



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

Notice 2015-52 – Request for Comments on Section 4980I Excise Tax on High Cost Employer-Sponsored Health Coverage

Ladies and Gentlemen:

On Behalf of the Johnson & Johnson Operating Companies, we are pleased to provide the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) with comments in response to Notice 2015-52 (the Notice) regarding the excise tax on employer-sponsored health coverage under Section 4980I of the Internal Revenue Code (the Section 4980I excise tax). Notice 2015-52 supplements Notice 2015-16 that described and requested comments to various substantive provisions of the Section 4980I excise tax. Johnson & Johnson (J&J) submitted comments in a letter dated May 15, 2015 in response to Notice 2015-16 (the May 15th letter).

J&J is the world's most comprehensive and broadly-based manufacturer of health care products for the consumer, pharmaceutical and medical device markets. For more than 125 years, J&J Companies have supplied the health system with a broad range of products and has led the way in innovation, beginning with the first antiseptic bandages and sutures.

J&J is a member of the Pharmaceutical Research and Manufacturers' Association, the ERISA Industry Committee, the Business Roundtable, The United States Chamber of Commerce, the American Benefits Council, and the HR Policy Association.

I. Background

J&J culture and practice places the highest priority on providing its employees with comprehensive health care benefits. This focus extends to the quality of the medical care offered to its employees, as well as the general wellness benefit programs. In the May 15th letter, we provided detailed background about the J&J workforce and its employee health benefit offerings.

J&J is concerned that the Section 4980I excise tax will negatively impact J&J employees' health care benefits. Our comments are intended to provide Treasury and IRS with a discussion of ways to smooth the implementation of Section 4980I and to provide employers with maximum flexibility to comply with the provisions.

J&J submitted a number of comments regarding certain substantive provisions of Section 4980I in our May 15th response to Notice 2015-16 (The May 15th letter is attached.) Some of the key points presented in the May 15th letter include:

- *Calculation of the cost of applicable coverage.* Future guidance should provide that, when multiple benefit packages are offered to a defined group of employees, employers may calculate the cost of applicable coverage in accordance with common actuarial practice by: (i) first aggregating all medical claims for all self-insured benefit packages for all employees in all locations; and (ii) next, assigning a cost to each benefit package based on the relative actuarial value of each benefit package and after applying other factors.
- *Cost of pre- and post-Medicare eligible retiree coverage.* In accordance with Section 4980I(d)(2), future guidance should provide that the cost of the coverage provided to pre-65 and post-65 retirees may be determined by aggregating these groups. J&J urges Treasury and IRS to clarify in future guidance that if the cost of pre-65 and post-65 retiree coverage is determined by aggregating the groups, then the dollar limit thresholds applicable to the cost of the retiree coverage should also be determined by aggregating the dollar limit thresholds applicable to pre-age 65 retirees and post-Medicare retirees.
- *Cost of health reimbursement arrangements (HRAs).* Future guidance should provide that there is no need to calculate separately the cost of an HRA that is integrated with another self-insured employer-sponsored health plan when the cost of claims paid under the HRA is already included in the employer's aggregate health care costs.
- *Cost of certain on-site medical clinics.* Future guidance should provide that the cost of an on-site clinic that provides substantial medical and health care services is not required to be calculated separately if the cost of the clinic is included in the employer's aggregate health care costs in the same manner as other health care costs.
- *Health savings accounts (HSAs).* J&J urged Treasury and IRS to use their regulatory authority under the statute to exclude employee pre-tax salary reduction contributions to HSAs from the definition of applicable employer sponsored coverage.
- *Permanent Safe harbor and Transition Relief.* J&J urged Treasury and IRS to establish a permanent safe harbor for plans that meet the Section 4980H minimum value standard.

J&J urged Treasury and IRS to establish transition relief for any applicable employer-sponsored coverage with the terms of coverage that are substantially similar to the terms of a gold-level plan offered on the SHOP Exchange marketplace in the geographic area where the majority of the employers employees are located.

I. Summary of Comments

J&J is concerned about the burden imposed on the company of administering the Section 4980I excise tax. J&J encourages Treasury and IRS to exercise the full extent of their regulatory and administrative authority to implement the Section 4980I excise tax in a manner that minimizes administrative burden.

