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October 1, 2015

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

Submitted electronically via: Notice.comments@irs.counsel.treas.gov

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

Dear Sir or Madam:

On behalf of the Cherokee Nation¹, we write to submit this comment in response to Notice 2015-52 (Notice 2015-52) issued by the Internal Revenue Service (IRS) on July 30, 2015. In Notice 2015-52, the IRS solicits comments on potential regulatory approaches for implementing Section 4980I of the Tax Code,² which establishes an excise tax on certain employer-sponsored health benefits under which coverage providers must pay a tax on employee plans that exceed certain statutory cost thresholds (the excise tax).³

As a threshold matter, we believe that the plain language of Section 4980I exempts plans offered by Indian Tribes and Tribal organizations from the scope of the excise tax. We additionally believe that to whatever extent that the IRS ultimately does seek to apply the tax

¹ The Cherokee Nation is the largest federally recognized Indian tribe in the United States, with more than 320,000 tribal citizens, and spans over 7,000 square miles in all or part of 14 counties in northeastern Oklahoma. Cherokee Nation and Cherokee Nation Businesses, the holding company for all of Cherokee Nation's companies, employ more than 9,000 people, and have an economic impact of \$1.5 billion on Oklahoma's economy. Cherokee Nation is committed to improving the lives of its citizens by investing in its housing programs for Cherokee families, improving its health care system, increasing minimum wage, extending maternity leave for its employees, creating jobs, and expanding economic development projects to bolster the local economy.

² See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001, 124 Stat. 119, 793 (2010), codified as amended at 26 U.S.C. § 4980I. Unless otherwise noted, references to "Sections" of statutes within this comment refer to sections of the Tax Code in chapter 26 of the United States Code.

³ The thresholds are \$10,200 for self-only coverage and \$27,500 for non-self-only coverage, subject to certain adjustments specified in the statute. 26 U.S.C. § 4980I(b)(3)(C).

to Tribes, Section 4980I additionally exempts plans offered to employees who are members of a federally-recognized Indian tribe. Both such exemptions are mandated as a matter of law and supported as a matter of policy, and the Cherokee Nation respectfully requests that the IRS acknowledge in its Proposed Rule that the excise tax does not apply any employer benefits provided by an Indian Tribe or Tribal organization.

Notwithstanding these provisions, should the IRS nevertheless apply the excise tax to covered Tribal employers,⁴ the Cherokee Nation offers the following comments regarding a matter of particular concern on which the IRS solicits input. Specifically, we believe that Notice 2015-52's proposed excise tax payment/reimbursement methodology, under which the "administrator" of a self-insured plan (if determined to be an entity other than the employer itself for purposes of Section 4980I) would pay the tax on the employer's behalf and then bill the employer for the cost after grossing up the amount of the entity's non-deductible excise tax to account for income tax on the reimbursement, is impermissible as a matter of statutory interpretation and very problematic as a matter of tax policy. We elaborate below.

DISCUSSION

I. Longstanding rules of statutory interpretation indicate that Section 4980I excludes Indian Tribal employers from the excise tax.

Section 9001 of the Patient Protection and Affordable Care Act (ACA), which established Tax Code section 4980I, applied the excise tax to excess benefits provided under "applicable employer-sponsored coverage," as defined in subsection 4980I(d)(1). That subsection includes a provision specific to governmental employers, which 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."⁵ This government plan provision does not mention anything about plans administered by an Indian Tribe or Tribal organization, despite specifically addressing state governments and the federal government.⁶

⁴ Tribal employers who purchase group health insurance for their employees would not be liable for the tax, as liability for the tax is limited to "coverage providers," which in those cases would be the health insurance issuer rather than the employer itself. 26 U.S.C. § 4980I(c). Any reference to Tribal employers in this comment is therefore limited to those employers administering self-funded plans.

⁵ 26 U.S.C. § 4980I(d)(1)(E).

