

National Coalition on **BENEFITS**

October 1, 2015

Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Section 49801 – Excise Tax on High Cost Employer-Sponsored Health Coverage, Notice 2015-52

Dear Secretary Lew and Commissioner Koskinen:

In response to the Notice issued on July 30, 2015, The National Coalition on Benefits (“NCB”) appreciates the opportunity to comment on Treasury and Internal Revenue Service (“IRS”) Notice 2015-52 regarding Section 49801 of the Internal Revenue Code which was added by the Patient Protection and Affordable Care Act (“ACA”), (Pub. L. 111-148), regarding the excise tax on high cost employer-sponsored health coverage. In our comments, we particularly want to urge Treasury and the IRS allow for direct payment of the tax, as well as to reemphasize some of our comments regarding Notice 2015-16.

The National Coalition on Benefits (“NCB”) is a coalition of national businesses and employer associations established to support the employer-sponsored health care system and ensure that companies can continue to provide health benefits in a uniform manner nationwide (www.coalitiononbenefits.org). NCB works with Congress and the Administration to ensure that federal and state health reform initiatives preserve, rather than erode, protections guaranteed by the Employee Retirement Income Security Act (“ERISA”).

As a coalition representing American companies that provide health coverage to their employees, we are committed to improving our employees’ health, and encourage Treasury and IRS to implement the tax fairly. Flexibility for employers is a central concern. In promulgating rules to implement the excise tax provision, we urge Treasury and the IRS to allow flexibility in determining what is “applicable coverage,” the cost of applicable coverage, and applying adjustments to dollar limit thresholds.

Our organization represents employers who highly value programs that reward and improve the quality and safety of health services. This includes offering benefit structures that facilitate affordable services and coverage, processes that reduce medical errors and waste, and efforts to improve the health status of our member organizations’ employees and their families. More than 150 million Americans obtain coverage through employer-sponsored health plans and, increasingly, a core component of the services that these plans are expected to deliver relates to quality improvement, patient safety, and wellness.

Payment of the Tax

The NCB would like to raise its concern about the fair administration of the tax. We believe that employers who sponsor health plans subject to the tax should have the flexibility to remit the tax payments directly to the IRS or to use their third party administrators to remit the tax, if so they choose. Requiring employers to use a third party to pay the tax will add unnecessary complications, not to mention significant cost. It would be far less costly and administratively simpler to allow the employer to administer and pay the tax.

The NCB believes that employers' ability to voluntarily offer and maintain benefit plans is an integral part of our health care system. Employers must continue to have the flexibility to determine how to best meet the needs of their employees and retirees. Reforms to the current system must continue to support ERISA's goals of promoting consistency, simplicity and predictability.

Coordination Between 4980I and 4980H

We urge Treasury and IRS to create a "safe harbor" for any plan that is at or below the minimum value requirements included in the shared responsibility provision of 4980H. This safe harbor is necessary as an employer could be subject to either the excise tax for "excess benefit" under 4980I, or if the employer reduced benefits and fell below the required 60 percent "minimum value," the employer could be subject to a penalty under Code section 4980H. If any employer offers a plan that meets the minimum value requirement of 4980H, that employer should not be subject to the excise tax of 4980I. It would be paradoxically unfair that, by offering this minimum value of benefits required by 4980H, an employer's plan is also deemed to be "in excess" for purposes of 4980I.

Additional Comments

The implementation of this excise tax has many important implications for our member organizations and their employees and families. Because it is an issue of such importance, we would like to reemphasize our comments to Notice 2015-16.

Determining Applicable Coverage

Section 4980I(a)(2) states that if "there is any excess benefit with respect to the coverage, there is hereby imposed a tax equal to 40 percent of the excess benefit." "Applicable coverage" should only include major medical and prescription benefits, and should exclude programs designed to improve health and wellness (e.g., wellness programs and onsite medical clinics), contributions to a health savings account ("HSA"), flexible spending account ("FSA"), health reimbursement arrangement ("HRA"), any benefit that can be treated as an "excepted benefit," and any mandated benefits coverage.