- A. *Persons liable for the Section 4980I excise tax.* J&J supports Treasury's and IRS's proposal to determine whether the employer that sponsors a self-insured health benefit plan or its third party administrator is considered the party who is liable for the Section 4980I excise tax. J&J believes that it would simplify its administration of the Section 4980I excise tax dramatically if J&J were considered the party liable for the tax.
- B. *Timing for calculating the cost of applicable employer-sponsored coverage (applicable coverage).* J&J recommends that Treasury and IRS provide in future guidance that the all information necessary for employers to assess whether the cost of their health care benefit options exceeds the thresholds for the subsequent taxable period – including the threshold amounts and age and gender adjustment table – must be published well in advance of the taxable period to provide employers with sufficient time to modify their health benefit plans to avoid the excise tax or to budget for the liability. We believe that this information must be published at least nine months before the start of the taxable period to provide employers with sufficient time to assess the cost of their health care plan options and to make adjustments. J&J further recommends that regulatory guidance provide that employers may calculate the cost of applicable coverage in advance of the taxable period. J&J opposes any requirement that employers must determine the cost of applicable coverage retrospectively.
- C. *Exclusion from the cost of applicable coverage of amounts attributable to the Section 4980I excise tax.* J&J supports the proposal to exclude from the cost of applicable coverage the reimbursement of the Section 4980I excise tax imposed on the insurer or third party administrator and any income tax attributable to the reimbursement.
- D. *Employer Aggregation.* J&J urges Treasury and IRS to provide in future guidance that, for purposes of calculating the cost of applicable coverage, employers may permissively aggregate the medical claims of all employees enrolled in a common health benefits program offered by a group of employers treated as a single employer under the Section 414 controlled group rules. J&J supports permitting employers to pool their claims experience for benefits offered to a common group of employees, even if employees are employed by different entities within the controlled group.
- E. *Determination of age and gender adjustment.* J&J appreciates Treasury's and IRS's thoughtful consideration of an approach to determining the age and gender adjustment. J&J has a number of comments about how to ensure that that the age and gender adjustment calculation is determined to produce reasonable results, can be completed with sufficient time in advance of the plan year and operates to minimize the administrative burden on employers.

- F. *Coordination between Section 4980H and Section 4980I Excise Taxes.* J&J urges Treasury and IRS to exercise the full extent of their regulatory and administrative authority to establish a safe harbor that is consistent with the standards for the type of coverage that is minimally acceptable for an employer to avoid the Section 4980H excise tax.

III. Comments and Recommendations

The Notice requests comments on the administrative and procedural provisions of Section 4980I. Comments are requested on the following items, among others: (i) the determination of persons liable for the Section 4980I excise tax; (ii) the timing for calculating the cost of applicable coverage; (iii) the exclusion from cost of applicable coverage of amounts attributable to the Section 4980I excise tax; (iv) the determination of the age and gender adjustment; and (v) the coordination between the Section 4980H and Section 4980I excise taxes.

A. Persons liable for the Section 4980I excise tax

J&J supports the option that Treasury and IRS propose that would identify the party that has ultimate responsibility with respect to the administration of plan benefits as the “coverage provider” that is liable for the Section 4980I excise tax. J&J further urges Treasury and IRS to provide in future guidance that this same rule for determining the party liable for the Section 4980I excise tax would also apply if the employer’s health benefit offerings are predominantly self-insured and the employer also sponsors limited insured health benefit options that provide coverage to a relatively small number of employees.

Section 4980I(c)(1) imposes the excise tax on the “*coverage provider*.” In the case of insured group health benefits, the coverage provider is the insurer. In the case of self-insured health benefits, the coverage provider is “*the person that administers the plan benefits*.”

The term – “person that administers the plan benefits” – is not used elsewhere in the Internal Revenue Code, the Affordable Care Act, ERISA, or the Public Health Service Act. However, Section 4980I(f)(6), which provides that the “the term ‘person that administers the plan benefits’ shall include the plan sponsor if the plan sponsor administers benefits under the plan.”

The Notice proposes two approaches to determine the person that administers a self-insured health plan and, therefore, the coverage provider that would be liable for the Section 4980I excise tax.

