ERIC

The
ERISA
Industry
Committee

September 30, 2015

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)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service ("IRS") for comments on Notice 2015-52, which supplements Notice 2015-16 and describes various procedural items that may be incorporated in the development of proposed regulations under new Internal Revenue Code ("Code") section 4980I (excise tax on high cost employer-sponsored health coverage). Added to the law by the Affordable Care Act ("ACA"), Code section 4980I first applies to taxable years beginning after December 31, 2017.

ERIC'S INTEREST IN CODE SECTION 4980I

The ERISA Industry Committee (ERIC) is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor health, retirement and compensation benefits for millions of employees, retirees and their families.

ERIC's members, which sponsor some of the largest private group health plans in the country, are committed to, and known for, providing high-quality, affordable health care. Our members expend considerable resources to maintain plans that cover many disparate populations across a wide range of geographic areas and that operate in all states and territories. These plans provide health care to millions of workers and their families with a high standard of cost containment and effectiveness.

We appreciate the government's solicitation of comments in advance of the development of proposed regulations under Code section 4980I. Earlier this year, ERIC members provided detailed comments on Notice 2015-16, the first IRS effort to solicit comments on Code section 4980I. In those comments, we urged the IRS to approach the Code section 4980I rule-making project pragmatically, by making the excise tax process flexible and easy to administer. To further this result, ERIC members advocated the liberal use of delayed effective dates, transition rules, good-faith compliance standards and safe harbors.

Since the publication of Notice 2015-52, ERIC members have expressed additional concerns. Instead of focusing on opportunities to simplify the process and reduce complexity, Notice 2015-52 seems to create additional impediments. For instance, the idea that all of the steps in the excise tax process will be accomplished quickly and easily within a short period of time after the end of each taxable period is simply not a viable proposition.

1400 L Street, N.W.
Suite 350
Washington, DC 20005
T (202) 789-1400
F (202) 789-1120
www.eric.org

There is a fundamental difference between traditional income and excise taxes and the code section 4980I excise tax. Traditional taxes are based on a simple premise – employers know, in advance, that they will have tax liability; the only unknown is the extent of the liability. The "fact" of tax liability is assumed, and employers price their goods and services accordingly, based on reasonable assumptions about anticipated taxes and tax rates. The specific amount of tax liability is answered after the end of the taxable year, when all facts are known regarding the employer's business income (subject to income tax) and sales of specific goods and services (subject to excise taxes). In short, traditional taxes are an expected cost of doing business.

In contrast, the code section 4980I excise tax is not an expected cost of doing business. It is a punitive, nondeductible tax that punishes those employers that are unable to circumvent the application of the tax through advance planning. It is a tax that employers may, in some cases, be able to avoid by reducing the cost of applicable coverage, but only if those cost reductions occur in advance of the taxable period. And it is a tax that employers will go to great lengths to avoid in advance, because it is not possible to avoid or mitigate the tax after-the-fact. This behavior – reducing the cost of applicable coverage to avoid the excise tax – apparently is what the law was intended to accomplish. Indeed, the most recent CBO estimates anticipate that the Code section 4980I excise tax will raise $87 billion over eight years because employers will reduce their spending on non-taxable health benefits and shift that spending to taxable compensation.[1]

The reality for ERIC members is that employers and their administrators and their insurance carriers need to assess and avoid the risk of Code section 4980I excise taxes in advance, and the *entire excise tax process should be designed to support these advance determinations*. Plan sponsors need to know the excise tax threshold amounts and the value of their health plan coverage <u>before</u> the applicable taxable period, not after. Plan sponsors need to have time to adjust their plan designs, and to reduce extraneous excise tax "costs" before the applicable taxable period, not after. If a plan sponsor has excise tax risk exposure, the amount of that risk should be known with reasonable accuracy before the applicable taxable period, not after.

Further, and importantly, if a plan sponsor needs to pay the excise tax, it should be able to do so directly, without the involvement of its third-party administrators or its insurance carriers and without having to negotiate complex income tax reimbursement formulas.

Our recommendations and suggestions below emanate from these concerns.

