



October 1, 2015

Submitted electronically via: Notice.comments@irs counsel.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 Sir or Madam:

The National Business Group on Health is pleased to respond to the Internal Revenue Service's invitation to comment on the excise tax on high cost employer-sponsored health coverage under § 4980I of the Internal Revenue Code.

The National Business Group on Health represents 427 primarily large employers, including 73 of the Fortune 100, who voluntarily provide group health plan coverage and other health programs, including wellness programs, to over 55 million American employees, retirees, and their families. Our members employ and provide health coverage for employees under a wide variety of work arrangements, including full-time, part-time, seasonal, and temporary. They also often operate multiple lines of business in multiple states and tailor employee work and benefit arrangements to the specific needs of each line of business.

As our members prepare for implementation of Code § 4980I and other new Code requirements under the Affordable Care Act (ACA), primary concerns will be:

- (1) Minimizing the administrative and cost burdens associated with those requirements; and
- (2) Having flexibility to implement and maintain innovative plan designs that lower the overall cost of health coverage.

Having flexibility to adapt their regulatory compliance to current and future work, benefit, and payroll arrangements will reduce compliance burdens and allow plan

sponsors to devote more resources to maintaining high-quality, cost-effective health coverage for employees and their dependents. Therefore, we support the Service's proposals to:

- Exclude from the cost of applicable coverage amounts attributable to excise tax reimbursement and income tax reimbursement;
- Allocate contributions to HSAs, Archer MSAs, FSAs, and HRAs on a pro-rata basis over the periods to which the contributions relate, regardless of the timing of contributions;
- With respect to FSAs with employer flex credits, adopt a safe harbor under which the cost of applicable coverage for the plan year would be the amount of an employee's salary reduction without regard to carry-over amounts;
- With respect to non-elective flex credits, adopt a safe harbor under which an FSA would be treated as funded solely by salary reduction if the amount elected by the employee for the FSA is less than or equal to the maximum amount permitted by § 125(i);
- Use Table A-8A and the Current Population Survey, as described in Notice 2015-52, as a source of data for age and gender characteristics of the national workforce;
- Have employers use the first day of the plan year as the snapshot date for determining the composition of employee populations;
- Publish adjustment tables to facilitate and simplify the calculation of age and gender adjustments to the baseline dollar limits under § 4980I; and
- Designate filing Form 720 as the method for annual payment of the excise tax.

We also encourage the Service, in developing § 4980I guidance and regulations, to take into account the features typical of large, self-insured employer-sponsored plans. Specifically, we recommend the following:

- **Person that administers the plan benefits.** Final § 4980I regulations should define "person that administers the plan benefits" as the "plan sponsor," as defined by ERISA.
- **Employer aggregation.** Although § 4980I(f)(9) provides that all employers treated as a single employer under § 414(b), (c), (m), or (o) are treated as a single employer, final regulations should permit employers treated as a single employer under § 414(b), (c), (m), or (o) to calculate and pay the excise tax separately.

- **Determination period.** Final regulations should require employers to determine the cost of applicable coverage and pay the excise tax no earlier than the end of the calendar quarter after the end of the taxable period.
- **Notice of calculation of applicable share of excess benefit.** Likewise, final regulations should require employers to notify the Secretary and each coverage provider of the amount of the excess benefit subject to the excise tax no earlier than the end of the calendar quarter after the end of the taxable period.
- **Age and gender adjustment to dollar limits.** Final regulations should permit employers the option of engaging independent actuaries to calculate age and gender adjustments to the § 4980I baseline dollar limits based on their employee populations.
- **Relief from applicable penalties.** The Service should allow relief from applicable penalties when employers make reasonable, good faith efforts to comply with § 4980I.

We provide further discussion of these recommendations below.

