



September 30, 2015

Comments filed electronically via email to 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 (Excise Tax on High Cost Employer-Sponsored Health Coverage)

Dear IRS/Treasury officials:

PCMA is the national association representing America's pharmacy benefit managers (PBMs), which administer prescription drug plans for more than 246 million Americans with health coverage through Fortune 500 companies, health insurers, labor unions, Medicare and Medicaid. PCMA members are committed to providing low-cost, quality, safe and effective pharmacy benefit programs to our clients and their employees and policyholders.

PCMA appreciates the opportunity to comment on IRS Notice 2015-52 ("Notice"), particularly Section III ("Persons Liable for the §4980I Excise Tax"). This section notes that Section 4980I(c)(1) does not define the term "person that administers the plan benefits" but that Section 4980I(f)(6) does provide that the term includes the "plan sponsor" if the plan sponsor administers benefits under the plan. The Notice states that the term "person that administers the plan benefits" is not used elsewhere in the Affordable Care Act, ERISA, or the Public Health Service Act. Therefore, Treasury and IRS are considering two alternative approaches to determine the identity of the person that administers the plan benefits and presumably will adopt one of these approaches in a future rulemaking.

The First Approach states that the "person that administers the plan benefits" would be:

The person responsible for performing the day-to-day functions that constitutes the administration of plan benefits, such as receiving and processing claims for benefits, responding to inquiries, or providing a technology platform for benefits information. Treasury and IRS anticipate that this person generally would be a third-party administrator for benefits that are self-insured, except in the rare circumstance in which the employer or plan sponsor performs those functions or owns the person who performs those functions.



Comments are requested on:

- The types of administrative functions that should be considered under this approach when determining who administers the plan benefits;
- Whether the person who administers the plan benefits could easily be identified; or
- Whether the identity of the person that administers the plan benefits often would be unclear because multiple parties (such as a PBM and a medical claims administrator) perform the relevant functions for a benefit package in which a single cost of applicable coverage would be determined.

The Second Approach states that the “person that administers the plan benefits” would be:

The person that has the ultimate authority or responsibility under the plan or arrangement with respect to the administration of the plan benefits (including final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility. For purposes of this Second Approach, the relevant types of administrative matters over which the person that administers plan benefits would have ultimate authority or responsibility could include eligibility determinations, claims administration, and arrangements with service providers (including the authority to terminate service provider contracts). Treasury and IRS anticipate that the person with such ultimate authority or responsibility, under the plan or arrangement, would be identifiable based on the terms of the plan documents and often would not be the person that performs the day-to-day routine administrative functions under the plan.

Comments are requested on:

- Whether the person that administers the plan benefits would be easy to identify in most circumstances;
- Whether multiple parties have ultimate authority or responsibility for the different relevant administrative matters with respect to the same benefit package; and
- Whether this approach would identify an appropriate person as the person that administers the plan benefits.

Overview of PCMA Comments

PCMA is concerned that the definition of the “person that administers the plan benefits” in Section 4980I(f)(6) of the Internal Revenue Code is unclear and could be misinterpreted to impose liability for the excise tax on third-party administrators (“TPAs”) or pharmacy benefit managers (“PBMs”). We believe this interpretation would be inconsistent with the intent of Congress in enacting the excise tax, which was to impose the liability on the entities in a position to determine and modify the design of employer-sponsored health plan benefits, and thus influence consumer behavior. TPAs and PBMs simply manage or administer the benefits delivered under those plans and are not, in this capacity, in a position to lower health care costs through plan design.



Specific Position on the Two Approaches

First Approach: PCMA believes the First Approach, which would potentially require allocation of portions of the excess benefit to multiple vendors, is (i) profoundly complex, (ii) would add significantly to administrative and compliance costs, and (iii) could dramatically increase the cost of employee health benefits. Imposing the excise tax on the person that administers claims or performs other routine operational tasks undermines the effectiveness of the excise tax in controlling health care costs because such an administrator does not, in this capacity, have any influence on the overall plan benefit design. Moreover, in response to the questions raised about this approach in the Notice, we believe it could be difficult to determine the identity of, and the appropriate allocation of, excess costs to the person that administers the plan benefits. Some sponsors of self-insured plans engage multiple TPAs and each has a different marginal tax rate, thereby increasing the administrative burden for the affected plans.