⁶ The IRS has recognized that the government-specific clause must be read as an integrated whole with the introductory language in 26 U.S.C. § 4980I(d)(1)(A), noting that the fact that the government clause only mentions "civilian" governmental plans implicitly means that Congress intended that military governmental plans are not subject to the excise tax. Notice at 8. This interpretation, and the government clause generally, would not make sense if Congress had intended that the excise tax apply to any government plans other than those specified in paragraph (d)(1)(E). See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a[] harmonious whole'" (citation omitted)).

Under well-recognized rules of statutory interpretation, Congress's exclusion of Tribal governments from Section 4980I must be considered deliberate. First, statutes of general applicability that interfere with rights of self-governance, such as the relationship between Tribal governments and on-reservation Tribal businesses and their employees, require "a clear and plain congressional intent" that they apply to Tribes before they will be so interpreted.⁷ Although Congress repeatedly referenced Indian Tribes in the ACA,⁸ and specifically discussed governmental entities in Section 4980I, it did not include Tribes at all in the statutory provision concerning the coverage of the excise tax. This indicates that the Section 4980I does not apply to Tribal employers that administer their own plans.⁹

Second, there are numerous provisions in the Tax Code that explicitly mention Tribal governmental entities,¹⁰ including Tribally-sponsored benefits within the definition of "governmental plans" in various contexts,¹¹ or specifically note when Tribal governmental entities are to be treated identically to State governments for the purposes of a given rule.¹² These provisions almost all cite the definition of "Indian tribal government" set out in Section 7701 of the Tax Code, a provision which the ACA repeatedly referenced and

⁷ *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (Age Discrimination in Employment Act did not apply to employment discrimination action involving member of Indian Tribe, Tribe as employer, and reservation employment); *accord Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (Fair Labor Standards Act did not apply to dispute between Navajo and non-Navajo Tribal police officers and Navajo Nation over "work [done] on the reservation to serve the interests of the tribe and reservation governance").

⁸ See, e.g., Section 1402(d)(2) (referring to health services provided by an Indian Tribe); Section 2901(b) (referring to health programs operated by Indian Tribes); Section 2951(h)(2) (referring to Tribes carrying out early childhood home visitation programs); Section 2953(c)(2)(A) (discussing Tribal eligibility to operate personal responsibility education programs); Section 3503 (discussing Tribal eligibility for quality improvement and technical assistance grant awards).

⁹ To whatever extent that there is uncertainty on this front, the Indian canons of statutory construction require that statutes relating to Indians be "construed liberally in favor" of Tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

¹⁰ See, e.g., 26 U.S.C. § 54F(d)(4) (including "Indian tribal governments (as defined in [Tax Code] section 7701(a)(40))" as qualified bond issuers for certain projects); 26 U.S.C. § 401(k)(4)(B)(iii) ("An employer which is an Indian tribal government (as defined in [Tax Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.").

¹¹ See, e.g., 26 U.S.C. § 414(d) ("The term 'governmental plan' includes a plan which is established and maintained by an Indian tribal government (as defined in [Tax Code] section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either. . .").

¹² See, e.g., 26 U.S.C. § 168(h)(2)(A)(i), (iv) (defining "tax-exempt entities" as including both "the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing," and "any Indian tribal government described in section 7701(a)(40)," and then explicitly noting that "any Indian tribal government . . . shall be treated in the same manner as a State").

amended.¹³ So, even though Congress applied numerous provisions in the ACA to Indian Tribes, it clearly knows how to include Tribal governments or health plans within the scope of a particular Tax Code provision,¹⁴ and in the ACA explicitly amended the Tax Code section that includes a commonly-cited definition of “Tribal government,”¹⁵ it did not mention Tribes in Section 4980I’s discussion of governmental entities. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposeful in the disparate inclusion or exclusion.”¹⁶ Section 4980I must be construed to exclude Tribal plans from the excise tax.

II. Policy considerations support the statutory exclusion of Tribal employers who administer their own plans from the excise tax.

Congress has recognized both that “[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people” and that it is a “major national goal . . . to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.”¹⁷ Applying the excise tax to Tribal employers that administer their own plans, in addition to running counter to Section 4980I’s statutory language, also undercuts Congress’s national policy towards Indian health by disproportionately burdening Tribal employers and individual American Indians and Alaska Natives.

