

Elk Valley
RANCHERIA
Crescent City, CA



2332 Howland Hill Road
Crescent City, CA 95531

Phone: 707.464.4680
Fax: 707.465.2638

September 30, 2015

VIA ELECTRONIC SUBMISSION
Notice.comments@irsounsel.treas.gov

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

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

To Whom It May Concern:

The Elk Valley Rancheria, California, a federally recognized Indian tribe (the “Tribe”) hereby provides its comments regarding Notice 2015-52 regarding Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage.

Section 4980I was added to the Internal Revenue Code by the Affordable Care Act and establishes an excise tax on certain employer-sponsored health benefits under which coverage providers, including health insurance issuers and employers who administer self-funded plans, must pay a tax on employee plans that exceed certain statutory cost thresholds.

Under the Affordable Care Act, the so-called “Cadillac tax” goes into effect in the beginning of 2018 for both fully insured and self-funded employer health plans. The tax will be assessed on the dollar amount of any premium that exceeds the annual limits of \$10,200 for individual coverage and \$27,500 for family coverage. The tax also includes several other costs such as contributions to flexible spending accounts or health savings plans. Tribal governments in high cost of

living regions, such as the Tribe, will likely be hit the hardest. In addition to the taxes, there will be a significant administrative burden on tribal government finance and Human Resources staff to complete the mandated reporting. The costs and burdens represented by the regulations will diminish already limited resources available to support tribal government operations.

The Tribe has provided health insurance coverage to its members and as an employee benefit for many years. The Tribe, like many other employers, is faced with difficult decisions as to whether it should continue to provide such benefits due to ever increasing costs of such coverage, the complexities of implementation of the Affordable Care Act, limited financial resources, and lack of access to health care providers. These restrictions limit the ability to adopt innovative strategies aimed at better cost and health management. The proposed excise tax threatens the Tribe's ability to adopt even tested strategies because of the possibility that the complex implementation of the proposed regulation(s) would result in imposition of the "Cadillac tax."

Federally Recognized Indian Tribes Should be Exempt from the Excise Tax

Section 9001 of the 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."¹ 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.²

¹ 26 U.S.C. § 4980I(d)(1)(E).

² 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.³ Although Congress repeatedly referenced Indian tribes in the ACA,⁴ 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 of its own force to Tribal employers who administer their own plans.⁵

Second, there are numerous provisions in the Tax Code that explicitly mention Tribal governmental entities,⁶ include Tribally-sponsored benefits within the definition of "governmental plans" in various contexts,⁷ or specifically note

³ *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").

⁴ *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).

⁵ 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).

⁶ *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.").

⁷ *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. . .").

when Tribal governmental entities are to be treated identically to State governments for the purposes of a given rule.⁸ 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 amended.⁹ So, even though Congress applied numerous provisions in the ACA to Indian tribes, Congress clearly knows how to include tribal governments or health plans within the scope of a particular Tax Code provision,¹⁰ and in the ACA explicitly amended the Tax Code section that includes a commonly-cited definition of “Tribal government,”¹¹ 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.”¹² Section 4980I must be construed to exclude tribal plans from the excise tax.

Federally recognized Indian tribes, such as the Tribe, are unique in the affordable health care arena and taxation of benefits provided as a result thereof. The Tribe has jurisdiction over its land, resources, and members. The federal government enjoys a special relationship with federally recognized Indian tribes, including a trust responsibility that includes the provision of adequate health care. The federal government’s provision of health care to Indians has historically been underfunded and continues to be so to this day. As a result, many tribes have filled that void and effectively subsidized the federal government’s responsibility by

⁸ 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”).

⁹ 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).

¹⁰ 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).

¹¹ 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).

¹² *Dean v. United States*, 556 U.S. 568, 573 (2009).

offering health care to their respective membership and to Native and non-Native employees.

The Tribe, in a time when other employers are discontinuing health care coverage, continues to provide a generous health care package to its employees and members. The Tribe's offering not only help Tribal member employees supplement the modest benefits available through the Indian Health Service, but helps Tribal businesses attract and retain talented employees.

Application of the excise tax to tribal governments would potentially significantly increase tribal tax liabilities for providing access to health care, seemingly contrary to federal public policy. In other words, that tax liability would force tribal governments to decide between continuing to offer such benefits and potentially pay such taxes or encouraging Tribal member employees to utilize their personal exemption and/or utilize the Exchange system and the Tribe making a simple business decision to pay any related employer penalties as a result of the Tribe's policy decision.¹³

Application of any such Cadillac tax forces the Tribe to make choices about the continuing investment in the well-being of Tribal members and employees which are essential to the long term health and general welfare of the Tribe. Such a Hobson's choice under the Affordable Care Act is contrary to federal health care and tax policy. The solution is simple – exempt federally recognized Indian tribes from the “Cadillac tax.”