I. Person That Administers the Plan Benefits

As noted above, one of our members' primary concerns in implementing § 4980I is minimizing the administrative and cost burdens of compliance. Because of their large and diverse employee populations, our members often sponsor one group health plan but make numerous benefit packages with different premium, cost-sharing, and benefit features available to employees through that one plan. A single group health plan with multiple benefit packages may be self-insured or partially insured, and our members often engage multiple third party administrators to perform different plan administration functions such as enrollment, claims processing, responding to participant inquiries, or providing technology platforms for benefits administration. Because day-to-day plan functions often are performed by multiple third parties, defining the "person that administers the plan benefits" by reference to these day-to-day functions would be particularly problematic for our members. The "person that administers the plan benefits" might vary by benefit package or by geographic region, and § 4980I liability would fall arbitrarily on different parties (or multiple parties), depending on which parties performed particular functions for a group health plan.

Therefore, we recommend that final regulations define "person that administers the plan" as the "plan sponsor," as defined by ERISA. Generally, the plan sponsor is a single entity identified in plan documents. This definition would clearly identify the entity bearing § 4980I liability and for self-insured plans, would reduce or eliminate the need to determine appropriate excise tax and income tax reimbursements. Furthermore, this definition would apply to both single and multiemployer plans and generally would be consistent with obligations under § 4980I(c)(4).

II. Employer Aggregation

Although § 4980I(f)(9) provides that all employers treated as a single employer under § 414(b), (c), (m), or (o) are treated as a single employer, we recommend that employers treated as a single employer under § 414(b), (c), (m), or (o) have the option of calculating and paying the excise tax separately. In some cases, our members may be in a controlled group or in common control with other entities but operate and sponsor group health plans independently. These group health plans may have widely varying designs and costs. In such cases, requiring a single employer (such as a parent company) to aggregate the necessary information and submit payment for these multiple employers would create unnecessary administrative and cost burdens. Therefore, final regulations should allow employers treated as a single employer under § 414(b), (c), (m), or (o) the option of independently calculating and paying the excise tax.

III. Determination Period and Notice of Calculation

As the Service acknowledges in Notice 2015-52, employers will need time to determine the cost of applicable coverage provided during a taxable year. Generally, our members believe that at least one calendar quarter will be required to make this determination and notify the Secretary and each coverage provider of the amount of excess benefit.

In addition, we emphasize that determining cost of applicable coverage will likely require substantial changes to administrative procedures, reprogramming of payroll and recordkeeping systems, and extensive coordination with third party administrators. Therefore, we strongly recommend that § 4980I regulations be effective no earlier than first day of the taxable year beginning 12 months after the issuance of final regulations.

IV. Age and Gender Adjustment to § 4980I Dollar Limits

As noted above, we generally support the Service's proposals regarding age and gender adjustments to the baseline dollar limits under § 4980I. However, because our members' group health plans cover such as large, diverse employee populations, some may find using an independent actuary to make appropriate age and gender adjustments based on their employee populations more efficient. We therefore recommend that final regulations permit employers the option of engaging independent actuaries to calculate age and gender adjustments to the § 4980I baseline dollar limits, based on reasonable actuarial principles and practices.

V. Relief from Applicable Penalties

Calculating the excise tax under § 4980I will involve substantial administrative burdens and will likely involve extensive coordination with self-insured group health plans' third-

party vendors (as discussed in our comment letter responding to Notice 2015-16, available at: <http://www.businessgrouphealth.org/pub/78a69979-782b-cb6e-2763-3f6baf1c72db>). Therefore, it is likely that employers will make inadvertent errors in complying with § 4980I, particularly in the first years of implementation. Such errors are likely to occur in situations such as mergers and acquisitions among different employers when employees transition mid-year from one plan (or plans) to another.

Therefore, we recommend that the Service allow relief from applicable penalties under § 4980I(e), at least for the first year of implementation, provided employers make reasonable, good faith efforts to comply and correct within a reasonable period after discovering errors.

Again, thank you for considering our comments and recommendations on the implementation of Code § 4980I. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Marcotte".

Brian Marcotte
President