SUMMARY OF MAJOR COMMENTS

As discussed in detail below, ERIC recommends that:

- The IRS and Treasury define the "taxable period" as either the plan year or the calendar year, as elected by the plan sponsor, and clarify that the excise tax thresholds in effect on January 1st of each calendar year apply to all plan years beginning during that calendar year. Many employers use non-calendar plan years for their group health plans, and these changes will simplify Code section 4980H compliance for this group of employers.

- The IRS and Treasury implement a process under which the excise tax thresholds, including the age and gender adjustment, are known well in advance of the applicable

[1] See Congressional Budget Office, *Updated Budget Projections: 2015 to 2025* (March 2015), at https://www.cbo.gov/sites/default/files/cbofiles/ attachments/49973-UpdatedBudgetProjections.pdf.

taxable period. We suggest that this should be relatively easy to accomplish, building on the statutory direction that inflation adjustments to the dollar thresholds be determined based on the percentage increase in cost-of-living measures for a 12-month period ending two years before the applicable taxable period.

- The IRS and Treasury implement a process that allows plan sponsors and their advisors to determine the excise tax cost of applicable coverage in advance of the applicable taxable period. In our earlier comment letter on Notice 2015-16, we discussed the scope of applicable coverage and the process steps that ERIC members believed would enable plan sponsors to determine the cost of that coverage in advance.[2] Our comments here focus specifically on some of the additional cost of coverage issues addressed in Notice 2015-52.

- The IRS and Treasury confirm that, assuming an excise tax liability exists, plan sponsors are *always* allowed to pay the excise tax directly with respect to their self-insured health benefits and, further, that plan sponsors are permitted to pay the excise tax directly with respect to their fully-insured health benefits. ERIC members believe this is a critical and necessary improvement to a flawed statutory process. As long as the excise tax is appropriately calculated and timely paid, it should not matter who makes the payment or how the payment is made.

COMMENTS

I. DEFINITION OF TAXABLE PERIOD

The Code section 4980I excise tax is imposed on the basis of the taxable period. The statute defines the taxable period by reference to the calendar year or such shorter period as the Secretary may prescribe.[3] Notice 2015-52 indicates that IRS and Treasury anticipate that the taxable period "will be" the calendar year for all taxpayers.

Many ERIC members maintain non-calendar year health plans. The use of non-calendar plan years is especially common among employers that are educational institutions and state and local governments, but many other employers use a non-calendar year plan as well. These employers conduct budget and planning cycles and determine their budget cost and COBRA cost in advance of their plan year, not the calendar year. In addition, these employers commonly change their third-party administrators and/or insurance carriers at the beginning of their plan year, not the calendar year. If the taxable period is defined as the calendar year, these employers will, by necessity, need to spend additional time and resources to compute excise tax cost across two plan years and may need to interact with vendors that have changed across two plan years.

We recommend that IRS and Treasury exercise their regulatory discretion to define the "taxable period" as either the calendar year or a plan year, as elected by the plan sponsor. We also recommend that IRS and Treasury clarify that the excise tax thresholds in effect on January 1st of each calendar year apply with respect to all plan years beginning during that calendar year. Adopting these two rules would remove an administrative challenge and financial burden that otherwise would hinder compliance with Code section 4980I for employers with non-calendar

[2] See, generally, ERIC's comments on Notice 2015-16 (May 15, 2015), at http://www.eric.org/health/eric-comment-letter-on-40-excise-tax-under-the-affordable-care-act/.
[3] Code section 4980I(f)(8).

plan years. The IRS and Treasury have already provided significant flexibility for employers with non-calendar year plans under Code section 4980H, and it makes equal sense to do so with respect to Code section 4980I.[4]

II. Advance Determination of Excise Tax Thresholds

As noted in our earlier comments, for employers with calendar year plans, the 2018 budget and planning cycle will begin in March or April of 2017 – less than two years from now. Employers need to know what the excise tax thresholds will be for the 2018 taxable period, and they need to have that information as they begin their 2018 budget and planning cycle. How can this goal be accomplished? Fortunately, the statute provides some helpful direction for the dollar thresholds, and this guidance can be extrapolated to create an advance determination process for the age and gender adjustment.