First, Tribes face many hurdles in maintaining a viable workforce. For example, Tribes in more remote areas often have trouble recruiting and retaining employees

¹³ See ACA Section 9010(d)(2) (incorporating definitions from Section 7701); Section 1409(a) of the Health Care and Education Reconciliation Act of 2010 (adding new subsection (o) to Section 7701).

¹⁴ See, e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 n.22 (1981) (“The dissent refers to our reading as ‘extremely strained,’ but the dissent, in relying on § 505(e) as evidence of Congress’ intent to preserve the federal common-law nuisance remedy, must read ‘nothing in this section’ to mean ‘nothing in this Act.’ We prefer to read the statute as written. Congress knows how to say ‘nothing in this Act’ when it means to see, e. g., Pub.L. 96–510, § 114(a), 94 Stat. 2795.”); accord *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014) (“[W]here Congress knows how to say something but chooses not to, its silence is controlling.”) (citations omitted).

¹⁵ See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 105, 88 Stat. 2203, 2208-09 (1975) (codified as amended at 42 U.S.C. § 215(d), 42 U.S.C. § 2004b) (federal law required to explicitly include Indian Tribes within the scope of statutory benefits previously limited to state and local governments).

¹⁶ *Dean v. United States*, 556 U.S. 568, 573 (2009).

¹⁷ 25 U.S.C. § 1601(1)-(2). We note that the federal government’s budgeting and expenditures do not come close to meeting the requirements of the trust responsibility: IHS is only funded at approximately 56% of need, and a recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP’S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

(particularly health care professionals or other individuals with advanced degrees), while ongoing funding disparities and the non-profit status of many Tribal entities can make it difficult for Tribes to offer competitive wages. As an alternative, many Tribes structure their employee benefits packages to be comparatively generous in order to attract applicants. These non-salary benefits, which can be virtually the only way for a Tribal employer to compete with non-Tribal counterparts, are a necessary cost for Tribes to do business, despite seeming inflated in a vacuum when compared to insurance costs for national or international employers that can better spread risk across thousands of urban employees.

Second, many areas with a high concentration of Tribal entities also have some of the steepest insurance prices in the United States. For example, the United Benefits Advisors' 2014 Health Insurance Cost Survey determined that the average cost of insurance in Alaska was \$12,584.00 per employee, far exceeding the \$10,200 excise tax threshold.¹⁸ At least one Tribal employer in Alaska has examined its own benefits packages and determined that current costs are \$11,880.84 per employee for self-only coverage (\$1,680.84 over the statutory threshold) and \$36,236.64 for family coverage (\$8,736.64 over the statutory threshold). These costs do not mean that the Tribe is encouraging irresponsible overuse of health care by offering "Cadillac" plans to their employees. Rather, the high expenses are driven by the necessity of employee recruitment in rural areas and the market forces associated with providing coverage in remote portions of Alaska (and other states nationwide), factors over which Tribal employers have little control.

Third, applying the tax to Tribal employers would disproportionately affect American Indians and Alaska Natives. The alleged purpose of the excise tax is to drive down health care costs by encouraging individuals to be more judicious in their use of health services. As this logic goes, in order to avoid the excise tax, employers will revise their plans by (1) reducing plan options, covered benefits, or the scope of provider networks for employees; and (2) increasing employee cost-sharing by offering plans with higher deductibles or other out-of-pocket costs. When employees subsequently must pay more for visits, tests, procedures, and medications, they will be more selective and only engage in "medically necessary" visits, tests, procedures, and medications (thus driving down service usage and overall costs).

But this theory is premised on the notion that the provision of "Cadillac" plans encourages employees to frivolously overuse the health care system. To whatever extent this might be true among the general population, American Indians and Alaska Natives' interactions with health care providers is neither frivolous nor overutilized: rather, these individuals suffer from chronic diseases at a significantly higher rate than the general population,¹⁹ have an increased rate of poverty,²⁰ and are often entirely reliant on remote and

¹⁸ Peter Freska, United Benefits Advisors, *The State of Healthcare Insurance – The Top Five Highest and Lowest Costs of Health Insurance* (May 7, 2015), <http://rss.ubabenefits.com/tabid/2835/Default.aspx?art=prOFd2v2yq4%3D&mfid=ybBRLsooTzo%3D> (calculating the average total amount that an employer can expect to pay to provide insurance for a given employee in a given state or profession, across plan variations and coverage types).

