



October 1, 2015

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

Re: Comments on IRS Notice 2015-52

To Whom It May Concern:

The Society for Human Resource Management (“SHRM”) welcomes the opportunity to submit the following comments in response to Internal Revenue Service (IRS) Notice 2015-52 dealing with the Internal Revenue Code (IRC) Section 4980I excise tax on high cost employer-sponsored health care coverage.

Founded in 1948, SHRM is the world’s largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

The impact the excise tax will have on employer-sponsored health plans is of great concern to our members. We appreciate this opportunity to offer comments, insights, and recommendations in anticipation of guidance that the Service will issue in the future.

Persons Liable for the 4980I Excise Tax

In Notice 2015-52, Section III(A) states that the “coverage provider” is liable for any excise tax, and distinguishes the coverage provider by type of coverage. We take no issue with the insurance carrier being the coverage provider for an insured plan, nor with the employer for an HSA or Archer MSA. However, for self-funded plans, presumably including medical plans, health reimbursement arrangements under IRC Section 105(h) and health care flexible spending accounts under IRC Section 125, the undefined “person that administers plan benefits” will cause employers significant concern. In

Section III(B), Treasury considers two alternative approaches to determining the identity of the person that administers the benefit plans. Under the first approach, the entity responsible for day-to-day functions—such as a third-party administrator (TPA)—would be the person liable for the 4980I excise tax. Under the second approach, the employer itself, typically identified as the Plan Administrator under ERISA or, for governmental and church employers not subject to ERISA, under applicable state law, would be the entity responsible for the excise tax.

We presume that insurance carriers (in the case of an insured plan), and third-party administrators (in the case of self-funded plans) would pass along any 4980I excise tax—most likely including the applicable gross-up for the additional tax liability to that carrier or TPA—to the employer. Our comments to this Section of the Notice are based upon that extremely likely premise.

We applaud Treasury for recognizing the many administrative difficulties, both for carriers/TPAs as well as employers, in the first option. Where there may be many different providers, such as Pharmacy Benefit Managers (PBMs), wellness providers, disease management providers, chronic care coordinators, and many more, how would a TPA allocate the excess costs attributable to each of the varying entities? It would indeed be an administrative nightmare, especially for the employer who ultimately will be paying the bill (plus a gross-up for the additional corporate taxes attributable to the 4980I excise tax). Further, this first approach doesn't contemplate how a carrier, TPA, or any of the other contracted entities mentioned above would deal with a situation where all of their costs combined do not exceed the 4980I limits, but where an employer's additional programs (*i.e.* health care FSA, pre-tax contributions to an HSA, or an eligible health reimbursement arrangement's actual costs) causes the 4980I limits to be exceeded.

Recognizing that it is the employer who is extremely likely to end up paying all of the passed-through 4980I excise taxes in the end, we would endorse Treasury's second option. This would alleviate the concerns of the previous paragraph of our comments relating to multiple provider entities, and particularly ease the administrative burden of adding all of the additional program costs together with the other self-funded costs from a TPA.

Cost of Applicable Coverage

Timing Issues. In Section V(B), Treasury notes that a Determination Period needs to be established in order to calculate whether any costs exceed the 4980I limits on a monthly basis. The Notice also correctly notes that while making such a cost calculation soon after each month or at plan year-end may be administratively feasible for the underlying medical plan, it would be extraordinarily difficult (if not impossible) for health care FSAs, HRAs, HSAs, and Archer MSAs to do likewise due to runoff periods in the subsequent plan year.

Further, since the Notice references that the cost of applicable coverage is to be determined using rules "similar to the rules of section 4980B(f)(4) determination of the COBRA applicable premium," we would urge Treasury to consider the impact of the special COBRA rules applicable to a health care FSA in the

case of a terminated employee (where the COBRA cost may be \$0 if the participant has already been reimbursed in excess of her account balance at the date of the COBRA qualifying event).

We also take exception with the Notice's view that the 4980I excise tax and any subsequent "administrative" reimbursement for the gross-up are excludable from the calculation of premiums for purposes of COBRA. Since the 4980I tax is indeed a plan cost, ultimately borne by the employer, we believe it should be included in the applicable cost of coverage for purposes of determining COBRA premiums like any other expense related to claims and administrative costs.

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

Section V(E) of the Notice deals with account-based plans. Since the dollars elected could be claimed and reimbursed in any single month of the year, we applaud Treasury's consideration of ratably allocating the annual reimbursements across each month of the determination period rather than having an excise tax due for a given month or months where high reimbursements caused the aggregated costs to exceed the monthly 4980I limit. We believe this is relatively easy to administer, again at the employer level.

Cost of Applicable Coverage under FSAs with Employer Flex Credits

Section V(F) of the notice deals with the cost of applicable coverage under FSAs. We endorse Treasury's idea of only considering actual reimbursements rather than including a participant's salary-reduction elections plus employer non-elective contributions in the costs of applicable coverage. However, we question the administrative mechanism and proposed safe harbor to avoid double taxation where there is a carryover allowable under Section 125 from one plan year to the next. A much simpler solution would be to only count amounts actually reimbursed (not elected) in any given year (whether attributable to the prior or subsequent plan year), rather than the convoluted mechanism of considering the full election in the prior year, whether reimbursed or not.

Lastly, we agree with the approach of creating a safe harbor where non-elective employer contributions are part of the cafeteria plan and capping the cost of coverage for 4980I purposes at the Section 125(i) limit.

Age and Gender Adjustments to the Dollar Limit

We applaud Treasury for its consideration of our previous comments in Notice 2015-16 relating to adjusting the dollar limits due to the age and gender make-up of an employer's workforce. As noted in Section VI of Notice 2015-52, two employers with identical plan designs could find their costs of applicable coverage wildly different due to one employer having a significantly older workforce than its neighbor. While we are not prepared to comment on the various administrative mechanisms identified as "step one" potential solutions in the Notice, we would emphatically voice our support for including some form of adjustment for the age rating scale adopted in regulations for the small group market. These employers are almost always community-rated, and vary significantly from the FEHBP claims experience.

Conclusion

In conclusion, we understand that this is a daunting task for rulemaking and appreciate the opportunity to offer comments, thoughts, and ideas on what could work for the first set of proposed regulations from the Treasury and the Service.

Again, SHRM appreciates the opportunity to comment on this Notice. Please feel free to contact us if you have any questions about our comments.

Respectfully submitted,



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