A. Dollar thresholds and adjustments. Code section 4980I(b)(3)(C) discusses the basic dollar thresholds and various adjustments to those thresholds. The starting point for the 2018 thresholds is $10,200 for self-only coverage and $27,500 for other than self-only coverage. These dollar thresholds are subject to various adjustments including:

- A "qualified retiree/high-risk profession" adjustment for certain pre-65 retirees and participants in plans where the majority of the employer's employees are engaged in high-risk professions (for 2018 taxable periods, this adjustment is an additional dollar amount - $1,650 for self-only coverage and $3,450 for other than self-only coverage);

- An "age and gender" adjustment based on whether the age and gender characteristics of an employer's workforce would produce a higher premium cost than the age and gender characteristics of the national workforce, with costs determined under the Blue Cross/Blue Shield ("BCBS") standard benefit option under the Federal Employees Health Benefits Plan ("FEHBP"); and

- A "health cost" adjustment based on the percentage increase in the per-employee cost under the BCBS standard benefit option under the FEHBP. This is a one-time-only adjustment; if it does not apply for 2018 taxable periods, then it is not taken into account in future taxable periods.[5]

B. Cost-of-Living Adjustments. For each taxable period after 2018, Code section 4980I(b)(3)(C)(v) provides explicit direction to the IRS about how and when to adjust the dollar thresholds (both the base amounts and the additional amounts for qualified retirees/high-risk professions). Specifically, Congress directed that, for 2019 taxable periods, these dollar thresholds are to be adjusted based on the percentage increase in the consumer price index for all-urban consumers (CPI-U) for the 12-month period ending August 31, 2017 (plus 1 percent for taxable periods before 2020).[6] Thus, the IRS will be able to determine and announce the 2019

---

[4] See, generally, section XV.D.1 of the preamble to the final regulations for Code section 4980H, 79 Fed. Reg. 8544, 8570 (February 14, 2014).

[5] A recent report by the Congressional Research Service indicates that this adjustment will most likely not be made in 2018. See, *Excise Tax on High-Cost Employer-Sponsored Health Coverage: In Brief*; Report #R44147 (August 14, 2015) available here: http://www.fas.org/sgp/crs/misc/R44147.pdf.

[6] Code section 4980I(b)(3)(c)(v) cross-references to Code section 1(f)(3) (the annual cost-of-living adjustment for various income tax provisions), but indicates that for purposes of Code section 4980I, the

dollar thresholds shortly after the August 2017 CPI-U numbers are released by the Bureau of Labor Statistics (BLS) in September 2017. This means that these dollar thresholds will be known well in advance of 2019.[7]

C. Age and Gender Adjustment. Code section 4980I(b)(C)(3) does not provide any direction to the IRS regarding how and when to compute the age and gender adjustment. This adjustment requires information regarding: (1) the age and gender composition of the national workforce; (2) the age and gender composition of an employer's workforce; and (3) the cost and benefit design for the BCBS standard option under the FEHBP. On the first item, Notice 2015-52 suggests that Treasury and the IRS are considering the use of Table A-8a from the Current Population Survey published by the Bureau of Labor Statistics. On the second item, Notice 2015-52 suggests that Treasury and the IRS are considering requiring an employer to determine the age and gender of employees on the first day of a plan year. On the third item, Notice 2015-52 suggests that Treasury and the IRS will develop age and gender adjustment tables, the starting point for which will be "aggregating all claims expenses of the FEHBP standard option" looking at either actual claims data from the FEHBP standard option or national claims data reflecting plans with a design similar to the FEHBP option.

Entirely absent from this discussion is any focus on timing – when will these determinations be made? The Notice suggests Table A-8a as a source for national age and gender workforce information, but does not address when or how the information would be collected and used. The Notice suggests that employers should be required to collect age and gender information as of the first day of the plan year, but does not address which plan year or why this date was chosen. The Notice suggests that the FEHBP standard option cost may be determined based on actual claims, but does not explain when or how that information will be collected and analyzed, let alone when it will be made available.

ERIC members have raised a simple question. If the dollar thresholds will be known in advance of the applicable taxable period, why cannot the age and gender adjustment also be known in advance of that taxable period? Stated differently, if the statute does not direct the IRS to follow a specific approach, then why not consider an approach that will make the age and gender adjustment known at or about the same time as the dollar thresholds?