¹⁹ SAMANTHA ARTIGA, RACHEL ARGUELLO & PHILETHEA DUCKETT, KAISER FAMILY FOUNDATION, *HEALTH COVERAGE AND CARE FOR AMERICAN INDIANS AND ALASKA NATIVES 2* (Oct. 7, 2013).

²⁰ *Id.* at 1.

drastically underfunded IHS and tribal facilities for their care.²¹ If applied to Tribes, the excise tax would therefore diminish the ability of American Indians and Alaska Natives to obtain services that are more likely to be medically necessary and less likely to be readily available, and increase out of pocket costs for a patient population that can least comfortably bear that burden. This not only fails to advance the nominal purpose of and logic underpinning the excise tax, but it undercuts the federal government's trust responsibility towards American Indian and Alaska Native health.

Fourth, and at the Tribal level, being subject to the tax would force Tribal employers into one of the following scenarios:

- **Option 1:** Pay the tax. Tribes must then divert their limited and finite funding away from necessary services such as law enforcement, health care, and other governmental requirements in order to “pay” the IRS. This circuitous process will essentially result in the Tribe receiving federal funding to provide member services and then paying it back to the United States in the form of the excise tax. The Tribe might then be forced to increase employee contribution amounts or cost-sharing in its self-funded plan to make up a portion of the difference, which would additionally burden the individual employees.²²
- **Option 2:** Replace its existing plan, which has been carefully tailored according to the needs of the Tribal workforce and the realities of market pressures, with lower-cost insurance. The replacement coverage may be less comprehensive, include fewer in-network providers, or have higher costs for the individual employee. This will result in dissatisfaction and potentially lower health outcomes for employees and difficulties for the Tribe in employee recruitment and retention.
- **Option 3:** Eliminate employer-sponsored coverage altogether. The Tribe will then become potentially liable for the ACA's employer mandate penalty, which would again force the Tribe to divert funding back to the federal government. The Tribe will also be placed at a significant disadvantage from a human resources standpoint and the employees would lack access to employer-sponsored care.

None of these options respect either the trust responsibility or the fact that Tribal design of employee benefits packages is itself an exercise in sovereignty. The Cherokee Nation believes that these policy considerations strongly support the statutory exclusion of Tribes

²¹ IHS is only funded at approximately 56% of need, and a recent contract support cost shortfall was estimated at \$90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP'S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

²² Such an increase could potentially eliminate the Tribal plan's grandfathered status under the ACA, if applicable. See 45 C.F.R. § 147.140(g)(1).

from the excise tax, and we request that the IRS acknowledge that fact in any ultimate regulations.

III. Even if it does not construe the statute as entirely excluding Tribal plans, the IRS should exclude coverage provided to Tribal member employees from the definition of “applicable employer-sponsored coverage.”

In the event that the IRS construes Section 4980I as applying to Tribal employers who administer their own plans, we note that the tax applies to the excess benefit provided to any employee covered under any “applicable employer-sponsored coverage.” The term “applicable employer-sponsored coverage” means 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 [of the Tax Code], or would be so excludable if it were employer-provided coverage (within the meaning of such section 106).”²³ With certain exceptions, Section 106 generally excludes the value of “employer-provided coverage under an accident or health plan” from an employee’s gross income.²⁴

Coverage for Tribal member employees, however, is not excluded from income pursuant to Section 106, but rather by virtue of Section 139D, which excludes from an individual’s gross income the value of:

- Any health service or benefit provided or purchased, directly or indirectly, by IHS through a grant to or a contract or compact with a Tribe or Tribal organization, or through a third-party program funded by IHS;
- Medical care provided, purchased, or reimbursed by a Tribe or Tribal organization for, or to, a Tribal member (including the member’s spouse or dependent);
- Coverage under accident or health insurance (or an arrangement or plan having the effect of accident or health insurance) provided by a Tribe or Tribal organization for a Tribal member (including the member’s spouse or dependent); and
- Any other medical care provided by a Tribe or Tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the federal government to Tribes or Tribal members.²⁵

Because coverage for Tribal member employees is excludable under Section 139D rather than section 106, it is not included in the definition of “applicable employer sponsored

²³ 26 U.S.C. § 4980I(d)(1)(A).

