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October 1, 2015

Via E-mail: comments@irscounsel.treas.gov

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

Re: Comments - IRS Notice 2015-52

To Whom It May Concern:

McAfee & Taft is Oklahoma's largest law firm and has one of the largest and most experienced employee benefits groups in the country. We represent a number of employers, including Indian tribal employers here in Oklahoma. I am the leader of the firm's employee benefits practice, one of the largest and most experienced of its kind in this region.

We respectfully submit the following in response to your request for comments regarding IRS Notice 2015-52. Please consider these comments, and let us know if you have any questions.

1. The Section 4980I tax penalizes Indian tribes that comply with the Section 4980H mandate to provide affordable, minimum value health insurance coverage to full-time employees and the IHCIA's charge to provide maximum health services to tribal members.

Section 4980I of the Internal Revenue Code[1] ("Section 4980I") imposes a 40 percent excise tax on the excess benefit of the aggregate cost of applicable employer-sponsored coverage over the annual statutory dollar limit. As a matter of policy, applying the Section 4980I excise tax to tribal employers complying with the employer shared responsibility requirements under Code Section 4980H ("Section 4980H") and the

[1] For purposes of this letter, the Internal Revenue Code of 1986, as amended is referred to as the "Code."

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principles of the Indian Health Care Improvement Act ("IHCIA") will significantly burden the tribes' ability to provide adequate health benefits to tribal members and to recruit and retain employees.

A. Policy considerations support the exclusion of Indian tribal employers who administer self-insured group health plans in compliance with Section 4980H from the Section 4980I excise tax.

Under the Affordable Care Act (the "ACA"), Indian tribal employers that administer self-insured group health plans must comply with certain requirements or face potentially substantial penalties under Code Section 4980H.

When Congress passed the ACA in 2010, it sought to ensure that individuals received quality, affordable health coverage by requiring health insurance plans and policies to satisfy specific requirements – e.g., elimination of preexisting condition exclusions, removal of annual and lifetime limits, first-dollar coverage of preventive services, the requirement to offer essential health benefits, etc. One of the ways Congress endeavored to enforce the new coverage requirements was to set forth significant penalties for certain employers choosing not to offer certain health coverage. Code section 4980H has been interpreted by regulators as being applicable to Indian tribal governments and employers.

Section 4980H generally requires an applicable large employer ("ALE")[2] to offer certain levels of coverage to full-time employees and their dependents or else potentially face two separate penalty taxes. The "subsection (a) penalty" may apply if an ALE fails to offer full-time employees and their dependents the opportunity to enroll in minimum essential health coverage under an eligible employer-sponsored plan.[3] The "subsection (b) penalty" may apply if an ALE offers eligible employer-sponsored coverage that is not affordable or does not offer minimum value as described under the Code.[4]

Whether a health plan meets the minimum value and affordability requirements for purposes of the subsection (b) penalty is based on benchmarks related to the total percentage of benefits provided.[5] As such, employers that attempt to comply with Section 4980H may not reduce costs for purposes of avoiding the Section 4980I tax on high-cost employer-sponsored coverage without also negatively impacting the minimum

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2 *See* Code § 4980H(c)(2)(A); *see also* Treas. Reg. § 54.4980H-1(a)(4).

3 Code § 4980H(a).

4 Code § 4980H(b).

5 Coverage is "affordable" if an employee's annual premium for self-only coverage does not exceed a specified percentage of the employee's household income (e.g., 9.56% in 2015). *See* Code § 36B(c)(2)(c)(i)(II); Treas. Reg. § 1.36B-2(c)(3)(v)(A)(1). A plan provides "minimum value" if the share of total allowed cost of benefits provided to an employee is at least 60%, and the benefits under the plan include substantial coverage of inpatient hospital services and physician services. 45 C.F.R. § 156.145(a).

value of the plan. For example, if a plan's benefits in 2018 are projected to exceed the Section 4980I $10,200 threshold for self-only coverage, the plan sponsor could not simply reduce the preventive care or essential health benefits it offers without triggering a Section 4980H subsection (b) penalty for failing to offer minimum value coverage. Further, employer-sponsored coverage that complies with Section 4980H(b)'s minimum value requirement to provide "substantial" inpatient hospital services and physician services is restricted to providing such services in a manner that will not exceed the Section 4980I annual dollar thresholds.[6]

It would be impractical for Indian tribal employers to comply with Section 4980H and the needs of their tribal member employees only to be penalized by Section 4980I's excise tax on high-cost coverage. As such, Indian tribal employers should be excluded from the Section 4980I excise tax.

