

October 1, 2015

Submitted Via Email: Notice.comments@irsounsel.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 Ms. Levin:

The HR Policy Association (“HR Policy” or the “Association”) welcomes the opportunity to provide comments to the Internal Revenue Service (IRS) regarding its Notice 2015-52 (“the Notice”), Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage, issued on July 30, 2015. Section 4980I, which was added to the IRS Code by the Affordable Care Act (ACA), applies to taxable years beginning after December 31, 2017. Under the provision, if the aggregate value of employer-sponsored coverage provided to an employee exceeds a statutory dollar limit, the excess is subject to a 40 percent excise tax. Notice 2015-52 describes some potential regulatory approaches the IRS could take to implement the excise tax and invited comments on those approaches.

The HR Policy Association is the lead organization representing chief human resource officers of over 370 of the largest corporations doing business in the United States. The member companies, all of whom are large employers, provide health care coverage to over 21 million employees and dependents, and collectively spend more than \$80 billion annually on health care in the U.S. Many HR Policy member companies will be directly impacted by the excise tax.

The Association’s member companies have a long standing commitment to improve the quality and affordability of health care, and they offer employees a host of innovative health benefits that are lowering health care costs. HR Policy appreciates the IRS effort in providing the potential approaches it may take to implement and administer the excise tax. However, we are concerned about the significant cost and administrative burdens the tax will impose on self-insured employers and the impact it will have on employees.

The Association strongly urges the IRS to enable employers to have the maximum flexibility possible in determining the cost of applicable coverage and employer aggregation. The Association’s detailed comments and reasoning are more fully described below.

Persons Liable for the § 4980I Excise Tax

The Notice says the IRS is considering two alternative approaches to determine which entities may be the “person that administers the plan benefits.” HR Policy strongly recommends that the approach the IRS takes should be the entity “that has the ultimate authority or responsibility under the plan or arrangement” (*i.e.*, the employer in the case of self-insured plans). The Association believes employers who sponsor the health plans subject to the tax should have the flexibility to remit the tax payments directly to the IRS or to use their third party administrators to remit the tax, if they so choose. This approach will be less costly as it would eliminate the “gross-up” complexities discussed in Sections V.C and V.D of the Notice.

Employer Aggregation

In situations where a company has subsidiaries or divisions that are on completely different payroll, benefit, and accounting systems, it may not be feasible to collect all of the information necessary to remit the excise tax. The excise tax calculations, reporting, and payment determinations should be made by the entity that is best positioned to accurately complete these tasks at the lowest possible administrative costs. HR Policy strongly recommends allowing employers to have the flexibility to determine whether or not the excise tax calculations will be performed for an entire control group, or for each individual member of the group. Moreover, if an employer elects to calculate the cost of coverage separately for each member of a controlled group, then the age/gender adjustment should also be calculated separately.

Determination Period for Cost of Applicable Coverage

As stated in the Notice, the IRS anticipates that employers will be required to determine the cost of applicable coverage provided during a taxable year “sufficiently soon” after the end of that taxable year in order for employers to pay any applicable tax in a “reasonably timely manner.” The IRS further notes that health plans are likely to have different timing issues depending on if they have health savings accounts (HSA), medical savings accounts (MSA), flexible spending arrangements (FSA), and/or health reimbursement arrangements (HRAs). If the cost of applicable coverage is determined based on a calendar year period, the cost may be determinable only after a subsequent run-out period during which employees may submit claims for reimbursement. In that case, an employer will need additional time to compute the cost of applicable coverage before it can calculate any tax that may be owed. According, HR Policy strongly urges the IRS to provide ample time in order for large self-insured employers to compute the cost of applicable coverage and any tax that may be owed, which should be no sooner than nine months after the end of the employers taxable period.

