

Notice 2015-52



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September 28, 2015

Sent via email to: Notice.comments@irsounsel.treas.gov

RE: Notice 2015-52

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

Dear Gentlemen and Ladies:

Thank you for the opportunity to comment on Notice 2015-52: Excise Tax on High Cost Employer-Sponsored Health Coverage. Since the passage of the Affordable Care Act, ("ACA"), your agency has had a difficult job producing many regulations in a short period of time. Those of us directly impacted by such regulations genuinely appreciate the consideration given to the "real world" impacts generated by these regulations.

The Health Care Administrators Association ("HCAA") is a national association of organizations that support the self-funded health plan platform – both ERISA and non-Federal governmental plans. Our membership is comprised of third party administrators and other industry partners who service the self-funded employer's or entity's health plans. These group health plans represent hundreds of employers with tens of thousands of plan participants.

You are requesting comments on IRC Section 4980I(c) (1) regarding the identity of the coverage provider. It appears there is some difficulty identifying who/what that entity should be, when considering a self-funded health plan. According to the definition of "Plan Administrator" on IRS.gov, the "Plan Administrator is the person who is identified in the plan document as having responsibility for running the plan. It could be the employer, a committee of employees, a company executive or someone hired for that purpose." Also Under ERISA 3(16) the plan administrators is: 1) The person named in the plan document; or 2) If no person is named then the plan sponsor is the plan administrator; and 3) In the case of a plan maintained by two or more employers it is the association, committee, joint board or trustees, or other similar group of representatives of the parties who establish or maintain the plan.

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These definitions would support the second approach that the Treasury and IRS are considering and not the first approach. The purpose of the “excise tax” is to impose a tax on “excess benefits” provided to an employee. Who is it that provides benefits to an employee? Under ERISA the 2 main decision makers on a plan are the Plan Sponsor and the Plan Administrator.

According to the Supreme Court in *Cigna v. Amara*, the differences between a plan sponsor and a plan administrator are:

“The plan’s sponsor (e.g. the employer), like a trust’s settlor,

- 1. creates the basic terms and conditions of the plan*
- 2. executes a written instrument containing those terms and conditions, and*
- 3. provides in that instrument ‘a procedure’ for making amendments.”*

“The plan’s administrator, a trustee-like fiduciary,

- 1. manages the plan,*
- 2. follows its terms in doing so, and*
- 3. provides participants with the summary documents that describe the plan (and modifications) in readily understandable form.”*

This would mean that the Plan Sponsor would create the Plan or Plans that provided the “excess benefits” and the Plan Administrator would then manage the plan. The management of the Plan often includes the Plan Administrator hiring an independent third party administrator to process claims within the scope of the Plan’s terms.

All of the above would seem to rule out the first approach which would view the third party administrator as the entity responsible for the tax on the “excess benefits”. The third party administrator processes claims according to the terms of the Plan that the Plan Sponsor has established and the Plan Administrator manages. To have the third party administrator responsible for the excise tax would be akin to requiring an accountant, or tax preparer, to pay the income tax for the client for whom s/he prepared a tax return.

One of the major reasons that an employer may choose to self-fund is so that it can tailor its benefit plan to meet the needs of its unique and specific population. We would request that in determining the excess benefits that the specific population’s characteristics be considered. As you are aware, “administrative” costs are a relatively small percentage of the total cost of the

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benefits. Even under a fully-insured arrangement they are limited by statute. Medical costs, or costs of treatment, comprise the overwhelming majority of the costs. A small to midsized employer that offers an "average" benefit plan could incur higher than average costs due to its aging population, or one that has some participants with significant health issues. It would seem unfair to tax that employer because its covered population is older, or has health conditions. We respectfully ask that when you are considering your Age and Gender adjustment tables that you consider removing high dollar claimants, for the reasons stated above.

We thank you for the opportunity to provide comments. We hope that you will give them serious consideration.

Very truly yours,

Carol Berry, CSFS
Chief Executive Officer
Health Care Administrators Association