B. Indian Health Care Improvement Act Implications

When Congress passed the ACA, it also permanently reauthorized the Indian Health Care Improvement Act to meet the severe and unmet health needs of Indian tribes and tribal members.[7] Congress recognized that federal health services to maintain and improve Indian tribal members' health are "consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to the American Indian people."[8] Further, Congress declared it a "major national goal" to provide resources, processes, and structures that will enable Indian tribes and their members to obtain both the "quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States."[9]

Congress's intent in passing the IHCIA was to provide tribes and tribal members with the *maximum* quantity and quality of health services and opportunities possible to eliminate the health disparities between Indians and the general population of the United States.[10] Native Americans are at a higher risk for health problems including but not limited to diabetes, obesity, and cardiovascular disease than that of the general United States population.[11] As a result, healthcare costs for such individuals are often higher than costs for non-Native Americans. The fact that Indian tribes sponsor self-insured group health plans in the spirit of the ICHIA to address the specific and often significant

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6 *See* 45 C.F.R. § 156.145(a) (requiring that benefits under an employer-sponsored plan include substantial inpatient hospital services and physician services).

7 *See* 25 U.S.C. 18 § 1601(1), (2).

8 *See id.*

9 *See id.*

10 *See id.*

11 *See* Center for Disease Control and Prevention: *American Indian and Alaska Native Populations* (available at www.cdc.gov/minorityhealth/populations/REMP/aian.html).

health needs of their tribal (and other) employees does not mean that the tribes are offering expensive or "Cadillac" plans to their employees. Rather, the high expenses are often driven by tribal member health concerns that are beyond the tribal employers' control.

Application of the Section 4980I excise tax to tribal employers that sponsor self-insured group health plans that – in the spirit of the ICHIA – offer quality care to Indian tribal members (and other non-Native employees) weakens Congress's stated intent and policy regarding Indian health. As such, it would be impractical for Indian tribes to provide maximum health services to meet the needs of their tribal member (and other) employees only to be penalized by Section 4980I's excise tax on high-cost health coverage. Therefore, regulations should be crafted to exclude Indian tribes acting in their capacity as employers of self-insured group health plans.

2. Indian tribes cannot practically comply with the Section 4980I employer aggregation rules.

In Notice 2015-52, the Treasury and IRS invited comments regarding the practical challenges presented by the application of the controlled group aggregation rules to Section 4980I.[12]

A. Until the IRS issues controlled group rules specific to Indian tribal governments, it will be very difficult to know for certain that tribal governments are correctly applying the employer aggregation rules that apply for purposes of 4980I.

Section 4980I(f)(9) generally provides that for purposes of Section 4980I, all employers treated as a single employer under subsection (b), (c), (m) or (o) of Code Section 414 are treated as a single employer. Notice 2015-52 indicates that the IRS intends employer aggregation rules to identify: (1) the applicable coverage to be taken into account for purposes of the excise tax; (2) the employees to be considered for age and gender adjustments and high-risk profession employees; (3) the taxpayer responsible for calculating and reporting the excess benefit; and (4) the employer liable for any penalties related to the failure to properly calculate the Section 4980I tax.

