October 1, 2015

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

Re: **Comments on Notice 2015-52 (I.R.C. Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage)**

Submitted By:

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Dear Commissioner Koskinen:

On behalf of the Connecticut Education Association ("CEA"), we respectfully submit comments in response to Notice 2015-52 (I.R.C. Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage), issued by the Internal Revenue Service ("IRS" or "Service") on July 30, 2015. In particular, we urge that the IRS clarify that § 4980I(c) prohibits the direct collection or withholding of excise taxes from employee paychecks.

Background

CEA, a state affiliate of the National Education Association, is a labor organization representing approximately forty-three thousand (43,000) certified teachers employed in dozens of municipalities and towns throughout Connecticut. A major component of CEA's

representational activities involves collective bargaining of wages and benefits, including health insurance, for CEA's members employed in said municipalities and towns.

Pursuant to Conn. Gen. Stats.§10-153, (otherwise known as The Teachers' Negotiations Act or "TNA") the collective bargaining process is strictly regulated with respect to subjects deemed as mandatory, permissive and illegal for bargaining purposes. Under the TNA both the employer and employee group subject to the collective bargaining process have the right to declare a proposal an illegal subject of bargaining and request that the State Board of Labor Relations (hereinafter, "SBLR") issue a declaratory ruling regarding a proposal's legality. Generally, proposals may be deemed illegal by the SBLR if the proposal would violate state or federal law.

Beginning in the summer of 2014, a number of Connecticut employers presented CEA bargaining representatives with proposals regarding the liability for payment of the § 4980I excise tax ("the excise tax"). While the exact language of the proposals varied, they shared the common feature that any excise tax liability incurred by the employer or its health plan administrator would be divided *pro rata* among the members of the bargaining unit, and paid in full by the members. For example, one proposal stated that "If the employee chooses…a coverage option…that triggers an excise tax, 100% of any such excise tax shall be borne solely by the employee." Another proposed "Should any plan incur a 'Cadillac Tax,' it shall be passed on 100% to Teachers…." .

In September of 2014 CEA's legal department filed a Petition For Declaratory Ruling with the SBLR on whether a proposal shifting the liability for payment of the excise tax was an illegal subject of bargaining. CEA argued that I.R.C. § 4980I provides that liability for payment

of the tax rests solely with the coverage provider and cannot be shifted through collective bargaining to the employees. In June of 2015, however, the SBLR dismissed the petition on the grounds that the SBLR could not issue an opinion because it lacks the authority to rule on subject matter governed by the Internal Revenue Service. Connecticut State Board of Labor Relations, Decision No. 4822, Case No. TDR – 31, 147 (June 24, 2015) (Copy attached herewith as Exhibit A).

Request for Additional Guidance

CEA urges the Service to clarify that, as the legislative history of the Affordable Care Act demonstrates, responsibility to "pay" the excise tax cannot automatically be shifted from the coverage provider to covered employees. Alternatively, if the Service determines that arrangements between employer and employee are beyond the scope of its statutory authority or otherwise are not an appropriate subject for this Rule, that it state as much clearly in the preamble to the new proposed Rule.

To make our proposal concrete, we set out here possible language the Service could adopt to implement Congress' intent. We explain in more detail the rationale that justifies this language below.

Proposed Language

> Section 4980I(c) of the Act provides that "the coverage provider shall pay" the excise tax. The coverage provider may seek reimbursement for the cost of the excise tax from the relevant employer or other permitted parties. Direct reimbursement of the employer or coverage provider from employees, however, is not consistent with the purposes and history of the Act. A coverage provider will not be deemed to have paid the excise tax if the amount of the tax, in whole or in part, is (1) added to the covered employee's premium contribution payments; (2) is the basis for a

> reimbursement obligation from the employee to the employer or coverage provider; (3) withheld from employee paychecks for payment to employer or the coverage provider; (4) or otherwise similarly serves as a source of financial obligation for the covered employee. Nothing in this provision is intended to prevent employers from bargaining with employees over other terms of employment, including salary, benefits, and hours worked.

Rationale for the Proposal

CEA recognizes that taxpayers may ordinarily seek to shift the economic burden of tax payments to other parties. Indeed, the Notice itself expressly contemplates that coverage providers may seek reimbursement from employers to the extent of the providers' excise tax liability. Further, CEA recognizes that the prospect of such reimbursement obligations may lead the Connecticut employers it bargains with to seek to reduce the package of salary and other benefits offered *collectively* to CEA members.