For example, the IRS could consider developing the age and gender adjustment over the same time period used to determine the cost-of-living increases to the dollar thresholds – September 1 through August 31 of each year. The age and gender adjustment for the 2018 taxable period could be determined by collecting and analyzing the necessary information over the period from September 2015 through August 2016 (with transition relief as necessary.) The FEHBP data could be collected and analyzed for the calendar year ending in this September through August period, and that data could be projected forward to develop costs for the applicable taxable period. This approach would give the IRS time to develop the age and gender adjustment tables, and release those tables *at the same time* the IRS releases the cost-of-living increases to the dollar thresholds.

The same pattern would be followed for each subsequent taxable period. Thus, the age and

---

adjustment period is based on the calendar year "that is 2 years before" rather than one year before the applicable year.

[7] For example, the IRS announced the 2015 income tax cost-of-living adjustments on October 30, 2014. See IR-2014-104.

gender adjustment for the 2019 taxable period could be determined by collecting and analyzing the necessary information over the period from September 2016 through August 2017. Doing so would enable the IRS to announce the age and gender adjustment tables for an applicable taxable period simultaneously with the dollar thresholds.

We offer the following specific comments on Table A-8a. Contrary to statements made in Notice 2015-52, this table: (1) is updated monthly, not annually; (2) displays data for some 5-year and some 10-year age bands, not all 5-year age bands; and (3) displays gender-specific ratios of employed workers to the total non-institutionalized civilian population for each age band, not the ratio of male to female workers in each age band. Thus, Table A-8a is not the best source of data for the age and gender composition of the national workforce. Fortunately, the BLS collects and publishes Current Population Survey data that is more specific than the information provided in Table A-8a, and that data will allow the IRS and Treasury to determine the gender composition of the national workforce for specific 5-year age bands.[8]

D. Make the Age and Gender Adjustment Optional. The age and gender adjustment operates only to increase, not to decrease, the dollar thresholds. In many cases, the age and gender composition of an employer's workforce will not be materially different from the age and gender composition of the national workforce. As a result, the age and gender adjustment will offer no advantage to a significant proportion of employers.[9]

Instead of requiring all employers to collect age and gender data, we suggest that the IRS and Treasury confirm that the age and gender adjustment is optional. If an employer wants to rely on the age and gender adjustment, then the employer will need to collect and maintain age and gender data for its workforce. But if an employer does not want to rely on the age and gender adjustment, then the employer should not be required to collect age and gender data for its workforce. ERIC members believe that making the age and gender adjustment optional is a common-sense interpretation of the law that will not adversely impact the administration of Code section 4980I.

For those employers that elect to use the age and gender adjustment, we also suggest that IRS and Treasury revisit the idea of requiring the choice of the first day of the plan year as a "snapshot date" for determining the age and gender composition of an employer's workforce. A snapshot date linked to the beginning of the plan year is completely arbitrary – the focus of the statute is on the age and gender composition of the employer's workforce, not on the plan or plan(s)

---

[8] The BLS maintains labor force statistics from the Current Population Survey in various series reports. These reports are highly detailed and display data for 5-year age bands based on gender and other attributes. For example, series report LNU02000326 shows the total number of employed women ages 25-29, series report LNU00024932 shows the total number of employed men ages 25-29, and series report LNU02024932 shows the total number of employed workers (both women and men). For July 2015, the percentage of women ages 25-29 in the workforce was 7,482,000/16,358,000 or 45.7%, while the percentage of men ages 25-29 in the workforce was 8,876,000/16,358,000 or 54.3%. The series reports can be accessed using the BLS "series report tool" at http://data.bls.gov/cgi-bin/srgate. A full list of series reports is available by contacting the BLS.

