

Internal Revenue Service
CC:PA:LPD:PR (Notice 2015-52)
1111 Constitution Avenue, N.W.
Washington, DC 20044
Notice.comments@irs.counsel.treas.gov

October 1, 2015

Re: Crossfire Connection, Inc.'s Comments on IRS Notice 2015-52

Ladies and Gentlemen:

Crossfire Connection, Inc. and Crossfire Connection Insurance Associates ("Crossfire Connection") appreciates the opportunity to provide comments on Notice 2015-52, in which the Treasury Department and the IRS solicited comments on issues related to the excise tax on high-cost employer-sponsored health coverage in Internal Revenue Code ("Code") Section 4980I. Crossfire Connection is a full-service insurance brokerage that facilitates property and casualty (including health) coverage for its clients. In particular, it partners with Indian tribal governments and tribal organizations to design self-insured tribal health plans that safeguard and improve the lives of tribal employees and tribal members.

The Treasury Department and IRS invited comments on several issues, including identification of the taxpayers who may be liable for the excise tax. Crossfire Connection's comments address this issue in the context of Indian tribal governments. In summary, Crossfire Connection believes Indian tribal governments that maintain self-insured health plans for their employees and for their members are exempt from the excise tax. This conclusion is based on the statutory language, which omits any reference to tribal government plans from both the general rule applicable to employers and the specific rule including certain governmental employer plans. Crossfire Connection is also concerned that portions of certain tribal health plans that are not even employment-based may be viewed as falling under the broad reach of Code Section 4980I if the IRS does not explicitly recognize the tribal government exemption in regulations. Each of these issues is addressed in more detail below.

1. Crossfire Comments on Exclusion for Tribal Health Plans

The excise tax in Code Section 4980I applies to excess benefits provided under "applicable employer-sponsored coverage." The definition of "applicable employer-sponsored coverage" in Code Section 4980I(d)(1) does not specifically mention Indian tribal employers, and it includes a provision specific to certain government employers intended to be included in the definition. That provision 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." Although it specifically includes federal and state governments, Code Section 4980I(d)(1) does not even mention plans administered by Indian tribes or tribal organizations.

This omission is in sharp contrast to other provisions in the Affordable Care Act, such as Code Section 6055, which imposes reporting requirements on persons who provide minimum essential coverage. The term "minimum essential coverage" is broadly defined, and includes governmental plans. By reference, the term "governmental plans" includes plans established and maintained by an Indian tribal government.

Crossfire Connection believes that the omission of Indian tribes and tribal organizations from the excise tax was intentional. Under the rules of statutory construction, Congress is presumed to act deliberately when it includes language in one provision but omits it in another. Further, courts have required clear Congressional intent to apply statutes of general applicability to tribal governments. By not including tribal governments in Code Section 4980I(d)(1), Congress should be assumed to have intended that they not be subject to the excise tax. Although Crossfire Connection believes tribal governments and tribal organizations are excluded from the excise tax, Crossfire Connection would appreciate Treasury and the IRS addressing the exclusion in regulations. By including clear guidance in the regulations, Treasury and the IRS can reduce confusion and errors of interpretation.

2. Crossfire Comments on Insured Tribal Members Who Are Also Tribal Employees

Section 4980I(d)(1)(A) defines “applicable employer coverage” as 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, or would be so excludable if it were employer-provided coverage (within the meaning of Section 106)” (emphasis added). Crossfire Connection is concerned that this broad language could be construed to include group health plan coverage offered to all members of a tribe in their capacity as tribal members to the extent that the plan covers members who happen to be employees of the tribal government. Because tribal health plans clearly are excluded from the excise tax, Crossfire Connection would appreciate clarification that Code Section 4980I(d)(1)(A) will not be construed to extend the excise tax to the coverage provided to these members who are also tribal employees.

Many Indian tribal governments offer health coverage to all of their government employees, all of their casino employees, and all of their members (whether or not employed by the government). Without regulatory guidance, it will be almost impossible for tribal governments to cover tribal members who happen to be employed by the tribe—even if such employees are segregated into a separate group plan. This result was not intended by Congress.

Conclusion

Crossfire Connection appreciates the opportunity to provide comments on the identification of taxpayers subject to the excise tax on high cost employer-sponsored health coverage in Code Section 4980I. If you have any questions or need any further information about Crossfire Connection's concerns, please do not hesitate to contact me at 916-365-3890 or eric.ramos@crossfireconnection.com.

Sincerely,

Eric Ramos
President & Chief Executive Officer, Crossfire Connection, Inc.

cc: Kathleen M. Nilles, Holland & Knight LLP