²⁴ 26 U.S.C. § 106(a).

²⁵ 26 U.S.C. § 139D(b). This Tax Code provision was implemented pursuant to Section 9021 of the ACA.

coverage” for purposes of Section 4980I. This is an important distinction, as Tribes may provide members with health insurance as an extension of or in association with an employee plan (whether as a group plan, through premium sponsorship in an ACA Marketplace, etc.). While these benefits might at first glance seem to “mimic” a Section 106 plan to which the excise tax would apply, the coverage would instead be exempt under Section 139D and remain outside the scope of the tax. Any proposed rule issued by the IRS should clarify this fact as a definitional matter in order to ensure that the tax is not levied against benefits provided by a Tribal employer to a Tribal member employee.²⁶

IV. The IRS’s proposed “pay and reimburse” methodology for self-insured plans violates Section 4980I.

In the event that the IRS ultimately does apply the excise tax outright to Tribal employers (which, as noted above, we do not think is supported as either a matter of law or policy), we are extremely concerned that the IRS’s proposed “pay and reimburse” methodology for self-insured plans will impermissibly inflate excise tax rates past their statutory limitations.

Section 4980I(c)(1) states that the “coverage provider” is liable for paying the excise tax. In the context of self-insured plans, the coverage provider is “the person that administers the plan benefits.”²⁷ According to Notice 2015-52, because the latter phrase is undefined in the Code or related statutes:²⁸

[T]he excise tax will be paid . . . by the “person that administers the plan benefits” (which may, in some instances, be the employer) in the case of self-insured coverage. 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 in some instances. 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. Because § 4980I(f)(10) provides that the excise tax is not deductible, the coverage provider will experience an increase in taxable income (that is not offset by a deduction) by reason of the receipt of the excise tax reimbursement. As a result, it is anticipated that the amount the coverage provider passes through to the employer may include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur (the income tax reimbursement).²⁹

²⁶ In addition, we believe that the regulations should recognize that applying the excise tax to Tribal member plans will frustrate one of the key goals in enacting Section 139D, as Tribes will be less likely to provide such tax-exempt benefits to their members (employee or otherwise) if they are concerned that doing so could subject the Tribal fisc to liability under Section 4980I.

²⁷ 26 U.S.C. § 4980I(c)(2)(C).

²⁸ *But see infra* for a discussion of why this interpretation is not accurate.

²⁹ Notice 2015-52 at 7.

The IRS accordingly proposes that for self-insured plans (1) the employer will calculate its excise tax liability; (2) pass that information to “the person that administers the plan benefits,” which the IRS believes may be the employer, a third party administrator (TPA), or some other entity as determined on a case-by-case basis; (3) that third party (if not the employer) will pay the excise tax; (4) the third party will then bill the cost onto the employer; (5) the employer will reimburse the third party the amount of the Section 4980I excise tax; and (6) in addition, the third party (either as part of the excise tax pass-through or as a separate process) will bill the employer an additional sum to reflect the third party’s increase in taxable income in the form of the excise tax reimbursement that it receives from the employer and the grossed up amount of the income tax reimbursement itself. We do not believe that this convoluted scenario is permissible as a matter of reasonable statutory interpretation and the clear statutory intent.