The controlled group rules under Code Section 414 determine whether a group of commonly-owned corporations constitutes a controlled group of corporations.[13] These rules also apply to a limited liability company that has elected to be taxed as a corporation. There are also specific, similar rules that apply to determine if other types of business organizations including corporations, partnerships, sole proprietorships, trusts, estates, joint ventures, and limited liability companies (whether or not incorporated)

12 Treasury and the IRS are referred to collectively herein as the "IRS."

13 *See* Code § 414(b) (referencing Code § 1563(a)); Treas. Reg. § 1.414(b)-1.

constitute a controlled group.[14] Similarly, the controlled group rules also apply to entities that are exempt from tax under Code § 501(a).[15]

There are, however, no specific controlled group rules that apply to Indian tribal governments. Instead, the IRS has indicated that Indian tribal governments must comply with a "reasonable, good faith interpretation of existing law" in determining which entities must be aggregated under Code Section 414(b) and (c).[16]

Employer aggregation is a key factor in imposing and enforcing the Section 4980I excise tax. Enforceability of the tax depends on accurately identifying: (1) the applicable coverage for purposes of determining any excess benefit; (2) the employees to be considered as part of the calculation; (3) the employer responsible for calculating and reporting the tax; and (4) the employer responsible for any penalties associated with payment of the tax. Without specific controlled group guidance, Indian tribal government employers cannot know for certain that they are correctly applying the Section 4980I employer aggregation rules. As such, tribal governments may face additional tax penalties if the IRS determines that their interpretation of the controlled group rules results in a miscalculation of the Section 4980I tax.

The IRS should not hold Indian tribal governments to the same standards and expectations as those entities for which the controlled group rules clearly apply. Because the Section 4980I tax largely depends on employer aggregation for a variety of reasons, and because a "reasonable, good-faith interpretation" standard may lead to the inconsistent application of the controlled group rules among different tribal governmental employers, final regulatory guidance should provide that the Section 4980I tax should not apply to Indian tribal governments, for this reason as well.

B. Customary employment within Indian tribes makes it difficult to identify the employer under the Section 4980I employer aggregation rules.

If the IRS takes the position that Indian tribes are subject to the Section 4980I tax, it must go beyond the standard Code Section 414 employer aggregation rules and identify clear procedures for identifying (1) the employer responsible for calculating and reporting the tax; and (2) the employer liable for tax penalties resulting from a miscalculation of the excise tax.

Section 4980I(c)(4)(A) provides that "each employer" must calculate the amount of the excess benefit subject to the excise tax and the applicable share of such excess benefit for each coverage provider. Similarly, if an employer fails to accurately calculate

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14 *See* Treas. Reg. § 1.414(c)-2(a).

15 *See* Treas. Reg. § 1.414(c)-5(b).

16 *See* IRS Notice 96-64.

the excess benefit and as a result, the coverage provider pays too little tax, the employer that miscalculated the tax will have to pay a tax penalty.[17]

Indian tribes often employ the same individual to perform multiple functions for more than one tribal employer. Tribes may simultaneously, for example, employ an individual to work, for example, part-time for a tribal governmental entity and also separately for a health care provider that serves Native Americans and the general public. Section 4980I's reference to the Code Section 414 controlled group rules does not assist in determining the responsible Indian tribal employer for purposes of calculating and reporting the tax when an employee may work for more than one employer. Further, the Code Section 414 rules do not identify the employer liable for tax penalties in the event of a miscalculation. In the example above, both employers (one or both of which is a sovereign governmental entity) would potentially be subject to calculating and reporting the tax and also be at risk for tax penalties due to miscalculation of the tax.

To assist with the identification of the responsible employer under Section 4980I, the IRS might consider taking the approach offered in its guidance under the Code Section 6056 reporting requirements. For purposes of reporting on health insurance coverage offered by applicable large employers, the IRS has indicated that all employer members of a controlled group are treated as a single employer for certain purposes (e.g., determining whether an offer of coverage was made). However, only one employer is considered the employer responsible for reporting in any given month. If an employee works for more than one employer in a month, the responsible employer is the employer for whom the employee works the greatest number of hours of service for that month. If the employee worked the same number of hours for more than one employer in a month, the employers must determine which employer is subject to reporting for that employee in that month.[18] Perhaps a similar approach might be workable for 4980I. If the IRS construes Section 4980I to apply to Indian tribes, it should clearly identify the employer responsible for calculating and reporting the excise tax and the employer liable for any associated tax penalties.

Please let me know if you have any questions.

Respectfully,

B. Long

Brandon Long

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17 *See* Code § 4980I(e)(1)(B).

18 *See* 2015 Instructions to Form 1094-C and Form 1095-C.

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