CVSHealth

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Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

CC:PA:LPD:PR (Notice 2015-52), Room 5203

Delivered electronically via Notice.comments@irscounsel.treas.gov

RE: Notice 2015-52

Dear Sir or Madam:

CVS Health, on behalf of its subsidiaries and affiliated entities, appreciates the opportunity to comment on IRS Notice 2015-52 ("Notice") and section 4980I of the Internal Revenue Code, which imposes on certain employer-sponsored health coverage a 40% excise tax ("the excise tax"). CVS Health is a pharmacy innovation company helping people on their path to better health. Through our more than 7,800 retail pharmacies, nearly 1,000 walk-in clinics, leading pharmacy benefit management business with more than 70 million members and expanding specialty pharmacy services business, we enable people, businesses and communities to manage health in more effective ways by lowering the cost of and increasing access to quality health care. As a preeminent pharmacy benefit manager ("PBM"), we manage the dispensing of pharmaceuticals to eligible members in the benefit plans maintained by our clients through our mail order pharmacies, specialty pharmacies and national network of more than 68,000 retail pharmacies, consisting of approximately 41,000 chain pharmacies (including our CVS retail pharmacies) and 27,000 independent pharmacies in the United States, Puerto Rico, the District of Columbia, Guam and the Virgin Islands. As of December 31, 2014, CVS Health had over 215,000 employees.

We commend Treasury and the IRS for the thoughtful and systematic manner in which they are seeking input from taxpayers on section 4980I during the process of developing regulatory guidance. We submitted comments on Notice 2015-16 on May 15, 2015, and those comments are incorporated by reference into this letter as well.

A. Person That Administers the Plan Benefit

The Notice seeks comments on two proposed approaches to determining the identity of the "person that administers the plan benefits." As the "coverage provider" in connection with employers' self-insured plans, that person would be liable for the excise tax. Under the Notice's first approach, the "person that administers the plan benefits" would be the person responsible for performing the day-to-day administrative functions for the plan, such as claims processing and customer service. The Notice states that this person generally would be a third-party administrator ("TPA") for self-insured benefits except in the rare circumstance in which the

employer or plan sponsor performs these functions, or owns the entity that performs these functions. Under the Notice's second approach, the "person that administers the plan benefits" would be the person that has the ultimate authority or responsibility under the plan with respect to the administration of the plan benefits, regardless of whether that person routinely exercises that authority or responsibility. The Notice states that Treasury and the IRS expect that this person would be identifiable based on the terms of the plan documents, and often would not be the person that performs the day-to-day routine administrative functions under the plan.

CVS Health has several significant concerns with the first approach and strongly favors the second. We believe that the first approach:

(i) is contrary to Congressional intent and would undermine a key policy objective of the excise tax;
(ii) involves great complexity that would make it extremely difficult to implement successfully; and,
(iii) significantly increases administrative costs and burdens to all parties, increasing the risk of errors and non-compliance.

Each of these concerns is discussed in more detail below, followed by a specific recommendation about the implementation of the second approach.

Consistency with Congressional intent. First, as stated in our comments to Notice 2015-16, we believe the approach of treating the TPA as the coverage provider for self-insured plans is contrary to Congressional intent. We believe that Congress intended, at least in the case of self-insured employer-provided coverage, that the excise tax apply to the party with ultimate responsibility and authority for determining and designing plan benefits, namely, the employer. Allocating to a TPA some amount of the excess benefit of applicable coverage, so that it is liable for an allocable portion of excise tax, undermines the key policy objective of the excise tax, which is to discourage the availability of health plan benefits that are considered overly generous. Unlike an employer, which has ultimate authority to determine the plan benefits in a self-insured plan, a TPA has no such authority, but is engaged by the plan sponsor to carry out the day-to-day administration of the plan benefit designed by the sponsoring employer. In this important but limited capacity, a TPA does not administer the plan benefits in any way that is relevant to the specific purposes of the excise tax. The Notice's first approach produces an outcome that is inconsistent with Congressional intent, whereas the second approach ensures an outcome that is fully in line with Congress' key policy objective.

Unanticipated complexity. The Notice's first approach involves considerably more complexity than the second approach, particularly in the not uncommon situation where multiple TPAs are involved in administering an employer's plan benefits. The Notice correctly observes that the "identity of the person that administers the plan benefits would often be unclear because, for example, multiple parties (such as a pharmacy benefit administrator and a medical claims benefit administrator) perform the relevant functions with respect to a benefit package for which a single cost of applicable coverage will be determined." It is not unusual for a self-insured plan to have separate vendors for medical benefits, drug benefits, disease management, substance abuse and

behavioral health, dental, vision and/or employee assistance programs. If multiple vendors are engaged to administer plan benefits, the complexity a plan sponsor would face in determining each vendor's applicable share of the excess benefit will be significant. The Notice's second approach, pursuant to which only sponsors of self-insured arrangements would be liable for the excise tax, avoids this likely complexity because the employer would be the single party that remits a single payment of excise tax to the IRS rather than allocating the excess benefit among a number of vendors providing administrative services to the plan.