- Under one approach, the person that administers the plan benefits would be the party that is responsible for performing the day-to-day plan administration functions, such as receiving and processing claims for benefits, responding to inquiries, or providing benefits information technology. Under this approach, Treasury and IRS anticipate that this person generally would be a third-party administrator.
- Under a second approach, the person that administers the plan benefits would be the party that has the ultimate authority or responsibility under the health plan with respect to the administration

of plan benefits (including final decisions on administrative matters). Under this approach, Treasury and IRS anticipate that this person would be identified in the plan document and likely would be the employer.

J&J urges Treasury and IRS to adopt the second approach in regulatory guidance. This approach would provide J&J and other employers that sponsor self-insured plans with the flexibility to determine the person that administers the plan benefits as the person with the ultimate authority and responsibility for the administration of the plan benefits. This person likely would be the party identified in the plan document. J&J believes that the second approach proposed in the Notice is consistent with definition provided in Section 4980I(f)(6). Because J&J is the only party that has access to the information needed to calculate the cost of applicable coverage for its employees and determine whether the cost exceeds the threshold, as adjusted, its administration of the Section 4980I excise tax would be simplified dramatically if it were considered the party liable for the excise tax (i.e., the coverage provider).

The Notice requests comments on whether the person that administers the plan benefits would be easy to identify under the second approach. J&J can confirm that the second approach would be straightforward and easy for employers and the IRS to administer. For J&J, the board of directors has delegated authority to administer its self-insured health plans to the J&J Pension & Benefits Committee, which is identified in the health plan document and summary plan description as the plan administrator. In operation, the J&J Pension & Benefits Committee has the ultimate responsibility for benefit plan design, the determination of which employees are eligible to enroll in the plan, and the determination of the amount of employee contributions. The J&J Pension & Benefits Committee also selects the vendors that serve as third party administrators to process claims, but the J&J Pension & Benefits Committee retains the ultimate decision making authority with respect to participant claims and the resolution of any participant's appeal of a denied claim.

B. Timing for calculating the cost of applicable coverage

J&J recommends that future regulatory guidance provide that all information necessary published by Treasury and IRS for employers to assess whether the cost of their health plan options exceeds the thresholds – including the indexed threshold amounts and the age and gender adjustment table – must be provided no less than nine months in advance of the taxable period. J&J further recommends that regulatory guidance provide that employers may calculate the cost of applicable coverage in advance of the taxable period, in accordance with current industry standard practice and as required under COBRA.

Section 4980I provides that the cost of applicable employer-sponsored coverage will be determined under rules similar to the federal COBRA rules. Section 4980B(f)(4) provides that the COBRA applicable premium is based on the average cost of providing coverage for individuals who are similarly situated. The Notice indicates that in certain circumstances that cost of coverage may be determined retrospectively and that the timing for calculating the cost of coverage for insured plans, self-insured plans and account-based plans may differ. J&J opposes any requirement to determine the cost of applicable coverage retrospectively. J&J further opposes any rule that could cause the coverage provider to become liable for an unexpected Section 4980I excise tax determined after completion of the normal prospective cost development process.

J&J recommends that regulations include rules that would permit employers to calculate the cost of all applicable coverage well in advance of the taxable period. Calculating the cost of coverage in advance of the plan year is consistent with current J&J practice. The J&J annual health coverage benefit planning and budgeting process adheres closely to a schedule that is roughly as follows:

- Approximately 14 months prior to the beginning of the plan year, which is the calendar year, J&J holds its initial planning meeting with its internal and external constituencies (including health benefit consultants and actuaries). For example, for the 2017 plan year, the initial meeting is scheduled for November 2015.
- By the first quarter of the calendar year (9 months in advance of the beginning of the plan year), J&J, working with its external advisors, has established for the subsequent plan year the preliminary vendor arrangements, plan design, employee contributions, and the total health plan expense for budgeting purposes.
- By July (6 months in advance of the beginning of the plan year), J&J has finalized the subsequent plan year's vendor arrangements, health plan design, active employee contributions, COBRA rates, and the total health plan expense for budgeting purposes.
- By September, employee communications materials, including the cost of each plan option, are finalized.
- In October, open enrollment begins for active employees to select a health plan option beginning the subsequent January for the calendar year plan year.

