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October 1, 2015

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

Re: IRS Notice 2015-52, Excise Tax on High Cost Employer-Sponsored Health Coverage

Dear Sir or Madam:

The California Public Employees' Retirement System (CalPERS) submits these comments pursuant to IRS Notice 2015-52 (Notice) concerning the Excise Tax on High Cost Employer-Sponsored Health Coverage (Excise Tax) under Internal Revenue Code section 4980I (Section 4980I). CalPERS previously submitted comments on IRS Notice 2015-16. In that letter we described our unique role as both a public employer health benefits purchaser and a public employee retirement system, and expressed our concerns that the Excise Tax will ultimately burden California's public employees with higher out-of-pocket costs. A copy of our May 15, 2015 comment letter is attached.

The comments provided in this letter are intended to simplify administration of the Excise Tax for public employers who contract for health coverage from health benefits purchasers, such as CalPERS. Together, these suggestions would allow purchasers, like CalPERS, to ensure that the Excise Tax payment is efficiently managed. It may also help to resolve some of the reimbursement issues described in the Notice. CalPERS believes that these suggestions are consistent with Section 4980I, are within the authority of the IRS and Treasury Department, and would greatly ease the administrative burden placed on employers, coverage providers, and the IRS with the implementation of this tax.

1. Background

CalPERS is the largest public employer health benefits purchaser in California and the second largest employer purchaser in the nation after the federal government. We purchase health benefits for approximately 1.4 million people, comprised of active and retired state, local government, public agency, and school employees and their families. Our health plan offerings include health maintenance organization, self-insured preferred provider organization, and exclusive provider organization plans. In 2015, CalPERS will spend more than \$8 billion to provide health benefits to our members.

CalPERS is a health benefits purchaser on behalf of the State of California, and approximately 1,200 public employers. CalPERS members may elect to participate in any of our fully-insured or self-insured plan offerings provided they meet the geographic requirements for that plan. We have engaged six insurance companies to provide insured benefits under our fully-insured plans. We also have an administrative services only (ASO) agreement with a large insurance company to administer our self-insured plans (an ASO Organization).

Under the ASO agreement, the ASO Organization provides services for our self-insured plans, similar to the services it provides for our fully-insured plans; however, the ASO Organization does not underwrite the self-insured benefits. For example, the ASO Organization facilitates benefit coverage for our self-insured plans through a similar network of providers that it uses for our fully-insured plans. With respect to its administrative duties for our self-insured plans, the ASO performs initial levels of claims adjudication, coordination of benefits, subrogation, pre-certification, initial medical necessity determinations, utilization review, referrals, second opinions, etc., while CalPERS performs secondary levels of claim adjudications.

2. Liability for the Excise Tax

Under Section 4980I, the “coverage provider” is liable for the Excise Tax. Where coverage is provided by an insured group health plan, the coverage provider is the health insurance issuer. Where coverage is provided by way of a health savings account (HSA) or Archer medical savings account (MSA), the coverage provider is the employer. Absent an insured group health plan, or an HSA or an Archer MSA, Section 4980I provides that the coverage provider is “the person that administers the plan benefits.” Recognizing that Section 4980I does not define “the person that administers the plan benefits,” the Treasury Department and IRS are considering two approaches for identifying this entity. One approach would be the person with day-to-day responsibility for plan administration, and the other approach would be the person ultimately responsible for administering plan benefits.

While these two approaches may identify a coverage provider in many instances, CalPERS believes that they will not fully address the complex relationship between CalPERS, the ASO Organization, and our contracting employers participating in our self-insured plans.¹ For public employer purchasers with self-insured health plan offerings, the circumstances under which a single entity would have sufficient administrative authority, or responsibility, to be the person that administers the plan benefits is not necessarily clear. As stated in the Notice, the identity of this entity will often be unclear because multiple parties perform functions for the plan. Under either of the proposed approaches, the analysis will be highly fact-specific, and reasonable minds may reach different conclusions as to which entity has requisite authority or responsibility. As a result, challenges with identifying the coverage provider may impede the facilitation and administration of the Excise Tax.

¹ The Notice requests comments on the extent to which the board of trustees of a self-insured multiemployer plan may be “the person that administers the plan benefits.” While CalPERS is a health benefits purchaser, and not a multiemployer plan, similar issues are presented.