[9] A broader concern is that the age and gender adjustment may lead to non-uniform administration of the Code section 4980I excise tax. At least one actuarial firm has noted that the age and gender adjustment will understate the age and gender impact for plan sponsors with higher-than-average costs, and overstate the age and gender impact for plan sponsors with lower-than-average costs. See Milliman Client Report, "*What does the ACA excise tax on high-cost plans actually tax?"* (December 9, 2014). As of September 30, 2015 a copy of the Milliman report is available here: https://www.nea.org/assets/docs/Milliman--What_Does_the_Excise_Tax_Actually_Tax.pdf

maintained by the employer. We suggest a more common-sense approach would be to permit employers to use one or more "snapshot dates" during the course of a 12-month measurement period and provide flexibility to allow the employer to determine which snapshot date or dates to use on a uniform and consistent basis.[10]

II. COST OF APPLICABLE COVERAGE

In our earlier comments on Notice 2015-16, we discussed the manner in which employers with self-insured health plans have historically approached the development of budget cost and COBRA cost, relying on actuarial projections. Importantly, these determinations are almost universally made in advance of a plan year, and ERIC members believe that a similar advance determination process is imperative for purposes of determining excise tax cost under Code section 4980I. Our comments below focus on the specific cost determination issues raised in Notice 2015-52.

A. Timing of cost determinations. Notice 2015-52 includes an extensive discussion of when the cost of applicable coverage will be determined. As part of this discussion, the IRS and Treasury repeatedly suggest that this determination will be made *after* the end of the applicable taxable period. Thus, Notice 2015-52 indicates that IRS and Treasury "anticipate that employers will be required to determine the cost of applicable coverage…sufficiently soon after the end of that taxable year" and "invite further comments on any issues raised by the anticipated need to determine the cost of applicable coverage for a taxable period reasonably soon after the end of that taxable period."

ERIC members strongly oppose any requirement that the cost of applicable coverage be determined only on a retroactive basis; employers must be given the option of making this calculation prospectively or retroactively.

As noted above and in our earlier comments on Notice 2015-16, employers will almost always want to determine the cost of applicable coverage well *in advance* of the applicable taxable period, not after the fact. Moreover, the IRS and Treasury suggestion that an after-the-fact cost determination approach will be *required* is completely inconsistent with the IRS and Treasury discussion in Notice 2015-16 regarding COBRA cost determinations. As discussed at length in our earlier comments, ERIC members universally determine COBRA cost in advance, and many intend to take the same approach with respect to the determination of the cost of applicable coverage under Code section 4980I.

It appears that some of the IRS and Treasury concerns are based on presumptions that certain costs will not be known until after the end of the applicable taxable period. This is irrelevant. Code section 4980I does not require after-the-fact reconciliation of costs, as is the case with the Medicare drug subsidy or the early retiree reinsurance program. Instead, Code section 4980I affirmatively indicates that applicable cost may be determined "under rules similar to" the cost determination rules under Code section 4980B. And, as Notice 2015-16 plainly recognizes, COBRA cost determinations may be based on projected rather than actual costs. There is not now, nor has there ever been, a suggestion that employers must "re-determine" COBRA cost after

---

[10] For example, the "snapshot" method for the PCORI fee allows employers with self-insured plans to count covered lives on at least one date in each quarter, then average the count by the total number of snapshot dates (and each date used for the 2nd through 4th quarters must be within 3 days of the date used for the 1st quarter) which must be the same date for each quarter). See Treas. Reg. §46.4376-1(c)(2)(iv)(A).

the fact based on payments or rebates received after the end of a COBRA determination period. To the contrary, if a plan sponsor receives such after-the-fact payments or rebates, those amounts are taken into account in setting COBRA premiums for future determination periods, but are not taken into account for past determination periods.

The IRS and Treasury concerns about claims run-out periods for HRAs and health FSAs are similarly misplaced. When determining the cost of applicable coverage in advance, ERIC members will first determine the cost of major medical coverage before determining the cost of supplemental health coverage, such as HRA or health FSA coverage. If the cost of the major medical coverage is close to the Code section 4980I dollar thresholds, ERIC members will always want to reduce or eliminate the cost of any supplemental health coverage *before* the beginning of the applicable taxable period. We urge the IRS and Treasury to confirm that Code section 4980I does not require the cost of applicable coverage to be determined or adjusted retroactively if an employer is projecting the cost of applicable coverage in advance under a methodology consistent with Code section 4980B.