As explained in the May 15th letter, J&J uses the actuarial basis method, rather than the past cost method, to develop a reasonable estimate of future cost of its self-insured health plan options for the subsequent plan year. This cost estimate is used to set the COBRA premium for the plan year. J&J offers only two insured health plan options and the premium cost for each option is known prior to the beginning of the plan year.

We believe that employers likely will design their benefit offerings to avoid the excise tax liability. In order to determine if a health plan option may be subject to a potential Section 4980I excise tax, requiring redesign or budgeting to account for the tax, J&J, like other employers, will need to assess whether the cost of their health care options exceeds the thresholds. This assessment must be made by the first quarter of the year prior to the beginning of the next plan year to ensure that the employer has sufficient time to assess and implement any changes to its health plans and to communicate the health benefit options to vendors and to employees.

J&J agrees with the objective expressed in the Notice to identify an administrable approach to calculate the cost of the coverage provided through an account-based plan such as a health reimbursement arrangement (HRA) or health flexible savings arrangement (health FSA). J&J urges Treasury and IRS to further simplify the approach to calculate the cost of these account-based plans in the manners described below.

- With respect to an HRA that is integrated with a self-insured employer-sponsored health plan, no separate cost calculation should be required when, as under the current J&J practice, the cost of HRA claims is already taken into account in determining the cost of the integrated health plan.

In the J&J situation, an active employee who enrolls in the J&J HRA Plan is eligible for credits made to an HRA notional account. The HRA is integrated with the benefit package and the credits are automatically applied to certain of the employee's out-of-pocket costs such as deductibles and co-payments. J&J, like most employers that provide a plan with an integrated HRA, includes the cost of HRA claims in its aggregate medical program cost by treating the claims paid from the HRA like any other claims. Under this approach the cost of the HRA is already embedded in the aggregate program cost and allocated to the particular benefit package. To be required to calculate the cost of the HRA separately would add needless administrative burden.

- With respect to a stand-alone HRA for retiree-only coverage, J&J recommends that employers have the option to determine the cost based on actual claims, rather than the notional credits. J&J offers stand-alone, retiree-only HRAs that are credited with a lump sum value at the employee's retirement. Amounts may be withdrawn starting at age 65 to reimburse qualified medical expenses. It would not be appropriate to calculate the cost of this type of HRA based on the lump sum amount available at retirement because in most cases the retiree will spread use of the HRA over a period of time longer than one year. Instead, J&J recommends that cost for this type of HRA be based on a reasonable actuarial projection of future annual claim payments under the terms of the arrangement.
- With respect to health flexible spending arrangements (health FSAs), J&J agrees with the approach proposed in the Notice to avoid double counting amounts associated with employee salary deferrals.

With respect to health savings accounts (HSAs), J&J reiterates the comments made in the May 15th letter that contributions to HSAs should not be included in the definition of applicable employer sponsored coverage if the HSA is not considered group health plan. Section 4980I(d)(1)(A) provides that only "group health plan" coverage is included in the definition of applicable coverage. Under current law, contributions to an HSA are not considered part of a group health plan subject to COBRA¹ and are not considered a group health plan subject to ERISA except in certain limited circumstances that would not apply to J&J or many other large employer plans.² Although Section 4980I(d)(2)(C) seems to include in applicable employer-

¹ Treas. Reg. § 54.4980B-2 Q&A-1(f) provides: "Under section 106(b)(5), amounts contributed by an employer to a medical savings account (as defined in section 220(d)) are not considered part of a group health plan subject to COBRA. See, Section 106(d)(2) ("Rules similar to rules of paragraphs (2), (3), (4), and (5) of subsection (b) shall apply for purposes of this subsection") and Section 106(b)(5) providing that a medical savings account is not treated as employer-provided coverage for purposes of section 4980B.

² DOL Field Assistance Bulletin 2004-1 (April 7, 2004) provides: "Accordingly, we would not find that employer contributions to HSAs give rise to an ERISA-covered plan where the establishment of the HSAs is completely voluntary

sponsored coverage employer contributions to an HSA that are excluded under Section 106(b) and (d), which would include employee pre-tax contributions, J&J believes that this provision could be interpreted to apply only to contributions to those HSAs that are considered group health plans subject to ERISA.