Potential Unintended Consequences of Implementation of Complex “Cadillac Tax”

In the event that the IRS construes Section 4980I as applying to Tribal employers who administer their own plans,¹⁴ we note that the tax applies to the

¹³ The proverbial “tug of war” between the employer mandate for large employers and the individual exemption for Tribal members is problematic for many tribal employers. While tribes might not be exempt from the employer mandate, it is strange that tribes as employers are potentially penalized for offering and/or not offering minimum essential coverage (“MEC”) or a plan that exceeds of MEC standards. The proposed “Cadillac tax” increases the irony and could potentially have disastrous impacts on tribal governments if such governments are not exempt or if the tax is implemented other than in a very narrow manner.

¹⁴ For the remainder of this comment, we will assume *arguendo* that the excise tax rules will apply to Tribal employers who administer their own plans. Tribal employers who purchase coverage for their employees from a plan issuer would not be liable for the tax.

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).”¹⁵ 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.¹⁶

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.¹⁷

¹⁵ 26 U.S.C. § 4980I(d)(1)(A).

¹⁶ 26 U.S.C. § 106(a).

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

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 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.¹⁸ We request that the IRS consult with Indian tribes in formal consultation and the Tribal Technical Advisory Group (TTAG)¹⁹ concerning specific approaches and language for reconciling any overlap between Section 4980I and Section 139D, and to generally address the application of the excise tax to tribes.

Proposed Benefit Exclusions

The Notice seeks comment regarding not only issue raised in it, but issues raised in Notice 2015-16, including whether or not the IRS should exclude the following benefits when calculating the value of an employee’s total compensation package: (1) certain types of on-site medical coverage; (2) Employee Assistance Program (EAP) benefits;²⁰ and (3) self-insured dental and vision coverage.²¹ The Tribe supports the exclusion of all three sets of benefits from the tax.

¹⁸ 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.

¹⁹ The TTAG advises CMS and other federal agencies on Indian health policy issues involving Medicare, Medicaid, the Children’s Health Insurance Program, and any other health care program funded (in whole or in part) by CMS. In particular, the TTAG focuses on providing policy advice regarding improving the availability of health care services to AI/ANs under federal health care programs.

²⁰ Generally, EAPs offer free and confidential assessments, counseling, referrals, and follow-up services to employees who have personal and/or work-related issues affecting mental and emotional well-being, such as alcohol and other substance abuse, stress, grief, family problems, marital distress, workplace issues, and psychological disorders.

²¹ Fully-insured dental and vision coverage are statutorily excluded from the calculation. 26 U.S.C. § 4980I(d)(1)(B)(ii).

Finally, we support the IRS's proposal to exclude self-insured dental and vision plans from the excise tax.²² This will assist the ability of Tribal employers to provide quality coverage to their employees without incurring additional costs under Section 4980I.

Conclusion

The intricacies of health care reform, which are difficult for any employer to navigate, are especially challenging for tribal employers, which operate under many unique rules enacted to address not only the Affordable Care Act, but also the federal government's trust responsibility to Indians.

For example, in addition to the individual mandate exemption in the Affordable Care Act, qualified tribal members are not subject to regular Exchange enrollment rules but can enroll during any month (with the practical effect of increasing the likelihood of § 4980H penalties for their employers (e.g., tribal governments), which are triggered by a full-time employee's receipt of subsidized Exchange coverage). We also note that a tribe can no longer implement a subsidy program (of helping employees buy individual Exchange coverage), as such a plan would most likely be considered an "employer payment plan" prohibited under IRS, DOL, and HHS guidance for plan years on or after January 1, 2014. Individual tribes could preserve Exchange subsidy eligibility for its employees—and protect itself from § 4980H(a) penalties—by offering non-affordable or non-minimum value coverage to enough full-time employees; but the tribe would still be subject to the penalty under § 4980H(b) (\$3,000 as indexed) for each full-time employee actually receiving Exchange subsidies, but that might be much less than the tribe would pay for affordable employer-sponsored group coverage meeting minimum value standards.

In light of the myriad of exemptions and laws addressing the federal trust responsibility, the proposed implementation of a "Cadillac tax" on tribal governments would only serve to make the health care taxation area more opaque.

The Tribe recommends that the IRS simply exempt tribal governments from any application of the so-called "Cadillac tax."

²² Notice 2015-16 at 9-10.

September 30, 2015

Page 9

Thank you for your consideration of the Elk Valley Rancheria, California's comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dale A. Miller". The signature is fluid and cursive, with the first name "Dale" being more prominent and the last name "Miller" following in a similar style.

Dale A. Miller
Chairman

cc: Elk Valley Tribal Council
Human Resources
Accounting Department
General Counsel