What the statute prohibits, however, is for an employer to cause the full amount of any excise tax associated with the insurance provided to any *individual* employee to be automatically deducted from the employee's paycheck or otherwise made fully reimbursable to the employer. Any such arrangement would be contrary to the clear statutory command that the "coverage provider shall pay" any excise tax. § 4980I(c).

The structure and legislative history of the Affordable Care Act makes clear that this reading is the only permissible understanding of § 4980I(c). Everything about the design of the excise tax demonstrates that it was intended to shelter workers from the direct imposition of the burden of the excise tax — so that, in other words, it would not appear to be or have the effect of a tax directly on workers' benefits. The operation and implementation of the excise tax would

have been far less complex if Congress had simply chosen to collect it directly from workers, such as through an addition to the FICA system. As the drafters of the Notice clearly recognize, the imposition of the tax on coverage providers instead creates a number of difficult regulatory problems. If Congress had wanted the full burden of the excise tax to fall automatically on workers, it clearly knew how to write such a statute and could easily have done so; it must have had good reasons for rejecting that simpler approach. No reasonable reading of the statute should allow employers, by private arrangements, to reconstitute the system Congress rejected.

The legislative history illuminates Congress' rationales in choosing to shelter workers from the direct burden of the excise tax. First, supporters of the legislation explained that the design of the excise tax was intended to honor President Obama's commitment not to tax health benefits. As Senator Sanders stated:

> Let me quote from what then-Senator Obama said when he was running for President….[N]o family making less than $250,000 will see their taxes increase, not your income taxes, not your payroll taxes, not your capital gains taxes, not any taxes. My opponent, Senator McCain, cannot make that pledge and here is why. For the first time in American history—This is Senator Obama speaking about Senator McCain's plan. For the first time in American history, he, Senator McCain, wants to tax your health benefits. Apparently, Senator McCain doesn't think it's enough that your health premiums have doubled. He thinks you should have to pay taxes on them, too.

155 Cong. Rec. S13157-01 (Sen. Sanders) (Dec. 14, 2009). Other members of Congress similarly argued that the excise tax would not be a tax directly on workers. *See, e.g.*, 155 Cong. Rec. S12745-02 (Sen. Baucus) (Dec. 9, 2009) ("It is not fair to say that taxes are going up for those folks in that category unless you also say it is largely because their income is going up."). These same members understood that, in the long run, the economic burden of any excise might

be shifted to workers in the course of negotiations over salary and benefits. *See, e.g.*, 155 Cong. Rec. S13890-02 (Sen. Mikulski) (Dec. 24, 2009). Their goal in imposing the obligation to pay on the coverage provider was to avoid the possibility that these burdens would have the look and feel of a tax that would violate the President's commitments.

Similarly, the evolution of the bill that became the ACA evinces congressional determination to avoid the appearance of a tax directly on workers. Initial versions included provisions imposing a tax on high-value plans directly on workers, but, according to news reports, these were removed due to objections from the Obama administration. The existing excise tax provisions were then introduced by Senator John Kerry, who explained in press accounts that his proposal would help to curb health costs without imposing a tax directly on individual workers.

During floor debates, senators on both sides of the aisle clearly expressed their understanding that the excise tax could not be passed directly on to workers. Instead, the senators expected that employers would attempt to distribute some of the economic burden of the tax by lowering the value of health insurance benefits and offering workers higher salary instead. See, e.g., 155 Cong. Rec. S13157-01 (Sen. Sanders) (Dec. 14, 2009); 155 Cong. Rec. S13205-01 (Sen. Ensign) (Dec. 15, 2009). As Senator Baucus observed, that assumption was critical to the budget estimate for the legislation provided by the Congressional Budget Office, under which the legislation was assumed to raise revenues. 155 Cong. Rec. S12745-02 (Dec. 9, 2009).

Even Republican opponents of the ACA, who had every reason to want to describe the excise tax as a tax on everyday voters, rather than one on big insurance companies, repeatedly acknowledged that the excise tax could not in fact be passed on directly to workers. Instead, Republican senators argued that, by encouraging employers to shift compensation from benefits to salary, the legislation would trigger higher social security taxes (which, as you know, ordinarily are not imposed on health benefits). *See, e.g.*, 155 Cong. Rec. S11139-01 (Sen. Crapo) (Nov. 5, 2009); 155 Cong. Rec. S12791-02 (Sen. Brownback) (Dec. 9, 2009); 156 Cong. Rec. S1685-08 (Sen. Thune) (Mar. 18, 2010). If excise taxes could lawfully be passed fully on to workers under the Act, this was a needlessly convoluted way of arguing that the bill would hit workers. The clear implication is that even the bill's opponents understood that such a direct imposition of the excise was not consistent with the language of the excise tax provision.