The inherent complexity of the first approach is exponentially increased when TPAs seek to recover from plan sponsors the true cost of the excise tax. Under their contracts with employers, TPAs generally pass through certain fees, charges and taxes that are incurred by the TPA in connection with the administration of the employer's plan. The TPA, solely as administrator of the employer's plan, passes these costs through to the employer so that the employer is treated as if the expenses were incurred directly by the employer. The Notice properly observes that "(i)t 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." The Notice goes on to describe not only the "excise tax reimbursement" but also the "income tax reimbursement," offering a formula that could be used by TPAs and others to compute the amounts due from employers and plan sponsors.

Although the income tax reimbursement formula produces the appropriate result for the TPA or other coverage provider—assuming the coverage provider's actual marginal rate is used—this formula produces certain potential inequities for the employer when compared to the direct payment of the excise tax under the Notice's second approach. The income tax reimbursement formula will, however, produce economic parity or equivalence for the parties only in the exceptional situation where the employer and the TPA (or all the TPAs where there is more than one) are subject to the same marginal tax rate(s). Most of the time, the employer will experience a windfall or a detriment compared to direct payment by the employer of the excise tax. For example, if the TPA's marginal tax rate is higher than the employer's, the employer's cost on an after-tax basis will be greater than if it had paid the excise tax directly. Conversely, if the TPA's marginal tax rate is lower than the employer's, the employer cost on an after-tax basis will be lower than if it had paid the tax directly. Because the employer will benefit economically wherever its marginal tax rate is higher than the TPAs, the unintended consequence of the use of this formula may be to cause employers to seek out or favor TPAs based on their marginal tax rates, rather than their qualifications as a TPA. When added to the administrative difficulties for the IRS, coverage providers and employers described in the Notice, the income tax reimbursement formula introduces needless complexity that can and should be avoided.

The Notice's second alternative for calculating the income tax reimbursement may be slightly simpler administratively but is also less equitable than the use of the actual marginal tax rate. When a standard marginal rate is used, the TPA will not be kept whole unless its marginal tax rate is equal to or lower than the standard marginal rate used. Since the primary purpose of the income tax reimbursement should be to keep the TPA whole, we believe that if the excise tax liability is allowed to fall on the TPA, any gross-up should at least use the TPA's marginal tax rate and not a standard marginal rate. Any seeming reductions in administrative complexity

compared to the use of the actual marginal rate are surely offset by the need for Treasury and the IRS to select appropriate sets of standard rates for particular segments of taxpayers, and to review and update these rates on a periodic basis.

In connection with the income tax reimbursement, Treasury and the IRS are considering whether some or all of it could be excluded from the cost of applicable coverage. The Notice describes their understandable concern that "a methodology for excluding an income tax reimbursement may not be administrable, given the potential variability of tax rates and other factors among different coverage providers and potential difficulties in determining and excluding the reimbursement amount." This complexity is avoided entirely by following the second approach, pursuant to which the employer would pay the excise tax directly. By adopting the second approach, Treasury and the IRS would ensure that the tax liability falls on the appropriate party economically, incentivizing the party who has control over plan design. Adopting the second approach will eliminate the need for any gross-up calculations and the inequities and potential market distortions they can create.

Risk of Reduced Compliance. Finally, based on the foregoing, the Notice's first approach to determining the "person that administers the plan benefits" will be much more burdensome and inefficient for all parties than the second approach. We believe that implementing the second approach increases the likelihood that each employer and TPA will be able to meet its compliance requirements. The compliance gap between the first and second approaches is the avoidable outcome of initially imposing the excise tax liability on a TPA, rather than the employer, and then using complex administrative rules, processes and formulae to effectively ensure that the true cost of the excise tax is borne by the appropriate party. It is also a function of the potential number of vendors and, therefore, coverage providers involved; with each additional TPA used by employers, the allocations, calculations, reporting, payments and potential for errors multiply accordingly. As the Notice states, "Treasury and IRS anticipate that calculation errors that affect the cost of applicable coverage may, in some instances, affect multiple coverage providers due to the allocation of the tax." This is an outcome that is readily avoidable by adopting the Notice's second approach to the determining the "person that administers the plan benefits," ensuring that the excise tax liability remains with the party ultimately responsible for it. The Notice's second approach avoids all the inefficiencies, time, effort and costs involved in trying to address these operational and administrative challenges, all of which combine to reduce tax compliance.

