EXPRESS SCRIPTS®

SUBMITTED ELECTRONICALLY

October 1, 2015

Hon. John Koskinen, Commissioner
Internal Revenue Service
C/O Notice.comments@irscounsel.treas.gov
CC:PA:LPD:PR (Notice 2015-52), Room 5203,
Internal Revenue Service,
P.O. Box 7604
Ben Franklin Station, Washington, DC 20044

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

Dear Commissioner Koskinen:

Express Scripts is grateful for this opportunity to share our comments on Notice 2015-52 concerning implementation of the Excise Tax on High Cost Employer-Sponsored Health Coverage under §4980I of the Internal Revenue Code. Express Scripts (ESI) is a pharmacy benefit manager (PBM) that provides integrated PBM services including network-pharmacy claims processing, home delivery services, specialty benefit management, benefit-design consultation, drug-utilization review, formulary management, and medical and drug-data analysis services for over 85 million Americans. We write today not only from the perspective of a third party administrator of benefits, but also as an employer of almost 30,000 people to whom we owe a responsibility to provide quality health benefits.

While ESI appreciates the efforts of the IRS to provide a structure for administering the Excise Tax that provides flexibility for benefit plan sponsors to mitigate some of the burden of implementing and collecting it, we have serious concerns that designating Third Party Administrators (TPAs) as "coverage providers" for purposes of applicability will add significant—if unintended—complexity and costs to the process both for plan benefit sponsors and TPAs. Our concerns and comments focus on Section III—"Persons Liable for the §4980I Excise Tax"—and its use of the phrase "person that administers the plan benefits," whose lack of specificity invites considerable confusion for the various entities who may or may not carry liability for this tax with regard to a particular employer plan.

Accordingly, as discussed in Section III IRS notes that because ". . . 'person that administers the plan benefits' is not used in other statutory contexts, Treasury and IRS are considering two alternative approaches to determining the identity of the person that administers the plan benefits." The first approach provides the person that administers the plan benefits would be the one " . . . responsible for performing the day-to-day functions that constitute the administration of plan benefits, such as receiving and processing claims for benefits, responding to inquiries, or providing a technology platform for benefits information," which we assume is directed at third party administrators (TPAs) such as those entities contracted by a plan sponsor to set up the actual means by which the employee accesses the benefits that the sponsor provides.

ESI strongly opposes the first proposed approach and encourages the IRS adopt the second, which provides that the person that administers the benefits is in fact the person " . . . that has the ultimate

authority or responsibility under the plan or arrangement with respect to the administration of the plan benefits . . . and often would not be the person that performs the day-to-day routine administrative functions under the plan." The merits of the second approach are many, including—most importantly—the proper identification of the "person" who in fact sponsors the benefit and has the ultimate say over benefit design. It follows appropriately therefore the sponsor is responsible for the tax liability as compared to the person who is contracted to provide the benefits and services which the sponsor seeks to make available to the covered employees. Put another way, without the sponsors, the TPA would not otherwise provide the health benefits to any employees beyond those employed by the TPA.

Recognizing that the necessity of seeking comments on both approaches offered by IRS are necessitated by the imprecise statutory language from the Patient Protection and Affordable Care Act (ACA), we understand the difficulties of establishing a new definition without any existing reference language in the Internal Revenue Code, ERISA, or the PHSA, and nevertheless applaud the decision to request stakeholder input on this matter. Accordingly, ESI's specific comments and suggested changes for different aspects of the proposed notice follow, beginning with our concerns regarding the first approach and rationale for supporting the second alternative instead.

Issues Making the First Approach Impracticable:

1. Aggregation and allocation of Excise Tax liability among multiple TPAs providing services for the same plan.

TPAs are not typically aware of the administrative duties and costs incurred therein by other TPAs that may be retained by the plan sponsor for providing other aspects of a sponsor's employee benefit plan. For example, a TPA such as a PBM may be contracted to provide the prescription drug benefit portion of a plan sponsor's complement of coverage for its employees, while other vendors/contractors may be retained to provide other components of the full benefit offering, such as mental health, substance abuse, and/or medical services.

Therefore, a plan sponsor would ultimately be the only entity that would be completely knowledgeable about actuarial value of the full benefits offered to its employees, and the costs of each delegated benefit operated by each TPA. It follows then that rather than having a PBM or other TPA aggregate and allocate the plan cost information for every other TPA's portion of the full benefit it operates as it pertains to the whole 40% obligation under the Excise Tax, the least costly and burdensome way for the tax to be assessed and paid is through the plan sponsor itself. Moreover, as the plan sponsor is the only entity with authority to design or modify its benefit offerings to avoid imposition of the Excise Tax, it is the only way this tax policy will in fact achieve its stated goal to root out excessive benefit offerings that increase healthcare spending while adding little or no value to the beneficiary.

