



JAMESTOWN S'KLALLAM TRIBE

1011 Old Blvn Highway, Sequim, WA 98282

509/63-1109

FAX 509/631-4641

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Internal Revenue Service
CC:PA:LPD:PR (Notice 2015-52)
1111 Constitution Avenue, N.W.
Washington, DC 20044
Notice.comments@irs.counsel.treas.gov

Re: Jamestown S'Klallam Tribe Comments on IRS Notice 2015-52

Ladies and Gentlemen:

The Jamestown S'Klallam Tribe (the "Tribe") appreciates the opportunity to provide comments on Notice 2015-52, in which the Treasury Department and the IRS solicited comments on issues related to the excise tax on high-cost employer-sponsored health coverage in Internal Revenue Code ("Code") Section 4980I. The Jamestown S'Klallam Tribe is located in the small rural town of Sequim, Washington. The Tribal population is approximately 580 tribal citizens with many living out of the service area. The Tribe is the second largest employer on the Olympic Peninsula with employment of around 650 people, many of who are non-tribal community citizens. The Tribal government and its enterprises have a self-funded medical insurance plan covering benefited employees working 30 hours or more per week.

The Treasury Department and IRS invited comments on several issues, including identification of the taxpayers who may be liable for the excise tax. The Tribe's comments address this issue in the context of Indian tribal governments. In summary, the Tribe believes Indian tribal governments that maintain self-insured health plans for their employees and for their members are exempt from the excise tax. This conclusion is based on the statutory language, which omits any reference to tribal government plans from both the general rule applicable to employers and the specific rule including certain governmental employer plans. The Tribe is also concerned that portions of certain tribal health plans that are not even employment-based may be viewed as falling under the broad reach of Code Section 4980I if the IRS does not explicitly recognize the tribal government exemption in regulations. Each of these issues is addressed in more detail below.

1. The Statute's Inapplicability to Tribal Health Plans

The excise tax in Code Section 4980I applies to excess benefits provided under "applicable employer-sponsored coverage." The definition of "applicable employer-sponsored coverage" in Code Section 4980I(d)(1) does not specifically mention Indian tribal employers, and it includes a provision specific to certain government employers intended to be included in the definition. That provision 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.” Although it specifically includes federal and state governments, Code Section 4980I(d)(1) does not even mention plans administered by Indian tribes or tribal organizations for their employees.

This omission is in sharp contrast to other provisions in the Affordable Care Act, such as Code Section 6055, which imposes reporting requirements on persons who provide minimum essential coverage. The term “minimum essential coverage” is broadly defined, and includes governmental plans. By reference, the term “governmental plans” includes plans established and maintained by an Indian tribal government.

The Tribe believes that the statutory omission of Indian tribal government plans from the excise tax should be construed as excluding such plans from the federal excise tax. Under the rules of statutory construction, Congress is presumed to act deliberately when it includes language in one provision but omits it in another. Further, federal courts have required clear Congressional intent to apply statutes of general applicability to tribal governments, particularly in areas that involve tribal self-governance. The provision of health care is a quintessential self-governance function for Indian tribes in today’s world.

In sum, by not including tribal governments in Code Section 4980I(d)(1), Congress should be assumed to have intended that they not be subject to the excise tax. Although the Tribe believes tribal governments and tribal organizations are excluded from the excise tax, the Tribe would appreciate Treasury and the IRS addressing the exclusion in regulations. By including clear guidance in the regulations, Treasury and the IRS can reduce confusion and errors of interpretation.

2. Tribal Group Health Plans for Tribal Citizens

Section 4890I(d)(1)(A) defines “applicable employer coverage” as 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, or would be so excludable if it were employer-provided coverage (within the meaning of Section 106)*” (emphasis added). The Tribe is concerned that this broad language could be construed to include group health plan coverage offered to all members of a tribe in their capacity as tribal members to the extent that the plan covers members who happen to be employees of the tribal government. Whether or not tribal health plans are generally excluded from the excise tax, the Tribe would appreciate clarification that Code Section 4890I(d)(1)(A) will not be construed to extend the excise tax to the group health plan coverage provided to tribal members (whether or not such members are tribal employees).

