

**TO: CC:PA:LPD:PR (NOTICE 2015-52), ROOM 5203, INTERNAL REVENUE SERVICE, P.O. BOX 7604,
BEN FRANKLIN STATION, WASHINGTON, DC 20044**

RE: COMMENTS TO NOTICE 2015-52

DATE: OCTOBER 1, 2015

Dear Sir or Madam:

The law firm of Novara Tesija, PLLC, appreciates the opportunity to comment on the Department of Treasury's (hereinafter the "Department") potential approaches to the "Person Liable for the 4980I Excise Tax" (hereinafter the "Tax") in Part III of Notice 2015-52 (the "Notice"). Due to the complex and unique operating structures associated with multiemployer plans, we strongly urge the Department to adopt a flexible approach for implementation with respect to multiemployer plans.

Introduction

Our firm represents nearly one hundred multiemployer plans located in various locations throughout the country. Our clients, in particular our health and welfare plans, offer medical, surgical, and other ancillary benefits to the working men, women, and retirees employed or formerly employed in the building and construction industry. As the Department is aware, multiemployer plans have unique operating structures, which are often not directly considered or accounted for during the legislative drafting process. Our comments to Notice 2015-52 focus on how these unique operating structures warrant the granting of transitional relief by the Department as it implements Section 4980I of the Internal Revenue Code.

Discussion

I. Part III of the Notice – Persons Liable for the §4980I Excise Tax

Notice 2015-52 provides that Section 4980I places responsibility for payment of any tax assessed on the "person that administers the benefits." Further, Section 4980I(f)(6) provides that the term "person that administers the plan benefits" includes the plan sponsor where the plan sponsor administers benefits under the plan. The Notice further states that this indicates "the plan sponsor of a self-insured arrangement may be, but is not always, the person that administers benefits under the plan." Since the term "person that administers the plan benefits" does not appear in any other governing authority, the Department laid out two approaches to determining the identity of the "person that pays the benefits."

The first approach contemplates responsibility being placed upon the person that administers the day-to-day benefits of the plan. Multiemployer plans frequently employ a variety of service providers and vendors for the purposes of providing benefits and plan administration. It is not uncommon for a health and welfare plan to utilize the services of a PPO network administrator, a third-party administrator, and a pharmacy benefit manager, just for the provision of medical and surgical benefits. In addition, dental and vision benefits are also often purchased from separate entities. Accordingly, for a multiemployer plan, it could be in the position of having five or more "persons" who arguably fit the definition of a "person that administers the benefits." When coupled with the requirement under the Notice to reimburse these providers for the additional income tax that is associated with this first approach, multiemployer plans would be faced with an administrative nightmare.

In addition, since the Boards of Trustees for multiemployer plans will be unable to do so, they will have to rely upon these various vendors and service providers to calculate what percentage of the Tax each provider is responsible for. This would be not only a significant administrative burden, but also likely a costly one. The vendors and service providers would likely pass along some charge to the plan for calculating their share of the Tax, since the calculation process would necessitate a significant information exchange and the use of accounting professionals by the vendor or provider. This, along with having to reimburse the service providers and vendors for its excess income tax, would be an inefficient use of plan assets needed to pay benefits.

The second approach, however, is a far more logical and cost-effective approach for multiemployer plans. This approach places responsibility on the person with "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." Should a plan meet the applicable threshold triggering the tax, ultimately the plan itself will be responsible under either approach. It is therefore far more prudent to apply the second approach with respect to multiemployer plans because it eliminates unnecessary administrative complexity and cost. Alternatively, at a minimum, multiemployer plans should be given the option to use either approach.

II. Comments to Part VII of the Notice – Notice and Payment

Finally, Part VII-A of the Notice provides that Section 4980I(c)(4)(A) imposes a notification requirement on the employer. The Notice further states, with respect to that section, that the employer would be required to calculate for each taxable period the amount of the excess benefit subject to the tax imposed by §4980I(a) and the applicable share of that excess benefit for each coverage provider. We believe that under this interpretation, the responsibility for calculating the amount of the excess benefit, and for providing notification, would fall upon contributing employers to multiemployer plans. These employers would not be in a position to undertake this responsibility. Quite simply, in a multiemployer setting contributing employers do not have regular or routine access to the information needed to perform these tasks. Rather, they would have to make efforts to reach out to the plan's third party or in-house administrator. Moreover, many employers in the building and construction industry contribute to more than one multiemployer fund. Accordingly, placing this responsibility upon contributing employer to multiemployer plans would result in an exceedingly difficult and unfair compliance mandate.

The Department has frequently extended transitional relief under similar circumstances to multiemployer plans. In fact, just recently in the Final Instructions for the completion of the Form Series 1095C for Section 6056 reporting, the Department confirmed that Part III of the Form 1095C would not have to be completed by contributing employers to multiemployer plans. This grant of transitional relief was due to the administrative difficulty that would come with placing this type of obligation upon such employers since they would not have access to the information needed to complete Part III of Form 1095C. We once again ask that the Department extend similar relief here. We would propose that the third party plan administrator, or another entity serving the multiemployer plan, be permitted to perform these calculations and provide the requisite notice on behalf of the multiemployer plan as well as – to the extent required by final regulations – contributing employers to multiemployer plans.

Conclusion

As discussed in detail above, multiemployer plans – and the employers that contribute to them – face unique compliance challenges with respect to implementation of the Tax. We believe these operating structures and considerations warrant the grant of the administrative flexibility requested. We thank you for your consideration of our comments to Notice 2015-52. Should you have any questions regarding these comments or wish to discuss them in more detail, please contact Paul O. Catenacci, Esq., at (248) 354-0380.

Sincerely,

NOVARA TESIJA, PLLC