First, the IRS’s interpretation would impose an effective tax rate on an employer that exceeds the rate specified in Section 4980I. In the event that an employer provides excess benefits, Section 4980I(a) imposes an excise tax “*equal to 40 percent of the excess benefit.*”³⁰ But by authorizing a TPA to pay the excise tax and bill the employer, and to additionally bill a grossed up income tax amount to cover the TPA’s own income tax liability with respect to the reimbursement payment, the employer’s liability for tax does not *equal* forty percent of the excess benefit; it *exceeds* it. For example, in the event of an employer’s \$2,500 excess benefit, and assuming an effective income tax rate on the TPA of twenty percent, the TPA would pay the excise tax of \$1,000, and then bill the employer for that amount, plus the \$250 the TPA will owe in income tax on the reimbursement of the non-deductible excise tax and related reimbursement of the income tax itself. That would mean that a Tribe, or any other tax-exempt entity operating a self-insured plan through a taxable TPA, would actually pay \$1,250 of tax on an excess benefit of \$2,500, or an effective tax rate of fifty percent.³¹

In addition, the application of this proposed methodology leads to a vicious cycle of increasing excise tax liability for the employer. In determining the cost of applicable coverage subject to the excise tax, Section 4980I(d)(2)(A) provides that “any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account.” While the drafters acknowledge in the Notice that the computation of the excess benefit under the employer’s plan will not include the excise tax reimbursement, the Notice indicates that reimbursement of the TPA’s income tax most likely will be added to the cost of coverage subject to the Section 4980I tax.³²

³⁰ 26 U.S.C. § 4980I(a) (emphasis added).

³¹ See Notice 2015-52 at 8-9 (explaining tax calculation formula under the scenario envisioned by the drafters of the Notice).

³² Notice 2015-52 at 7-8. However, this interpretation is at odds with the plain language of Section 4980I(d)(2)(A) noting that any portion of cost of coverage “which is attributable to the tax imposed under this section shall not be taken into account.” The income tax should be considered to be “attributable to the tax imposed under” Section 4980I and subsequently excluded; if not, the IRS is essentially admitting that it has created the income tax payments *sua sponte*, without statutory authorization, and in violation of the statutory forty percent excise tax responsibility.

In practice, this means that should any ultimate implementing regulations treat the TPA as the person administering the plan benefits, and implicate the proposed pay-and-reimburse model, employers will be stuck in a cycle through their reimbursement of the TPA's income tax expenses will subsequently increase the employer's own cost of coverage. Unless the employer amends its plan, this increase in coverage cost will subsequently increase the employer's excise tax liability and its TPA income tax reimbursement obligation. This itself will once again increase the deemed cost of coverage and further gross up the employer's excise tax liability, thus triggering the entire cycle in perpetuity.

This has the potential to drastically compound an employer's effective liability under the statute *without any increase of benefits under its plan*. For instance, one Tribe has calculated that it would be liable for approximately \$250,000 in penalties on an excess benefit of \$625,000. Applying the IRS's "income tax liability" formula would result in an additional \$62,500 owed to a TPA with a marginal income tax rate of 20%, which would then increase the Tribe's cost of coverage to \$712,500 and its excise tax payment to \$275,000: a \$25,000 increase in liability. In imposing the Section 4980I excise tax as being "equal" to forty percent of the excess benefit, Congress simply did not leave room for an interpretation under which the end-result is an effective tax rate will almost always exceed this stated statutory amount if a TPA is responsible for administration of the plan under the terms established by the employer.

Second, and as noted above, the IRS states that this payment and reimbursement process is necessary because "Section 4980I does not define the term 'person that administers the plan benefits'" who is liable to pay the tax.³³ But this is not accurate: Section 4980I(f)(6) defines the "person that administers the benefits" as the "plan sponsor if the plan sponsor administers benefits under the plan," while Section 4980I(f)(7) then defines "plan sponsor" through the incorporation of section 3(16)(B) of the Employee Retirement Income Security Act of 1974. This provision states in relevant part that the plan sponsor in this context is "the employer in the case of an employee benefit plan established or maintained by a single employer."³⁴

We believe that the most natural reading of these provisions as a whole is that the employer should be considered the person that "administers benefits" under the plan, in that the employer has the ultimate administrative authority to set the plan terms, pick the TPA and usually make final benefit decisions. If that were the case, the employer itself would calculate and pay the tax, without having to involve third parties. That seems a much more logical application of the tax than the complex TPA reimbursement scenario Notice 2015-52 suggests, particularly with respect to any Tribe or other tax-exempt employer.³⁵

Third, as a matter of practical implementation and tax policy, requiring that employers coordinate tax payments with a TPA invites a host of administrative difficulties

³³ Notice 2015-52 at 7.