We also want to highlight certain specific income tax difficulties posed under the First Approach for both the sponsor and parties they engage to administer their plans (e.g., TPAs and PBMs). Sponsors are responsible for: (a) aggregating all benefit information to determine the amount of the excess benefit, (b) determining the allocable portion of such excess benefit to each coverage provider, and (c) notifying each coverage provider of its share of the excess benefit. Each coverage provider then would be liable for the excise tax on its share of the excess benefit, which, in most instances, it would pass through to the sponsor for reimbursement. The excise tax is not a deductible business expense, but the reimbursement obtained from a plan sponsor would be treated as taxable income. In order to keep itself economically whole, a coverage provider would need to “gross-up” its reimbursement from a plan sponsor to take into account the income taxes owed by the coverage provider on the reimbursement. It is expected that this gross-up will be computed using the marginal tax rate of the coverage provider.

The use by the coverage provider of its marginal tax rate ensures economic neutrality, but this approach will create economic distortions for the sponsor. In almost every instance, the marginal tax rates of a coverage provider and the sponsor will differ and the after-tax cost to the sponsor of the excise tax will vary depending on the marginal rates of its coverage providers. The potential inequities that will arise when the sponsor and the coverage provider have different marginal tax rates would result in the two proposed approaches for determining the “person that administers the plan” not being economically equivalent, which we believe they should be. Notice 2015-52 indicates that a “standard” marginal tax rate might be used instead of actual marginal rates, but a standard rate also would result in inequities and impose additional costs on coverage providers that have higher actual marginal rates than the standard rate. In addition, the requirements on Treasury and IRS to select and maintain standard marginal rates will not be insignificant.

Under the First Approach, when several coverage providers are involved, the process of determining and allocating liability for the excise tax would be unduly complex and burdensome



for sponsors. The complexity of this approach likely would increase the incidence of errors in calculating the tax and make program oversight and audits difficult for Treasury and IRS, another reason why it should be rejected in favor of the approach described below.

Second Approach: PCMA strongly supports the Second Approach because liability for the excise tax should fall on the person who has the ultimate authority or responsibility under the plan for the administration of the plan benefits (including final decisions on overall plan design and administrative matters), regardless of whether that person routinely exercises that authority or responsibility. Arguments in favor of the Second Approach include:

- Employers would prefer to pay the excise tax directly to the Treasury because such payment would significantly reduce their compliance costs;
- The administrative burden will be lighter. As discussed above, if TPAs and PBMs have to pay the tax, it is expected they will charge back the cost of the tax to the plan sponsors, subject to a tax gross-up;
- Administration of the excise tax would be greatly simplified if the employer or the ERISA plan administrator pays the tax rather than allocating it among multiple other parties; and
- If the goal of the tax is reducing health care costs by reducing the generosity of plan benefits, imposing the tax directly on employers—who control plan design—better serves this goal.

In response to the questions posed in the Notice regarding the Second Approach, PCMA believes that for self-insured, employer-sponsored health plans, the “person that administers the plan benefits” should be the person that determines what benefits are to be covered under the plan. A person who processes routine claims without having ultimate authority over or responsibility for the benefit design of the plan does not administer benefits in any capacity that is germane to the purpose of the excise tax. In a self-insured plan using this definition, the person that administers the plan benefits will generally be the plan sponsor, as that term is defined in Section 4980I(f)(7) and Section 3(16)(B) of ERISA. We recognize that Section 4980I(f)(6) says that the “person that administers the plan benefits” *includes* the plan sponsor “*if the plan sponsor administers benefits under the plan.*” (emphasis added) Our proposed definition would give meaning to Section 4980I(f)(6) while appropriately imposing liability for the excise tax on plan sponsors, not TPAs or PBMs of self-insured plans.

Finally, while we strongly encourage Treasury and IRS to adopt the Second Approach and impose liability for the excise tax on the sponsors of self-insured plans, which we believe is consistent with Congressional intent, plan sponsors should retain discretion to delegate certain responsibilities for calculation and payment of the tax to third-party vendors through contractual relationships. Of course, this discretion to delegate relates to administrative responsibilities associated with the tax, in contrast with the financial and legal liability for the tax which, for all the reasons noted above, should clearly remain with the plan sponsor.



Comments on Timing

The excise tax does not apply until the 2018 tax year, but PBMs already are working with health plans to develop proposals and bids for multi-year contracts that include that year. PCMA strongly encourages resolution of the definition of “the person that administers the plan benefits” as early as possible, so that plan design proposals and bids can proceed in a timely manner with all parties understanding their obligations under the new law.

PCMA appreciates the opportunity to provide comments on Notice 2015-52. If you have questions on our comments, please do not hesitate to call me at 202-756-5731 or email me at wkrasner@pcmanet.org.

Sincerely,

A handwritten signature in cursive script that reads "Wendy Krasner".

Wendy Krasner
Vice President – Regulatory Affairs