Many Indian tribal governments offer health coverage to all of their government employees, all of their casino employees, and to all of their members in their capacity as tribal citizens (whether or not employed by the government). Without regulatory guidance, tribal government coverage of tribal members who happen to be employed

by the tribe may be subjected to the excise tax—even if such employees are segregated into a separate group plan. This result was not intended by Congress. IRS and Treasury need to clarify that the broad statutory definition of applicable employer coverage in Section 4980I(d)(1)(A)—particularly the phrase “would be so excludable if it were employer-provided coverage”—does not pertain to group health plans (whether insured or self-insured) offered by a government to its citizens in their capacity as citizens.

Should Treasury and the IRS determine tribal employer plans are not exempt from the excise tax then we would like to make the following comments with regard to the calculation and imposition of the tax.

3. Comments on Persons Liable for the 4980I Excise Tax

Under Section 4980I, the tax is imposed on “each coverage provider” with respect to excess benefits provided to an employee. In the case of most self-insured plans, the coverage provider will be the “person that administers the plan benefits.” However, it is not clear whether the “person who administers the benefits is the person who processes and receives claims on a day-to-day basis, such as a Third Party Administrator (TPA) or the persons that has “the ultimate authority or responsibility under the plan with respect to plan benefits, such as an internal Plan Administrator. We feel that the second approach to determining who is liable for the Excise Tax is the most logical. If a TPA is responsible for the Excise tax, we are concerned that it will ultimately cost the governmental employers, such as tribes more as the TPA will bill the plan sponsor for the tax, but has to report the reimbursement as income. The additional tax incurred by the TPA will be passed on to the plan sponsor as an administrative expense, , thus raising the cost of coverage as a result of the excise tax even more. The spiraling of tax costs becomes a vicious cycle which will further impair all employers' ability to provide adequate health coverage for their employees. In the case of tribes who provide health coverage for their own citizens, it also violates the federal government's trust responsibility toward Indian tribes. Tribal governments should not be forced to subsidize federal income taxes paid by private TPAs providing administrative services to a government health plan. For these reasons, we feel that the employer (i.e., the person that has the ultimate authority or responsibility under the plan for plan benefits) should be the responsible party for any excise tax due.

4. Comments on Cost of Applicable Coverage

Though Notice 2015-16 and Notice 2015-52 describe that cost of applicable coverage is determined under rules similar to the rules under COBRA for determining the COBRA applicable premium, it does not address in enough detail how self-insured plans will calculate or administer this. The current notices give two methods--actuarial cost and past cost--as ways to determine the COBRA rate. However, there does not seem to be guidance or examples to account for the fact that self-insured plans may have some years in which significant or even catastrophic health claims are incurred by covered individuals and other years when such claims are below average or minimal. If there is

no consideration for this, then the lack of ability to plan and budget the excise tax will make it extremely difficult for tribes. Many tribes, especially small tribes have very little discretionary income and just paying the cost of health care for their employees and citizens places a significant burden on governmental resources. If now, in a year with unplanned large claims, tribes also have to fund an excise tax, resources that have been dedicated to support and provide services to their citizens could be in jeopardy.

5. General Comments on Administrability and Compliance Burdens

Treasury and IRS reference many times in Notice 2015-52 their need for comments on how to administer the excise tax. It is important to remember, many tribes do not have the staff or other resources to implement a complex and laborious system. Tribes are already staffing up either internally or finding external sources for upcoming ACA reporting requirements. This is taking away precious financial resources that otherwise could be dedicated to tribal services. We ask that whatever regulatory guidance is issued work toward simplifying this complex topic, not making it more difficult. Examples would include determining methods for reporting and paying excise taxes (Form 720), timing of such reporting and payment, employer aggregation rules, age and gender adjustments just to name a few.

Conclusion

The Tribe appreciates the opportunity to provide comments on the identification of taxpayers subject to the excise tax on high cost employer-sponsored health coverage in Code Section 4980I and additional items of concern. If you have any questions or need any further information about the Tribe's concerns, please do not hesitate to contact me at rallen@jamestowntribe.org or 360-681-4621 or the Tribe's CFO Diane Gange at dgange@jamestowntribe.org or 360-681-4608.

Sincerely,



W. Ron Allen, Chair/CEO