³⁴ 26 U.S.C. § 4980I(f)(7) (incorporating by reference 29 U.S.C. § 1002(16)(B)(i)).

³⁵ In addition, the Indian canons of construction demand that the agency avoid such an anti-Tribal interpretation of an unclear statute. See, e.g., *Montana*, *supra*.

that would not exist if employers simply paid the tax themselves.³⁶ For example, Section 4980I(e) penalizes the “coverage provider” for failure to properly calculate and pay the tax, which, per the Notice, would mean the TPA. But how will the TPA ensure that the employer has properly calculated the tax amount, which it would then send to the TPA for payment? What recourse would the TPA have if the employer failed to calculate the tax amount accurately and in a timely manner? Would the TPA face a compliance penalty for failure to remit the correct amount of tax based on calculations for which it was not responsible? This would seem to suggest that TPAs would have to oversee or otherwise “check the work” of the employer in order to insulate themselves from liability; would the TPA be authorized to pass through the costs of these added burdens to the employer? Would such pass throughs increase the employer’s cost of coverage?³⁷

These are just some of the many difficulties and potentially lawsuit-inducing adversarial situations that could arise under Notice 2015-52’s pay and reimburse model. As a practical matter, Congress cannot have intended to subject both employers and TPAs to the cost of undertaking such a complex and expensive system, particularly as compared to the relatively straightforward option of simply having the plan sponsor (the employer, in the case of a self-insured plan) calculate and pay the excise tax on its own. Absent any clear statutory direction for doing so, the IRS should not unnecessarily complicate an already complicated calculation.

CONCLUSION

Section 4980I has the potential to seriously affect Tribes’ ability to structure employee benefit packages in accordance with Tribal-specific needs. Because the statute excludes Tribes from the list of covered governmental entities, and by its terms does not apply to health benefits provided by a Tribe or Tribal organization to a member of an Indian Tribe, Cherokee Nation does not believe that Tribal employers who administer their own plans should be subject to the excise tax. Should the IRS disagree on this point, however, we believe that the Notice 2015-52’s proposed pay and reimburse model will impermissibly inflate Tribes’ excise and income tax based liabilities far beyond the statutory rate specified in Section 4980I. The IRS should abandon this payment model both as a matter of law and tax policy in favor of allowing employers to calculate and pay the tax themselves on any excess benefits they may provide.

Thank you for the opportunity to engage with the IRS on this matter. Cherokee Nation stands ready to work with the IRS on any necessary follow up issues and looks

³⁶ The IRS acknowledges this point when it requests comments on a number of difficult issues related to the implementation of this process, such as the manner in which the employer can reimburse the TPA for the income tax-specific portion of the transaction, the discussed issue of whether the income tax payment goes towards cost of coverage, the formula used when calculating the income tax, and other issues. See Notice 2015-52 at 7-9.

³⁷ In addition to these tax compliance issues, there would be a number of new contractual issues that would arise out of the employer–TPA relationship once this new tax goes into effect, such as the need to verify the TPA’s marginal income tax rate on which a portion of the claimed reimbursement is based. While those matters are separate from the tax compliance issues themselves, they would result from an unnecessary and questionable interpretation of tax law.

forward to a continued open dialogue on the excise tax. Please let us know if you have any questions or need additional information.

Respectfully submitted,

A handwritten signature in black ink that reads "Bill John Baker". The signature is fluid and cursive, with a long horizontal stroke at the end.

Bill John Baker
Principal Chief

A handwritten signature in blue ink that reads "Lacey A. Horn". The signature is cursive and somewhat stylized, with a long horizontal stroke at the end.

Lacey A. Horn
Treasurer