Recommendation. For all of these reasons, we strongly encourage Treasury and the IRS to adopt the Notice's second approach to identifying the "person that administers the plan benefits" for self-insured employer-sponsored benefits, and require that the person that has the ultimate authority or responsibility under the plan with respect to the administration of the plan benefits, regardless of whether that person routinely exercises that authority or responsibility, be directly responsible for and directly pay the excise tax.

The Notice asks for comments on whether it would be easy to identify the person that administers plan benefits under this second approach. We recommend the following:

For purposes of identifying the party that bears fiduciary responsibility under the Employee Retirement Income Security Act (ERISA), Sections 3(16)(A) and (B) of ERISA provide precise definitions of the terms " plan administrator" and "plan sponsor". For purposes of identifying the plan sponsor in the excise tax context, Congress explicitly referenced in section 4980I(f)(7) the ERISA definition of "plan sponsor". For reasons of consistency, clarity and simplicity, we recommend that Treasury and IRS to adopt and cross-reference for all self-insured plans subject to the excise tax the definition of "plan administrator" from ERISA Section 3(16)(A) to identify the party responsible for excise tax liability. This definition is consistent with the approach taken by Congress with respect to the term "plan sponsor", and has the advantage of a well-established meaning from the ERISA context, and so avoids Treasury and the IRS having to address all the potential interpretative issues, such as having to determine and specify "the relevant types of administrative matters over which the person that administers plan benefits would have ultimate authority or responsibility." Finally, this approach is also appropriately inclusive: administrators of employer-sponsored plans as well as government, church or other plans that are not subject to ERISA will be easily identifiable if the ERISA 3(16)(A) language is adopted. There are several other instances under the Affordable Care Act ("ACA") where ERISA terms are incorporated by reference for purposes of defining a term without limiting the application of the ACA rule only to plans governed by ERISA.

B. Applicable Employer-Sponsored Coverage

Many employers offer "employment-based" Medicare Part D coverage to their employees or former employees in the form of Employer Group Waiver Plans ("EGWPs"). EGWPs provide a standardized prescription drug benefit in a form mandated by the Center for Medicare and Medicaid Services ("CMS"). Coverage of Part D prescription drug benefits is subsidized by CMS in the form of premium subsidies, low income enrollee subsidies, reinsurance and risk corridor payments. In addition, employers often provide premium subsidies with respect to this coverage, which help reduce the costs for the employees and retirees enrolled in the coverage. We do not believe Congress intended for these types of Medicare plans to be subject to the excise tax, the purpose of which is to discourage the provision of overly-generous benefits. EGWPs provide a mandatory prescription drug benefit over which the coverage provider has no discretion. Moreover, we do not believe that Congress intended for the cost of coverage to include amounts paid by federal government agencies like CMS as subsidies for enrollees.

As a policy matter, not explicitly excluding employer-sponsored Part D plans from the definition of "applicable employer-sponsored coverage" would have a chilling effect on employers, likely causing many to cease to offer this coverage, particularly to retirees. This would be directly contrary to Congressional intent with respect to the Part D program, where the federal government has gone to great lengths to encourage employers to offer stand-alone prescription drug plans to their retirees, not only through federal subsidies, but also by giving CMS the authority to waive certain Part D requirements that would hinder the offering of employment-based retiree coverage under Part D.[1]

[1] See Section 1860D-22(b) of the Social Security Act and 42 CFR 423.458(c).

Recommendation. We strongly urge Treasury and the IRS to use their regulatory authority to explicitly exclude the employer-sponsored Part D coverage provided by EGWPs from the definition of "applicable employer-sponsored coverage."

In the event such plans are not wholly excluded from the excise tax, we recommend that amounts paid or subsidized by CMS with respect to such plans should be considered as an offset or reduction in the determination of the aggregate cost of applicable employer sponsored coverage under section 4980I.

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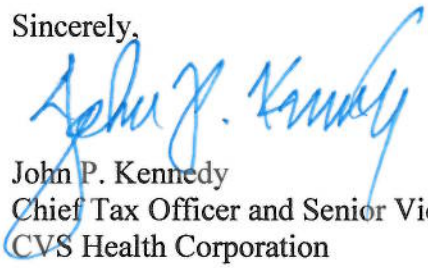
We appreciate the opportunity to comment on the Notice and on other issues under section 4980I, and we are grateful to Treasury and the IRS for their deliberate and inclusive approach to developing regulatory guidance. I would be happy to discuss our comments with you or answer any questions about this submission. My email address is John.Kennedy@CVSHealth.com or I can be reached by phone at 401-770-2378.

Sincerely,



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