NCB urges Treasury and the IRS to exclude all benefits that are considered excepted benefits from the calculation of applicable coverage. In addition, as discussed above with regard to 4980H, any benefit or minimum level of coverage that is required, such as \$0 cost-sharing for certain mandated preventive benefits, should not be included in assessing if coverage is "in excess" for purposes of calculating the tax. A benefit cannot be both required and excess; therefore, any required benefit should be excluded from the calculation of applicable benefits or be subject to a safe-harbor.

NCB, as a group, is committed to improving the quality of care for our member organizations' employees. We ask Treasury and the IRS to exclude any costs associated with improving health from the calculation of applicable coverage. Programs like wellness programs and on-site clinics are designed to improve employee's health, as well as lower overall costs. In the same vein, NCB members encourage employees to contribute to their health savings accounts ("HSA") as a way of engaging employees in consumerism and proactively improving their health. We strongly urge that *all* contributions to an HSA be excluded from the excise tax calculation, but we ask that, at minimum employees' pre-tax contributions to HSA be excluded from the calculation of applicable coverage. NCB also urges Treasury and the IRS to exclude costs of programs designed to foster innovation in health care from the calculation; if innovation is to continue, the health care system must recognize and encourage it.

The Cost of Applicable Coverage

The statutory language related to calculating the cost of applicable coverage, particularly as it relates to “blending” tiers between self- and other-than-self coverage, allows for flexibility. NCB urges Treasury and the IRS to allow employers as much flexibility as possible in this area when finalizing implementing rules. Section 4980I imposes a 40 percent excise tax on the excess, if any, of the aggregate cost of the applicable coverage of an employee for a month over the applicable dollar limit for the month.

Section 4980I(d)(2)(A) provides that the cost of applicable coverage generally is determined under rules similar to the rules of § 4980B(f)(4), which apply for purposes of determining the COBRA applicable premium. However, Section 4980I does not mandate the use of the rules used to determine the COBRA applicable premium for purposes of this tax. The rules for determining the COBRA applicable premium were intended for a very different purpose. Treasury and the IRS have considerable flexibility to construct more appropriate rules to be used to determine the cost of applicable employer-sponsored coverage. Nothing in the statute prevents the Departments from defining and interpreting “similarly situated beneficiary” as broadly as possible.

Additionally, the NCB asks for greater flexibility in the mechanism used to determine the cost of applicable coverage, much like Medicare Part D allows multiple options for determining the cost of coverage, including prospective or retrospective assessment, or actuarial attestation. For instance, we urge that a mechanism be developed to equate the statutory dollar threshold (as indexed for a particular year) to an equivalent actuarial value, and that plans with an actuarial value not exceeding this equivalence be exempt from the excise tax. We request that, in the alternative, a plan below a specified AV that is cross walked to the threshold is deemed to be exempt from the excise tax in order to maintain stability and certainty in the value of the benefit.

Adjustments to Thresholds

The excise tax was designed to apply to *excess* benefits. However, early estimations show that one-third of employers will be subject to the tax in 2018, growing to 60 percent by 2022. Due to the fact that the tax is tied to CPI and medical inflation grows more quickly than CPI, more and more plans will be hit with the 40 percent tax each year. Due to additional requirements under the ACA and other changes, employers have already begun to scale back employee benefits offerings. However, we fear that over the course of time, companies may forgo offering health coverage.

Delayed Implementation

We strongly recommend that implementation of the 4980I excise tax be delayed for at least two years following release of the final rule. Employers are now concerned that a 2018 effective date does not allow sufficient time for the government to promulgate workable rules to implement the tax, along with an appropriate payment and collection system, or for companies to then be able to plan for and develop the necessary design changes and communicate the major impacts to employees and their families.

Thank you for considering our comments on these important issues.

Sincerely,

National Coalition on Benefits