Another complication is that the statute indicates that the plan sponsor may be the person that administers the plan benefits for a self-insured plan, but it does not clarify the circumstances under which this should occur. Section 49801(f)(6) states that the person that administers the plan benefits “shall include the plan sponsor if the plan sponsor administers benefits under the plan.”² Hence, the statute implies that plan sponsor status is a factor in identifying the coverage provider, but is not necessarily determinative, unless the plan sponsor also “administers benefits under the plan.” For CalPERS’ self-insured plan, it seems clear that in the context of this area of the law CalPERS is the plan sponsor,³ but it is not clear that it has the requisite administrative authority, or responsibility, to be the person that administers the plan benefits.

Given the ambiguity in the statute, CalPERS proposes a third approach for identifying the coverage provider for the self-insured component of a public purchaser’s employer plans with an ASO Organization. Specifically, CalPERS requests that the Treasury Department and the IRS consider allowing the plan sponsor of such plans and its ASO Organization to agree which entity will be responsible for the Excise Tax. CalPERS envisions that this allocation of responsibility would be accomplished as part of the larger contract negotiation process that takes place between it and the ASO Organization, and could be reflected in the written agreement between the parties and/or a filing made by both parties with the IRS that could be modified annually.⁴

Allowing a public plan sponsor and ASO Organization to agree by contract which entity will be responsible for the Excise Tax largely resolves the problems described above. It would remove ambiguity as to which entity is responsible for the Excise Tax, and all parties, including the IRS, would know which entity to hold accountable for payment. It would also allow the parties to immediately implement payment of the Excise Tax, rather than spend time and resources disputing responsibility. Further, in some cases, it may be a way to avoid the cumbersome reimbursement arrangements that could drive up the cost of applicable coverage. Perhaps most importantly, it would create significant efficiency for not only the plan sponsor and ASO Organization, but also for the IRS and CalPERS’ employers participating in the plan.

As discussed in more detail below, the employer obligations under Section 49801 to calculate and report the Excise Tax are particularly challenging for participating public employers purchasing coverage through an arrangement like that of CalPERS. For example, CalPERS’ employers do not work directly, or have any relationship, with our

² Section 49801 does not provide that the plan sponsor is the exclusive coverage provider for a self-insured plan, but includes the plan sponsor among the parties that may be the coverage provider for a self-insured plan. The Notice further confirms that the person that administers the plan benefits for a self-insured plan may be the plan sponsor in some instances.

³ Section 49801(f)(7) defines the “plan sponsor” with reference to section 3(16)(B) of ERISA. Section 3(16)(B) of ERISA generally defines the plan sponsor of a plan like CalPERS’ plan as the association, committee, joint board of trustees, or other similar group of representatives acting on behalf of participating employers. Although CalPERS is not covered by ERISA, it meets this definition in this section of the law.

⁴ This payment allocation of the Excise Tax could also be extended to public employers who obtain coverage through a health benefits purchaser.

health plans or ASO Organization, making it that much more difficult to reconcile the employer's calculations with the coverage provider's Excise Tax payments. Where multiple administrators are responsible for different components of the plan, the challenges increase. By allowing the purchaser and the ASO Organization to negotiate which entity is responsible for the Excise Tax, it would ensure that payment is managed by the entity best equipped to do so efficiently. It would also allow a public plan sponsor, its ASO Organization, and participating employers to avoid duplication of efforts and the wasted resources that may result if the Excise Tax roles are divided between multiple parties. In short, giving the parties flexibility ensures that the administration and payment of the Excise Tax will be managed as effectively as possible.

3. Reporting the Cost of Applicable Coverage

As noted above, employers have obligations under Section 4980I to calculate and report the Excise Tax. Specifically, employers must determine the extent to which the cost of applicable coverage provided to an employee during any month of the taxable period exceeds the dollar limit. Employers must also notify the IRS and the coverage provider of the amount of the excess benefit, enabling the coverage provider to pay the Excise Tax. The Notice requests comments on issues raised by the anticipated need to make these determinations reasonably soon after the end of the taxable period. The Notice also recognizes that different types of plans may have different timing concerns, noting that in some cases an employer will need additional time to compute the cost of applicable coverage before it can calculate and allocate any excess benefit.

Given that our approximately 1,200 contracting public employers do not have a direct relationship with our health plans, CalPERS anticipates the need to provide guidance or possibly act as a conduit between our employers and our health plans so that employers can fulfill their reporting obligations. For example, employers may report to CalPERS those employees who exceed the dollar limits based on their coverage providers' pro rata share of the excess benefit, and then look to CalPERS as the health benefits purchaser to notify coverage providers of their respective shares of the excess benefit. Given that the calculation, reporting, and allocation responsibilities will be a significant undertaking for CalPERS' public employers, on top of the other administrative functions they now have related to the shared responsibility reporting mandates for applicable large employers, CalPERS respectfully requests two calendar year quarters to meet the Excise Tax requirements.