B. Income Tax Reimbursements. Notice 2015-52 requests comments on whether income tax reimbursements should be excluded from the cost of applicable coverage, and on administrable methods for excluding such reimbursements. Notice 2015-52 also describes two approaches for administering an income tax reimbursement formula, and requests comments on those approaches. While our preferred approach is to avoid income tax reimbursements entirely by clarifying that in all cases employers may pay the excise tax directly (see the discussion below in Part IV), we offer the following comments and observations.

ERIC members strongly support the policy that income tax reimbursements should be excluded from the cost of applicable coverage. Because these reimbursements will always occur after the end of the applicable taxable period, they raise many of the same "after-the-fact" complications noted above. The fact that Code section 4980I(d)(2)(A) specifically excludes excise tax reimbursements from the cost of applicable coverage is a clear suggestion that Congress did not believe that tax costs related to the excise tax should be included in the cost of applicable coverage. Excluding income tax reimbursements from the cost of applicable coverage also makes the administration of Code section 4980I less complicated, and that is beneficial for both employers and the IRS.

With respect to the income tax reimbursement formula itself, ERIC members note that it is common practice for vendors to negotiate tax gross-ups based not on their specific marginal tax rate, but on the highest possible marginal tax rate (including federal, state and local tax rates). The vendors' rationale is that they do not know, in advance, what their marginal tax rate will be over the term of a particular contract, so their negotiating position is based on protecting themselves from a "worst-case" tax scenario. We suggest that IRS and Treasury simplify the tax reimbursement formula by substituting "highest marginal tax rate" for "marginal tax rate," clarifying that the formula may include not just federal but also state and local income taxes, and excluding any income tax reimbursement based on this revised formula from the cost of applicable coverage.

C. Allocation of contributions to HSAs, HRAs, etc. Notice 2015-52 indicates that IRS and Treasury are considering an approach under which contributions to account-based plans would be allocated on a pro-rata basis over the period to which the contribution relates (generally, the plan year), and invites comments on this approach and alternative approaches.

At the outset, let us strongly reiterate one of our comments on Notice 2015-16 vis-à-vis HSAs, namely, that HSAs do not constitute "applicable coverage" for purposes of Code section 4980I because they are not group health plans. Thus, neither employer nor employee contributions to HSAs should be taken into account in determining the cost of applicable coverage.

In addition, our comments on Notice 2015-16 also recommended that IRS and Treasury adopt several positions vis-à-vis HRAs; namely:

- Excluding integrated HRAs entirely, because employer credits to such HRAs are already taken into account in determining the cost of coverage for the integrated group health plan;

- Excluding stand-alone retiree HRAs, because subjecting these arrangements to the excise tax is inconsistent with historic promises made to retirees; and

- Excluding all pre-2018 credits to stand-alone and integrated HRAs from the cost of applicable coverage (and particularly in the case of contributions to retiree HRAs).

Based on these positions, we believe that the pro-rata approach described in Notice 2015-52 should not apply to contributions to HRAs that are excluded from the scope of applicable coverage.

Finally, in addition to excluding pre-2018 credits from the cost of applicable coverage, we suggest that the IRS and Treasury consider alternative approaches that would give employers the flexibility to spread HRA contributions over periods of time longer than a single plan year. For example, we are aware that some employers are converting their retiree health plans from traditional defined benefit plans to retiree HRAs, and "funding" those HRAs with a lump-sum credit (rather than an annual credit) designed to be sufficient to cover retiree health costs over a period of years. In this situation, for post-2017 contributions, it would be appropriate to spread the front-loaded credit over the retiree's life expectancy (or over a shorter period based on reasonable assumptions) rather than a single plan year; failure to permit such treatment may force many employers to forgo this additional financial protection for their retirees.

D. Miscellaneous comments on cost determinations. In reviewing Notice 2015-52, some ERIC members suggested that IRS and Treasury consider a long-term or intermediate safe harbor to simplify the process for making cost determinations under Code section 4980I. In lieu of using a COBRA cost determination approach, an employer would be permitted to use the group health plan cost information reported on Form W-2 as an alternative cost determination methodology.[11] The advantages of this approach are self-evident: employers already have procedures in place to identify the Form W-2 information in advance of a calendar year, and those procedures comply with existing IRS guidance.

