Dorothy Coleman

Vice President
Tax and Domestic Economic Policy

October 1, 2015

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

VIA Email to Notice.comments@irscounsel.treas.gov

RE: Notice 2015-52, Section 4980I Excise Tax on High Cost Employer-Sponsored Health Coverage

Attention: Karen Levin

Dear Ms. Levin:

The National Association of Manufacturers (NAM) – the largest manufacturing association in the United States representing manufacturers in every industrial sector and in all 50 states – appreciates the opportunity to provide comments on proposed guidance implementing the new excise tax on high-cost employer-sponsored health coverage under Section 4980I, which was included in the Affordable Care Act (ACA).[1]

Overview

The vast majority of manufacturers in the United States – including 97 percent of NAM member companies – voluntarily offer health benefits to attract a skilled workforce and because they believe it is the right thing to do for their employees. During the debate on health care reform, manufacturers strongly supported proposals to reduce soaring health care costs, improve the efficiency of the current system and enhance the quality of care.

In contrast, the NAM opposed many provisions that would increase costs for manufacturers and their employees. In particular, the NAM opposed the new excise tax on employer-provided health coverage. Unfortunately, this new excise tax – to be levied on health coverage plans beginning in 2018 – will increase costs for manufacturers that provide health care benefits and, in many cases, for the employees covered by these plans.

Even before this new tax is imposed, manufacturers already are concerned by health coverage costs. Indeed, in a recent NAM Survey, 77.5 percent of respondents cited rising health care/insurance costs as a primary business challenge. In many cases, this additional tax burden will force employers to reduce or modify health coverage they currently provide for their

[1] Pub. L. No. 111-152

workforce. Although referred to as the "Cadillac tax" because it targets generous employee benefit packages, it is more aptly described as an employee benefits tax since it will apply to most employee benefit plans within a few years. According to a recent study by the Kaiser Foundation, 56 percent of the plans sponsored by companies with more than 200 employees would be subject to the tax by 2023.[2]

While the NAM will continue to pursue opportunities to repeal this new excise tax, we recognize the challenges facing employers in planning ahead in the event the tax goes into effect. Our members have a critical need for guidance from the Internal Revenue Service (IRS) and Treasury on the potential implementation of the tax as they plan for their longer term health coverage costs. In May, we submitted comments to Notice 2015-16 and we appreciate the opportunity to provide additional comments on several issues covered in Notice 2015-52.

Liability for the Tax

Under the statute, the coverage provider is liable for any excise tax. The statute also specifies that the coverage provider is the health insurance issuer for insured group health plans and, in the case of a health savings account or Archer MSA, the employer is the coverage provider. In other cases, including self-insured plans, the coverage provider is "the person that administers the plan benefits."

In defining the "person that administers the plan benefits," the NAM prefers the second alternative suggested in the Notice, i.e., the person who has the ultimate authority or responsibility for administering plan benefits, as identified in plan documents. We believe that the employer (or a subset of the employer) would fit into this definition.

In contrast, the first alternative suggested by the Notice, i.e., the person responsible for performing the day-to-day functions of the plan administration could be a third-party administrator (TPA), making the TPA liable for any excise tax for most self-insured plans. This approach would lead to unnecessary complexity, especially for self-insured plans with multiple TPAs administering different benefits under the same general coverage option. In addition, some TPAs would pass on the cost of the excise tax to the employer in the form of increased administrative service rates, raising some of the same "gross-up" complexities anticipated for employers sponsoring fully insured plans.

Employer Aggregation

In response to the request by Treasury and IRS for comments on the practical challenges of considering all employers treated as a single employer under Section 414 subsections (b), (c), (m), or (o) as a single employer when calculating and paying the excise tax, the NAM recommends giving employers the flexibility to consider the costs of coverage for all members of the controlled group when determining any excise tax liability. Specifically, when calculating the cost of coverage, employers should be allowed to aggregate the costs of all self-insured plans it offers and then apportion these costs to each plan option based on the relative actuarial value of each plan option.

In cases where a parent company has "non-fully integrated" subsidiaries, the employer may not have sufficient information on the subsidiary's employee demographics and/or on the benefits offered by the subsidiaries (and their associated costs) to calculate any excise tax liability

[2] How Many Employers Could Be Affected by the Cadillac Tax?, August 25, 2015.

associated with these groups. It is important that employers with non- fully integrated subsidiaries have the flexibility to calculate the excise tax either for the controlled group as a whole, or separately for each individual member. If an employer elects to calculate the cost of coverage separately for each member of the controlled group, then the age/gender adjustment should also be calculated separately.

The NAM also recommends allowing for flexibility in identifying the taxpayer responsible for calculating and reporting the excess benefit and the employer liable for any penalty for failure to properly calculate the tax imposed. For example, if a parent company lacks sufficient information about subsidiaries to properly calculate the cost of coverage and applicable tax, it may be more appropriate for each individual group member to be responsible for these items.

Calculating Costs of Applicable Coverage

In order to meet obligations related to the excise tax in a timely manner, manufacturers need sufficient lead time to calculate costs. Individual employers also need the ability to choose the appropriate time period for the cost determination based on their business needs, and allowing for sufficient time to gather the necessary data that will be required in determining the cost of applicable coverage.

In addition, the specified time period between the end of the plan year and the time of payment should be long enough to allow for retroactive adjustments that may be made in the months following the end of the plan year.

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

Under the statute, the cost of applicable coverage generally is determined on a monthly basis and, if coverage is determined on other than a monthly basis, Treasury has the authority to determine how these costs will be allocated. The NAM agrees with Treasury that contributions to health savings accounts (HSAs), Archer medical savings accounts (MSAs), flexible spending accounts (FSAs) and health reimbursement accounts (HRAs) should be allocated on a pro-rata basis over the period to which the contribution relates (generally the plan year), regardless of the timing of the contributions. These contributions may be used over the course of the full plan year and it is appropriate to allocate them proportionally over that period of time.

Conclusion

In addition to the issues above, it is important to note that, at a minimum, final rules should exempt the value of the coverage attributable to the minimum benefits package mandated by the ACA. Similarly, employee benefits plans provided by employers for their retirees, which are exempt from many provisions of the ACA, should be excluded from the definition of applicable coverage.

Employers also need adequate time to implement the long-term benefits strategies and negotiate related contracts needed to comply with forthcoming guidance. Given the timeframes required, we strongly encourage the IRS to utilize its transition relief authority. Similarly, it is critically important that any guidance allows employers the flexibility to structure their employee benefits programs to fit the demands of their business, and the needs and expectations of their workforces.

Manufacturers historically have led the business community in providing generous health benefits to their employees and are committed to continuing this tradition in the future. At the same time, the burden of providing health coverage already represents a major challenge for the industry. In promulgating regulations, we urge you to minimize the impact of the tax on health care coverage and promote employer-sponsored health care coverage for employees and their families. We also encourage you to consider the impact of the tax on the broader economy. Increased health care costs will translate to an increase in the marginal cost of hiring additional workers, thus discouraging job creation and economic growth.

Thank you in advance for considering our comments. If you have any questions, please feel free to contact me at (202) 637-3077 or dcoleman@nam.org.

Sincerely,

Dorothy Coleman