Denise D. Hilger
Senior Vice President &
Deputy General Counsel

FMR LLC Legal Department

Mail: 100 Salem St., OT1N3, Smithfield, RI 02917
Office: 900 Salem St., Smithfield, RI 02917
Phone: 617-563-6742 Fax: 508-229-9655
Email: denise.hilger@fmr.com

SUBMITTED ELECTRONICALLY: Notice.comments@irscounsel.treas.gov

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: Notice 2015-52 (Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage)

Ladies and Gentlemen:

This comment letter is submitted on behalf of a group of financial services companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, "Fidelity"). In addition to being a benefits plan sponsor itself, Fidelity is a leading provider of employee benefit plan services, offering those services to other plan sponsors in support of a variety of benefit plans and programs. As a plan sponsor and as a service provider to other plan sponsors, Fidelity may be subject to the excise tax that is the focus of Notice 2015-52.

We appreciate the Department of the Treasury ("Treasury") and the Internal Revenue Service's ("IRS") thoughtful approach to rule-making with the publication of Notice 2015-16 and now Notice 2015-52. Thank you for communicating the preliminary thinking about the excise tax on high cost employer-sponsored health coverage and providing an opportunity to comment on the issues even before a proposed rule is issued. Given the significance and high-profile nature of this tax, we believe that a thorough vetting of the issues is warranted.

Fidelity's comments are centered on the question that exists with respect to the person liable for the excise tax under section 4980I(c) of the Internal Revenue Code ("Code"). We support a regulatory interpretation that places the liability for the tax burden on the person that controls the plan design. In addition, we encourage Treasury and the IRS to simplify the calculation of the tax.

******

The liability for paying the tax should lie with the party that has the power to control whether the health plan provides excess benefits and is therefore subject to the tax.

The Affordable Care Act ("ACA") imposes a 40% excise tax on employer-sponsored health coverage that provides "any excess benefit." Code section 4980I(c) puts the liability to pay the tax on the "coverage provider." The coverage provider is defined as: (a) the health insurance issuer for insured coverage; (b) the employer for HSA and MSA contributions; or (c) "the person that administers the plan benefits" for all other coverage. Unfortunately, the phrase "the person that administers the plan benefits" is not defined except to say that it shall include the plan sponsor if the plan sponsor administers the benefits[1], and so Notice 2015-52 proposes two alternatives for determining who has the liability to pay the excise tax under arrangements such as self-insured coverage.

The first alternative would put the tax burden on the person responsible for performing the day-to-day functions that constitute administration. The second alternative would put the tax burden on the person that has the ultimate authority or responsibility under the plan with respect to administration. Between the two alternatives, the second is better aligned with the purpose of the tax as well as with equitable tax policy.

If the purpose of the excise tax is to discourage plans that are too rich and that operate to increase the total cost of health care in the U.S., then logic dictates that the tax be levied on the party that controls the plan design. The party that controls the plan design has the power to affect whether the plan provides "any excess benefits" and is, therefore, the only party in position to affect the imposition of the tax.

For self-insured plans, the party that controls the plan design is the plan sponsor. Thus, in the context of self-insured arrangements, the plan sponsor (typically the employer) should be the responsible party. This approach is consistent with the application of the tax to the health insurance issuer in the case of fully-insured coverage since it is the issuer that determines the plan design. Likewise, it is consistent with the application of the tax to employers for their contributions to HSAs[2] or MSAs since the employers determine those contributions.

---

[1] See Code section 4980I(f)(6).

[2] We do not concede that contributions to HSAs are properly subject to the excise tax. As outlined in our letter of May 14, 2015 in response to Notice 2015-16, HSAs are not group health plans and therefore do not meet the definition of "applicable employer-sponsored coverage."

Alternatively, if the tax must be apportioned across multiple parties that provide day-to-day administrative services, the cost of providing coverage will go up. The coordination alone adds complexity. And while some administrative service providers may have the ability to negotiate a reimbursement of some or all the tax, the additional cost of those negotiations and the administrative costs of monitoring, measuring, billing, and collecting that reimbursement all add to the cost of providing coverage. This resultant inefficiency increases costs in the aggregate. Increasing the costs of providing coverage is inconsistent with the purported goals of the ACA.

Further, it may be difficult to identify all the parties "that administer the plan benefits" and even more difficult to allocate costs appropriately across them. Large plan sponsors may employ many different parties to provide a variety of functions. For example, each of the following may be performed by a different vendor: claims adjudication, stop-loss insurance, enrollment, COBRA services, communication (phone, print, and electronic) services, EAP services, PBM services, claim appeal services, etc.

Finally, the imposition of the tax on parties that do not control the plan design is in conflict with the principle of tax equity: it is unfair to levy an excise tax on a party for the actions (or inactions) of another party.

For these reasons, we urge the IRS and the Treasury to levy the tax on the party that has the ability to affect whether or not the tax will be payable: the party that controls the plan design. By applying this lens to the interpretation of the phrase "the person that administers the plan benefits," the phrase would be aligned with the definition of "plan administrator" under ERISA and the Code. A plan administrator may or may not retain the day-to-day administrative responsibilities, but the plan administrator always has the ultimate authority with respect to plan administration and plan benefits.

The Treasury and IRS should simplify the calculation of the tax.

The ACA objectives of improving health care affordability by reducing overall costs and keeping employers in the system are undermined if complicated calculations must be used to determine the excise tax. Safe harbors should be developed for plan sponsors to use, including, but not limited to, for the purposes of applying age and gender adjustments. Simplified calculations and safe harbors will promote compliance and result in fewer errors and penalties.

******

Thank you for the opportunity to comment. We would be pleased to discuss these comments and to provide any additional information that you may find helpful.

Sincerely,

/s/ Denise D. Hilger

Denise D. Hilger
SVP & Deputy General Counsel