan. Because the term “person that administers the plan benefits” is not used in other statutory contexts, the IRS is considering two alternative approaches in determining the identity of the person that administers the plan benefits.

Under one approach, the person that administers the plan benefits would be the person responsible for performing the day-to-day functions that constitute the administration of plan benefits, such as receiving and processing claims. Under the second approach, the person that administers the plan benefits would be the person that has the *ultimate authority or responsibility under the plan or arrangement* with respect to the administration of the plan benefits (including final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility. **ASHA recommends that the IRS adopt the second option to define coverage provider.** For self-insured plans, the employer ultimately has the responsibility for the different relevant administrative matters and, therefore, it would be easier to identify the employer as the “person that administers the plan benefits.” It is not uncommon for employers that offer self-insured coverage to use multiple parties to perform various functions for which a single cost of applicable coverage will be determined. Under the first approach, it would be virtually impossible, as well as administratively confusing, for employers to attempt to determine the cost of the excise tax when the employer uses a pharmacy benefits manager, disease management vendor, third party administrator, flexible spending account vendor, and health savings account vendor to perform the functions of administering plan benefits. Many fully insured plans also use multiple vendors. Therefore, in all instances, it would simplify the administrative burden for employers to file the necessary information and pay the tax without involving the providers. This approach will also greatly reduce the opportunity for errors inherent in allocating the tax among providers.

Exclusion from Cost of Applicable Coverage Amounts Attributable to the Excise Tax

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. If the coverage provider does pass through the excise tax and receives reimbursement for the tax (the excise tax reimbursement), the excise tax reimbursement will be additional taxable income to the coverage provider. As a result, the amount that the coverage provider passes to the employer would include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur. ASHA understands that the IRS is considering whether the income tax reimbursement can also be excluded from the cost of applicable coverage. If it is determined that it cannot be excluded, employers will have to pay the additional tax. The notice also points out that the income tax reimbursement could be included in the cost of applicable coverage increasing the burden exponentially.

ASHA has several concerns. First, ASHA is a 501 C(6) non-profit tax exempt organization. The income tax on the excise tax is effectively requiring tax exempt organizations to now pay income tax incurred by for-profit entities. Second, this approach is administratively burdensome and supports ASHA’s position that the employer should pay the tax directly, especially for self-insured coverage, “the person that administers the plan benefits” should be the employer only.

Determination Period to Calculate Cost of Applicable Coverage

We suggest that the Service consider administratively mandating that all reporting should be made annually. Many of the options that the Service is considering in this Notice note that the information needed to perform the various calculations may only be available after the end of the calendar year. If the tax calculations must be reported on a monthly basis, and then be subject to adjustment retroactively, the result will be a tremendous administrative expense and burden on employers and providers. It would be much simpler for the Service and for taxpayers if the filing could be made once after the end of the calendar year, consistent with the payment method suggested by the Service in Section VII.B of this Notice. This would give employers and providers the opportunity to reconcile their records before filing the information returns and payment. The IRS anticipates that employers will be required to determine the cost of applicable coverage provided during a taxable year sufficiently soon after the end of that taxable year to enable coverage providers to pay any applicable tax in a reasonably timely manner.

ASHA recommends that the coverage provider be required to pay the excise tax by March 30 of the following year. In other words, for calendar year 2018 the excise tax would be paid to the IRS by March 30, 2019. This approach is preferable because it gives employers the opportunity to reconcile the cost of applicable coverage provided to an employee by taking into account changes in family and employment status (e.g., termination, marriage, adjustments to health savings accounts (HSA) contributions) that can alter the total amount due. ASHA also suggests that should the IRS designate the filing of Form 720, Quarterly Federal Excise Tax Return, as the method for payment of the tax, the form should be filed before the end of the first quarter of the following year.

Allocation of Contributions to HSAs, Archer MSAs, FSAs, HRAs

In Section V.E., the IRS is considering an approach under which contributions to account-based plans, such as flexible spending accounts (FSA) and HSAs, would be allocated on a pro rata basis over the plan year. We recommend that the IRS adopt this approach, which will help minimize the complexity of the monthly reports. Similarly, we support the safe harbor proposed in Section V.F. concerning FSA carry-over amounts.

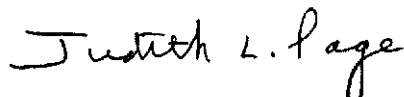
Age and Gender Adjustment to the Dollar Limit

Section VI of the Notice addresses possible ways of calculating the Age and Gender Adjustment to the Cadillac tax's dollars limits under Section 4980I(b)(3). We support requiring the employer to use the first day of the plan year as the snapshot date for determining the composition of its employee population. We also support the use of the Federal Employee Health Benefits Plan standard option as the baseline for determining the adjustment. However, we are concerned that the calculations required by an employer are going to be unduly burdensome and complex. Also, there are timing issues to consider. Employers need to make their benefit choices at least 60-90 days prior to the beginning of their plan year, which is commonly, but not always, January 1. In order to effectively manage against the excise tax, the IRS would have to provide the adjustment for the coming January 1 plan year no later than September 30 of the prior year. In practical terms, the adjustment would have to be based on premium costs for the year ending the prior

December 31, which would represent a lag of a year in the data supporting the adjustment. We also ask that the IRS consider transitional relief for those employers with plan years that do not begin on January 1.

ASHA appreciates the opportunity to provide comments on Notice 2015-52. Please contact Janet McNichol, ASHA's human resources director, at jmcnichol@asha.org or at 301-296-5714, if you require additional information or clarification.

Sincerely,

A handwritten signature in black ink that reads "Judith L. Page". The signature is written in a cursive, flowing style.

Judith L. Page, PhD, CCC-SLP
2015 ASHA President