IV. EXCISE TAX PAYMENT RESPONSIBILITY

Notice 2015-52 indicates that IRS and Treasury are considering an approach under which the coverage provider responsible for paying the Code section 4980I excise tax is "the person that administers the plan benefits" and explains further that this person is "the person that has the ultimate authority or responsibility under the plan … with respect to the administration of plan benefits." Notice 2015-52 invites comments on this approach.

---

[11] See generally Code section 6051(a)(14) and Notice 2012-9.

One of the most intransigent administrative problems related to Code section 4980I is the baffling way in which the statute approaches the determination and payment of the tax. The statutory scheme turns already highly complicated and reticulated excise tax calculations and payment activity into a veritable three-ring circus, featuring multiple coverage providers, nonsensical information flows, and the apparently un-anticipated problem of income tax reimbursement payments. To the maximum extent possible, the Code section 4980I rule-making process should attempt to bring clarity and simplicity to this unnecessarily complex system.

ERIC members believe that the IRS and Treasury are on the right track, but we believe that additional clarity is necessary. Plan administrative responsibilities are a labyrinth of complexity. In some cases, plan administrative responsibilities are delegated to a single person, a committee, or a board of trustees, rather than to an entity. In other cases, plan administrative responsibilities are delegated (or re-delegated) to service providers performing specific functions – this is particularly common for enrollment functions, claims adjudication functions, appeal functions and subrogation functions. And, unfortunately, the documentation of plan administrative responsibilities is not always precise – in some cases, plan documents and employer resolutions describing the delegation of administrative responsibilities will be highly specific, while in other cases such documentation may be less clear.

But one thing is universally true – the plan sponsor is always the entity with the "ultimate authority or responsibility" for the administration of plan benefits. For this reason, we recommend that IRS and Treasury clarify that, at its option, the plan sponsor may always choose to assume the role of coverage provider with respect to self-insured health benefits, regardless of the way in which the plan assigns and/or delegates plan administrative responsibilities. Adopting this position combines the cost determination and payment functions and assigns both functions to the entity with the greatest authority and control over the plan. This position also eliminates the time delays, financial transfers and income tax problems associated with vendor payments of the excise tax. To the extent vendors are relieved of excise tax payment responsibility, plan administrative costs are reduced, and the IRS can focus its resources on administering the excise tax in the simplest way possible. Plan sponsors would continue to have the option, however, of permitting its relevant vendors to assume responsibility for payment of the tax.

We also recommend that IRS and Treasury permit (but do not require) plan sponsors to accept the coverage provider role with respect to fully-insured health benefits. Many ERIC members offer self-insured health benefits nationwide, but also offer fully-insured HMO benefits in certain geographic locations. These employers will already be determining the cost of applicable coverage for their self-insured benefits (both major medical coverage and supplemental coverage), and making the same determination for fully-insured benefits may not be a major additional responsibility. If an employer is permitted to report and pay the excise tax for both its self-insured and fully-insured options, all of the administrative efficiencies described above will apply with equal force. The insurance carrier will not need to bill the employer for the excise tax, and the employer will not need to reimburse the carrier for the excise tax (and for additional income taxes); further, the IRS will be able to look to one payor rather than two. The IRS could create an administrative mechanism under which the carrier would assign, and the employer would accept, the responsibility of paying the excise tax, and the parties could protect themselves contractually through typical indemnification provisions.

We urge the IRS and Treasury to approach these excise tax payment issues flexibly, with an eye towards simplifying and promoting the manner in which the excise tax is determined and paid. For those who choose this route, assigning the payment responsibility directly to the plan sponsor of a self-insured plan will provide needed clarity and greatly simplify the administration of the tax. Permitting the plan sponsor of a fully-insured plan to accept payment responsibility will offer similar administrative advantages, particularly to those large employers that offer a combination of self-insured and fully-insured benefits.[12]

V. ADDITIONAL COMMENTS

A. Employer aggregation. Notice 2015-52 requests comments on Code section 4980I(f)(9), which generally provides that all employers treated as a single employer under Code section 414(b), (c), (m) or (o) are treated as a single employer for purposes of Code section 4980I. Notice 2015-52 seeks comments on how this aggregation rule affects several determinations required by Code section 4980I, including: (1) the identification of applicable coverage; (2) the age and gender adjustment and increased dollar thresholds for high risk professions; (3) the identification of the entity responsible for reporting excess benefits; and (4) the identification of the employer liable for penalties for failure to properly calculate the excise tax.