CalPERS requests that the Treasury Department and the IRS establish that the date on which public employers participating in plans purchased through health benefits purchasers must notify coverage providers and the IRS of any excess benefit be no later than the end of the second calendar year quarter (June 30) following the taxable period. Presumably, the Excise Tax would then be due by the end of the third quarter (September 30). CalPERS requests two calendar quarters because of the many steps involved for public employers in coordinating with health plans or the health benefits purchaser, and the IRS, after completing the initial Excise Tax calculation. In addition, during the first calendar quarter

of the tax year, applicable large employers will be engaged in issuing individual statements by January 31 regarding employer-sponsored coverage, and reporting this information to the IRS by March 31.

4. Excise Tax Reimbursement

CalPERS is concerned that coverage providers may seek to recover the cost of the Excise Tax by increasing premiums. This would have an adverse effect on public sector employees and retirees, overburdening them when health care costs are already significant. It would also be contrary to the goals of Section 4980I to reduce and manage the cost of applicable coverage. In fact, the increase in premiums could result in a higher cost of applicable coverage and more Excise Taxes. Therefore, CalPERS supports the efforts of the Treasury Department and IRS to ensure that neither Excise Tax reimbursements, nor any related coverage provider tax events, inadvertently increase premiums. For example, the use of income tax reimbursement formulas may be appropriate to avoid an increase in premiums. That said, full tax reimbursements for coverage providers may not be appropriate in all cases and should be subject to negotiation between the relevant parties. In addition, to further ensure that neither Excise Tax reimbursements, nor any related coverage provider tax events, inadvertently increase premiums, the Treasury Department and IRS should take into account that, for public employer benefits purchasers, where employers do not directly buy coverage from health plans, there may be more than one layer of reimbursement for the same Excise Tax (e.g., among participating employers, CalPERS, and coverage providers), and all should be excluded for purposes of determining the cost of applicable coverage.

5. Age and Gender Adjustment of the Dollar Limit

As CalPERS stated in our comment letter to IRS Notice 2015-16, there are features about our demographics that impact the cost of applicable coverage, including the fact that more than half of our members are women, and more than half are older than age 35. CalPERS continues to support generous safe harbors that adjust the dollar limit thresholds for employee populations with age and gender characteristics different from the national workforce.

In Notice 2015-52, the Treasury Department and IRS are considering requiring that employers use the first day of the plan year as a snapshot date for determining its employee population composition. CalPERS is concerned that using the first day of the plan year may be inconsistent with age data collected by the Current Population Survey (CPS), which may occur throughout the year. Accordingly, setting the date for both the Federal Employees Health Benefits Plan (FEHBP) and employer plans' data at 180 days or six months after the first day of the plan year may help better align the age data from the FEHBP and employer plans with that of CPS, and more accurately reflect the age of plan members over a given calendar year.

The Treasury Department and IRS are also considering relying on either actual claims data from the FEHBP or national claims data from plans similar to the FEHBP to determine the

average cost of FEHPB coverage for the age and gender adjustment tables. CalPERS believes relying upon actual claims data may be the better approach because of operational simplicity and the possibility that plans similar to the FEHBP may not have claims experience that would be representative of larger populations. In addition to the adjustment tables, a sample or samples of an adjustment calculation included in the proposed regulations under Section 4980I might also facilitate and simplify the calculation of age and gender adjustments.


6. Conclusion

Our hope is that these comments will, among other things, contribute to regulations that simplify the administration of the Excise Tax by allowing the affected parties to agree on their respective roles. This will allow public employer health benefits purchasers to ensure that payment of the Excise Tax is accomplished in the most efficient and accurate manner, thereby easing the administrative burden on employers, coverage providers, and the IRS.

In conclusion, CalPERS and our health plan partners provide employees, retirees, and their dependents high-quality, comprehensive, and affordable employer-sponsored health coverage. Our plan offerings, while not excessively generous, exceed the basic 60 percent minimum value standards that, if otherwise offered, would ultimately push increased out-of-pocket costs onto valued public employees. We believe the Excise Tax could significantly undermine the health security of the employees of our many contracting public agencies and the State of California; however, despite our concerns about the Excise Tax, CalPERS remains committed to continued collaboration with the federal government to help ensure the successful implementation of the ACA.

Please contact me at doug.mckeever@calpers.ca.gov, or 916-795-0404, if you have any questions or wish to discuss these issues further.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. McKeever", with a long horizontal line extending to the right.

DOUG P. McKEEVER
Deputy Executive Officer
Benefit Programs Policy and Planning

cc: Robert Neis
J. Mark Iwry
Victoria Judson
Stephen Tackney