Determining Applicable Coverage

As noted in the Association’s comments on Notice 2015-16, employers should have the maximum flexibility possible in determining applicable coverage in order to minimize the

unintended consequences of the excise tax. Any costs associated with improving health, as opposed to direct medical costs, should be excluded from the calculation of applicable coverage for purposes of the excise tax. For example, wellness programs and on-site clinics are designed to improve health and reduce health care spending and should be completely excluded from the tax. Similarly, employee assistance programs should be excluded from the excise tax.

Mandated preventive care services covered under Section 2713 of the Affordable Care Act (ACA) should also be excluded from the tax. It makes absolutely no sense for the federal government to require employers to provide access to an ever expanding list of preventive care items and services at no in-network cost to participants, and then tax the cost of those benefits as being “excessive.” Health care benefits cannot be both required and excessive at the same time.

Any costs arising from efforts to innovate with the health care delivery system to improve value should be excluded from the excise tax. Programs such as direct contracting with providers, utilizing accountable care organizations, patient-centered medical homes, Centers of Excellence, and bundled and capitation payment initiatives are designed to reduce excessive health care spending and improve health outcomes, and should not be discouraged by taxing them at 40 percent. The Association strongly urges the IRS to exclude the costs of programs aimed at innovation in health care delivery from the calculation of applicable coverage.

Similarly, high-deductible health plans coupled with health savings accounts are an increasingly important health care strategy for incentivizing employees to become more informed and better consumers of health care, and to reduce the tests and treatments that scientific and professional organizations have consistently determined to have no health benefit or to be outright harmful. Employee contributions to health savings accounts, flexible spending accounts, and health reimbursement accounts should be excluded from the excise tax. Inclusion of these accounts into the calculation of applicable coverage will have the unintended consequence of incentivizing employers to discontinue these types of accounts and only penalize employees and their families in the end.

Further, any benefit that is treated as an “excepted benefit,” including self-insured vision and dental coverage and employee assistance programs, should be excluded from the excise tax. The Association urges the IRS to exclude all benefits that are considered excepted benefits, regardless of the type, from calculations for purposes of the excise tax.

Allocation of Contributions to HSAs, MSAs, FSAs, and HRAs

As stated above, employee contributions to HRAs, MSAs, FSAs, and HRAs should not be included in the applicable cost of coverage. To do so will substantially discourage employers from allowing employees to make such contributions as they are made at the discretion of the employee and may push the cost of applicable coverage above the excise tax threshold.

However, should the IRS determine otherwise, HR Policy supports the proposed approach would allow employers to allocate contributions on a pro-rata basis over the plan year.

Age and Gender Adjustment to the Dollar Limit

As a technical note, Table A-8a, Employed Persons and Employment-Population Ratios by Age and Sex, that is published by the Bureau of Labor Statistics is not an annual table. The IRS may be referring to the annually published Table 3, Employed Persons and Employment-Population Ratios by Age and Sex, which is available here: <http://www.bls.gov/cps/cpsaat03.pdf>.

More specifically, the Notice states that the IRS will formulate and publish adjustment tables to facilitate and simplify the calculation of the age and gender adjustment that employers can make to the excise tax dollar limits. The Notice indicates that when developing these adjustment tables the IRS will use the claims experience in the Federal Employee Health Benefit Plan (FEHBP) standard option plan. However, because the standard option has a more generous plan design and higher employee contributions it is likely to have an age profile and cost differences that is not reflective of the claims experience of all self-insured plans. Therefore, the IRS should either use all of the FEHBP self-insured plans, or conduct a national survey of self-insured plans to develop more appropriate data to formulate the adjustment tables.

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HR Policy appreciates the deliberate and collaborative process the IRS has signaled for the implementation of regulations surrounding § 4980I, and we look forward to working with you in the future. If the Association can be of further assistance, please contact Mark Wilson at 202-315-5575 or mwilson@hrpolicy.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. M. Wilson", written over a horizontal line.

Mark Wilson
Vice President, Health & Employment Policy
HR Policy Association