2. A tax intended to promote efficient healthcare spending should not add significant complexity and compliance costs to overall healthcare spending.

As discussed above, having any entity other than the plan sponsor administer and pay the tax introduces substantial complexities that only serve to increase compliance costs at the expense of funds that would otherwise be available for providing benefits to a plan's enrollees, driving innovation, or reducing fraud, waste, and abuse. In fact, these unnecessary compliance expenses directly add to the cost of providing healthcare coverage which, as we understand it, precisely conflicts with the intent of the tax to reduce unnecessary healthcare spending overall. Further, these costs are not only incurred by plan sponsors and TPAs under this approach, but to the federal government as well since the added complexity only

increases the likelihood of errors in the Tax's administration—necessitating more extensive auditing by the IRS to ensure compliance among payors.

3. Pass-through by TPAs to the plan sponsor for administrative costs incurred while paying the Excise Tax will create distortions among all parties responsible as provided under this Notice.

If TPAs are made responsible for paying the Excise Tax under this approach, absent IRS' approval for use of Actual Marginal Tax Rate Method to achieve after-tax economic parity, the tax burden and responsibility will be allocated inappropriately between the sponsor and TPAs, adding further costs and complexity to comply with the Tax's requirements. This is because the TPA's payment of the Excise Tax on behalf of its client, the plan sponsor, is not deductible and therefore requires "grossing up" the amount of the Tax passed through so the TPA can recover not only the amount paid on behalf of the plan sponsor, but the tax on the amount of the payment made since it would be considered ***taxable income*** *even though the TPA was only made whole by the plan sponsor for the amount paid on its behalf.*

Use of the Actual Marginal Tax Rate Method option discussed in the Notice and applied as above optimizes spreading of the tax responsibility between the TPA and the plan sponsor. On the other hand, computing the gross-up via the Standard Marginal Tax Rate Method also provided in the Notice for discussion would potentially expose the TPA (coverage provider, not plan sponsor) to either a windfall after taxes, or losses—with possible impacts to effective tax rates—depending on the inputs computed. The applications for the latter formula only distort further when factoring-in multiple TPAs in the computations.

Why the Second Approach is the Better Option:

As an employer plan sponsor and TPA for many employer-sponsored health plans, as well as for the foregoing reasons, ESI strongly recommends that the IRS adopt the second approach provided under Notice 2015-52. We believe the liability of the Excise Tax applies to the person who is ultimately responsible for the determination of the plan's benefits—even if they also contract with TPAs to administrate them in lieu of doing so itself—the plan sponsor (employer). We note however, that while the liability for the Excise Tax should remain with the plan sponsor, such liability should not interfere with a sponsor's authority to delegate certain responsibilities for tax calculations and payments to TPAs via contractual arrangements.

This approach allows the plan sponsor the opportunity to directly assess and pay the Excise Tax while avoiding the unnecessary complexity and increased administrative costs imposed by the First Approach. Moreover, if the aim of the Excise Tax is in fact to encourage plan sponsors to reduce excessively generous health benefits it is most appropriate that they in fact feel any impact of the Tax liability since they are the only ones with authority to modify such benefits—not TPAs. This notion comports with our obligations to our clients to provide them with efficient and effective pharmacy benefit management services, and to our own interests as an employer-plan sponsor seeking to provide generous benefits to our employees without running afoul of Excise Tax liabilities.

Calculating, Reporting, and Paying the Excise Tax:

Speaking from our perspective as an employer, we note that plan sponsors will need a reasonable amount of time to determine and aggregate costs across different benefit providers, which will involve a measured process. First, we would have to establish notification processes among our vendors to obtain the cost information necessary for calculating their portion of any Tax liability. Next, sponsors will

need to compute and confirm those calculations with the vendors, and then finally pay the Excise Tax liability.

ESI therefore urges that IRS issue guidance establishing an Excise Tax projection, reporting, and payment timeline that provides adequate time to compute the aggregate costs of coverage (potentially across multiple TPAs) and any applicable Excise Tax Amount to ensure accurate reporting and payment. Further, we believe that rather than waiting for the actual costs to be determined annually, it would be more efficient and less administratively burdensome to allow plan sponsors to project potential Tax costs upfront before the tax year begins. If IRS decides against allowing plan sponsors to use cost projections for plans, then we propose alternatively that no deadline be imposed before the due date of an employer's corporate income tax return for that year (including permitted extensions).

****

Express Scripts remains eager to work with IRS as it seeks to interpret and apply the new Excise Tax requirements, and we reiterate our appreciation for this opportunity to share our comments on the Notice. If ESI can be of additional assistance, or if you have any questions, please contact me, Jonah Houts, via email at jhouts@express-scripts.com or by phone at 202.383.7983.

Sincerely,

Jonah Houts
Vice President
Corporate Government Affairs
Express Scripts