ERIC members believe that IRS and Treasury should interpret this provision cautiously. Some ERIC members centralize the administration of their health plans, making the same coverage available to all or most of their affiliates. Other ERIC members have de-centralized health plan administration, allowing one or more affiliates to each offer their own health plan coverage. Depending on the employer's health plan structure, the forced aggregation of different affiliates may create unnecessary administrative problems.

For example, assume that a diversified large employer operates multiple lines of business and allows each affiliated business to sponsor its own health plan. Assume further that each line of business has a separate workforce and that the age/gender composition of each affiliate's workforce is different from the age/gender composition of another affiliate's workforce. In this example, does it make sense to aggregate all of the employers to determine a single age/gender composition for the entire aggregated group? Or does it make sense to adopt a permissive disaggregation rule allowing each affiliate to separately determine the age/gender composition of its workforce? We would pose the same question with regard to the determination of the adjustment for high-risk professions.

Employers in aggregated groups may want the flexibility to centralize, or de-centralize, the functions of determining the cost of applicable coverage, the amount of the excess benefit, and the payment of any applicable excise tax. We recognize that the IRS and Treasury may need to impose ground rules to prevent employers from using related entities to inappropriately avoid excise tax liability. But doing so should not throw the good out with the bad – employers not engaged in abusive activities should be permitted to approach the Code section 4980I excise tax following their own health plan structures, whether centralized or de-centralized.

B. Payment of the excise tax. Notice 2015-52 observes that Code section 4980I does not specify the time and manner in which the excise tax is paid. Notice 2015-52 indicates that the IRS and Treasury are considering using the Form 720 for this purpose, and invites comments about whether a particular quarter should be designated as the quarter for paying the tax.

---

[12] Permitting plan sponsors to pay the Code section 4980I excise tax directly will also help ameliorate potential market disruptions that may be created by the statutory payment scheme. As written, the Code section 4980I payment scheme disadvantages taxable insurance carriers (who will need to seek income tax reimbursement) vis-à-vis tax-exempt insurance carriers (who will not). Direct payment eliminates the need for income tax reimbursement, leaving a level playing field for both taxable and tax-exempt insurance carriers.

At this point, ERIC members do not have firm opinions on this topic. For calendar year corporations, the extended tax return filing date for corporate returns is September 15th, making the third quarter a busy quarter to begin with. But to maximize the time available for determining and paying the tax, it would be advantageous for the 3rd or 4th quarter to be designated as the applicable quarter for paying the excise tax.

C. Additional Comments. ERIC also recommends the following:

- IRS and Treasury should clarify that the rules of Code section 4980I(d)(2)(A), permitting an employer to treat pre-65 retirees and 65+ retirees as similarly situated beneficiaries for excise tax cost determination purposes, do not require an employer to treat both groups of retirees the same for COBRA cost determination purposes.

- IRS and Treasury should clarify that employers using the actuarial cost method for COBRA cost determination purposes are not required to conduct an after-year-end reconciliation process to "true-up" projected COBRA costs with actual COBRA costs.

- Per our earlier comments, IRS and Treasury should clarify that employers are not required to use the same cost determination approach for purposes of Code section 4980B and Code section 4980I. In other words, it should be permissible for employers to use the actuarial cost method for COBRA cost determination purposes and the past cost method for excise tax cost determination purposes (or vice versa).

- Per our earlier comments, IRS and Treasury should not force employers to determine excise tax cost by slicing and dicing their plans in accordance with complicated aggregation and disaggregation rules. Instead, IRS and Treasury should provide flexibility allowing employers to make good-faith determinations of excise tax cost in accordance with longstanding employer practices for determining budget costs and COBRA costs.

ERIC appreciates the opportunity to provide comments on Notice 2015-52. If you have questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Annette Guarisco Fildes
President & CEO
The ERISA Industry Committee