C. Exclusion from the cost of applicable coverage

J&J supports the proposal to exclude from the cost of the applicable coverage the reimbursement of the Section 4980I excise tax imposed on the insurer (or the third party administrator, if the employer is not determined to be the coverage provider for the self-insured coverage) and any income tax attributable to the reimbursement incurred by a taxable entity.

In determining the cost of applicable coverage subject to the excise tax, Section 4980I(d)(2)(A) provides that “any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account.” The Notice states that this provision indicates that the excise tax reimbursement should be excluded from the cost of applicable coverage. J&J urges Treasury and IRS to provide in future guidance that the income tax reimbursement also would be excluded from the cost of applicable coverage, provided that the amount is billed separately.

J&J has two insured health plan options. If J&J is not considered to be the coverage provider with respect to the insured plans, it likely will be required to reimburse the insurer if the cost of the insured options, together with other applicable coverage, exceeds the threshold for any taxable period. J&J observes that because insured group health plans create additional cost and administrative burden, many employers may choose to terminate their insured plans in favor of being fully self-insured in order to avoid or minimize any excise tax obligation.

D. Employer aggregation

J&J urges Treasury and IRS to provide in future guidance that, for purposes of calculating the cost of applicable coverage, employers may permissively aggregate the medical claims of all employees enrolled in a common health benefits program offered by a group of employers treated as a single employer under the Section 414 controlled group rules. J&J supports permitting employers to pool their claims experience for benefits offered to a common group of employees, even if employees are employed by different entities within the controlled group. J&J opposes any approach that requires defining cost of applicable coverage separately by each entity within the controlled group.

Section 4980I(f)(9) provides generally that, for purposes of § 4980I, all employers treated as a single employer under subsections (b), (c), (m), or (o) of § 414 are treated as a single employer.

on the part of the employees and the employer does not: (i) limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the Code; (ii) impose conditions on utilization of HSA funds beyond those permitted under the Code; (iii) make or influence the investment decisions with respect to funds contributed to an HSA; (iv) represent that the HSAs are an employee welfare benefit plan established or maintained by the employer; or (v) receive any payment or compensation in connection with an HSA.” Also see Field Assistance Bulletin No. 2006-02 (October 27, 2006).

This provision of Section 4980I appears to contemplate that the health benefit claims the employees of any employer that is treated as a single employer under the Section 414 controlled group rules may be aggregated for purposes of calculating the cost of the coverage. In the May 15th letter, J&J urged Treasury and IRS to permit employers to use the common practice for calculating COBRA rates when multiple benefit packages or options. Under the common practice, the cost of a benefit package is determined generally by:

- First, aggregating the medical claims and related costs (such as administration fees and stop loss insurance) of all self-insured benefit packages for all eligible employees within a defined group (e.g., salaried active employees) in all locations, without regard to the separate employing entities;
- Next, assigning a cost to each benefit package based on the relative actuarial value of each benefit package and after taking into consideration other factors, but generally without regard to the risk selection of each separate option within the benefit package.

It would be unusual for employers within a larger controlled group of employer to separately determine the cost of health benefits offered to their employees, unless the employee were part of a defined group or there was another reason to do so.

J&J acknowledges that the Section 4980I controlled group rule may indicate that each employer within the controlled group may be jointly and severally liable for Section 4980I excise tax.

E. Age and gender adjustment

J&J appreciates Treasury's and IRS's thoughtful consideration of an approach to determining the age and gender adjustment. J&J supports the Treasury and IRS establishing adjustment tables that would be made available for employers to determine the threshold adjustment based on the age and gender distribution of the employer's workforce.

J&J has the following comments with respect to the age and gender adjustment.

- J&J urges Treasury and IRS to provide in regulatory guidance that the indexed threshold amounts and the age and gender adjustment tables must be published in the first quarter of the calendar year prior to the next calendar year taxable period.