Good policy, as well as political considerations, drove Congress's decision to limit the obligation to pay the excise to coverage providers. First, as Senator Baucus, a lead sponsor of the bill, explained, imposing the legal obligation to pay on coverage providers created stronger incentives for insurers to experiment with cost-control measures. 155 Cong. Rec. S13558-06 (Sen. Baucus) (Dec. 20, 2009). This incentive remains even if providers can pass costs on to employers, as the Notice contemplates, because in that instance employers may reduce demand for insurance coverage, reducing insurers' profits.

The situation is different if costs can automatically be further passed on in full to workers. As recent evidence shows, large portions of the workforce are slow to respond to changes in the details of their benefit packages, especially when those details are not highly

salient.[1] Because of inertia, complexity, and the cognitive costs of health insurance decisions, enrollees rarely switch plans once enrolled.[2] If employers can shift costs to workers seamlessly, such as through payroll deductions or increased premium cost sharing, workers may simply absorb the cost without changing their health care choices. That would frustrate one of the central goals of the legislation, while at the same time hurting working families with no return policy benefit.

Another policy concern is that permitting full pass-through of any excise tax would lead to a double tax burden that Congress could not have intended. The excise tax is not deductible from income taxes. § 4980I(f)(10). If employers withhold pro rata excise taxes from employee paychecks, or require reimbursement of the employer's excise tax bill, households will be paying the excise tax with after-tax dollars—effectively, a double tax. This result can be avoided if employers cannot pass excise taxes directly to workers, but instead must negotiate new compensation packages that account for the economic burden of the tax. In that case, even if workers' salaries are reduced dollar for dollar by the amount of any expected excise tax, the worker will be in a much better financial position, because in effect the excise tax will have been paid for with pre-tax dollars. While employees who belong to large, sophisticated bargaining units may be able to take advantage of this tactic even in the absence of any guidance from the Service, many others will not. The revised Notice should help to protect unorganized workers and workers in smaller or less savvy bargaining units.

[1] Raj Chetty et al., Active vs. Passive Decisions and Crowd-Out in Retirement Savings Accounts: Evidence from Denmark, 129 Quarterly J. Economics 1141 (2014).
[2] Jason Abaluck & Jonathan Gruber, Evolving Choice Inconsistencies in Choice of Prescription Drug Plans, NBER Working Paper No. 19163 (June 2013); Pamela Nadash & Rosemary Day, Consumer Choice in Health Insurance Exchanges: Can We Make It Work?, 39 J. Health Pol., Pol'y & L. 209 (2014).

A final important policy consideration is household planning and liquidity. Health insurance premiums have been relatively volatile since the Act's introduction. Contracts that pass all of the cost of an excise tax directly on to workers expose individual households to risks of dramatic one-year increases in health costs. Again, as with the tax result, this outcome can be avoided if the economic burdens of an excise tax are allocated over time through a bargaining process, rather than immediately and automatically.

In short, when Congress directed that "the coverage provider shall pay" the excise tax, Congress intended to prohibit the provider and employer from imposing the financial burden of the tax directly on workers through reimbursement or automatic withholding. The revised Notice should make this clear, such through the suggested language provided above.

We acknowledge that the Act does not appear to provide the Service directly with a method for enforcing failures to follow this suggested guidance. The Service has existing authority, however, to refuse to accept payment from taxpayers who have failed to comply with IRS payment procedures. The Service can simply exercise this authority in determining that a coverage provider did not properly "pay" the excise tax, as that phrase is understood by Congress, in the event that a reimbursement or automatic withholding agreement is in place.

Finally, in the event that the Service determines that resolution of this question is beyond the scope of the Proposed Rule, we would ask that the Service state as much in the preamble to the Proposed Rule, or elsewhere. As we have described, it appears that some state regulators with authority over labor and employment are reluctant to wade into interpretation of the excise

tax provision, despite its obvious importance to the employment relationship. A statement by the Service that no guidance is forthcoming on this matter would be a helpful stimulus to those regulators to act within the scope of their own authority.

We thank the Service for your consideration in this matter and for reviewing our comments on this important issue. We welcome additional follow-up questions at jamest@cea.org and adrienned@cea.org.

Respectfully submitted,

/**s**/

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