As previously discussed, employers are likely to design their health care benefits to manage the cost of the plan to avoid the Section 4980I excise tax. In order to determine the potential for a Section 4980I excise tax and, therefore, whether a health care benefit plan needs to be redesigned, employers will need to assess whether the cost of their health care benefits exceeds the thresholds, as adjusted. Employers will need to make this assessment well in advance of the beginning of the plan year; to make the assessment employers will need the indexed threshold amounts and the age and gender adjustment tables.

- J&J urges Treasury and IRS to permit employers to choose any snapshot date in the year prior to the applicable taxable period, provided the same date is used each year, to determine the age and gender characteristics of its employee population.

The Notice proposes to require employers to determine the age and gender of each employee as of the first day of the plan year. This proposed snapshot date does not work because, as discussed above, employers will need to determine the age and gender composition of its employee population well in advance of the first day of the plan year to assess whether the cost of its health care benefits exceeds the thresholds, as adjusted.

- J&J urges Treasury and IRS to use a national workforce table that includes individuals who are employed and seeking employment. The Notice proposes to use a Bureau of Labor Statistics (BLS) table that is limited to employed individuals. We believe that use a BLS table that includes the national workforce, broadly defined as those who are employed and those who are seeking employment, is consistent with the Section 4980I(b)(3)(C)(iii) statutory provisions.
- J&J agrees with the Notice's proposal that the age and gender adjustments and calculations should be determined separately for self-only (SO) coverage and for other-than-self-only (OTSO) coverage.

J&J further urges Treasury and IRS to provide in regulatory guidance that the employer's employee population characteristics should be determined based only on the employees actually enrolled in the employer-sponsored health care coverage. Basing the age and gender adjustment only on the employees enrolled in health care coverage is appropriate because the cost of applicable coverage is driven exclusively by the employees who are enrolled in coverage. Furthermore, to perform the age and gender calculations separately for SO and OTSO coverage, the employer must determine the numbers of employees who actually enrolled in each type of coverage.

- J&J urges Treasury and IRS to consider using a representative national claims database to develop the age and gender adjustment tables instead of using claim costs under the FEHBP BCBS standard option. National claims data are a better basis for comparison for purposes of the age and gender adjustment because, by definition, such data better reflects a broader cross-section of the entire national workforce. The FEHBP BCBS standard option claims data are generated from a select group of Federal employees and may be subject to adverse selection, inclusion of inactive employees/retirees and other factors that may compromise the usefulness of this source in developing appropriate national costs for linkage with national workforce data.

F. Coordination between Section 4980H and Section 4980I excise taxes

The Notice requests comments on the circumstances in which the interaction between the provisions of Sections 4980H and 4980I may raise concerns and on whether and how these provisions might be coordinated.

As stated in the May 15th letter, J&J urges Treasury and IRS to exercise the full extent of their regulatory and administrative authority to establish a safe harbor that is consistent with the standards for the type of coverage that is minimally acceptable for an employer to avoid the Section 4980H excise tax. It seems unlikely that Congress intended a 60% minimum actuarial value plan that employers must offer to employees to avoid the Section 4980H excise tax as the type of “high cost” plans that may become subject to the Section 4980I excise tax.

J&J urges Treasury and IRS to establish a permanent safe harbor for plans that meet the Section 4980H minimum value standard. Under this proposed safe harbor applicable employer-sponsored coverage that has an actuarial value of between 60 percent and 70 percent would not cause the employer to become subject to the excise tax, even if the cost of the coverage is above the applicable dollar threshold. Employers who design their health care offerings to satisfy the minimum value requirement to avoid the Section 4980H excise tax should not be subjected to the Section 4980I excise tax if the cost of the coverage exceeds the applicable dollar threshold.

Conclusion

In conclusion, we appreciate that Treasury and IRS recognize the potentially significant impact that the Section 4980I excise tax may have on employers who are offering the coverage and benefits required by the Affordable Care Act and on their employees. We respectfully submit these comments and proposed approaches to the future guidance and we look forward to providing additional details as the regulatory process proceeds. Should officials at Treasury or IRS need any further information from J&J on these important issues, please do not hesitate to contact us.

Sincerely,



Robert Donnelly
Senior Director, Health Policy
Johnson & Johnson Worldwide Government Affairs and Policy



Lisa Blair Davis
Vice President
International Total Rewards & Global Benefits