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Submitted electronically via: **Notice.comments@irscounsel.treas.gov**

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

RE: Notice 2015-52 on Section 4980I — Excise Tax on High Cost Employer Sponsored Health Coverage

I. INTRODUCTION.

I write to the Internal Revenue Service (IRS) on behalf of the Tribal Self-Governance Advisory Committee (TSGAC)[1] in response to IRS Notice 2015-52 (Notice 2015-52). In Notice 2015-52, the IRS solicits comments on potential regulatory approaches for implementing Section 4980I of the Tax Code,[2] which establishes an excise tax on certain employer-sponsored health benefits under which coverage providers must pay a tax on employee plans that exceed certain statutory cost thresholds (the excise tax).[3]

Although the TSGAC did not previously submit comments on the excise tax in response to Notice 2015-16, the IRS's February 26, 2015 solicitation of input on various aspects of the tax's implementation[4], we support that benefits provided by Tribes and Tribal organizations are excluded from from the scope of the excise tax:

- In the context of government-provided benefits, the excise tax only applies to "coverage under any group health plan established and maintained primarily for its civilian employees by the Government of the United States, by the

[1] Established in 1996, the TSGAC provides information, education advocacy and policy guidance for the implementation for Self-Governance within the Indian Health Service (IHS). We appreciate the opportunity to provide these comments.

[2] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001, 124 Stat. 119, 793 (2010), codified as amended at 26 U.S.C. § 4980I. Unless otherwise noted, references to "Sections" of statutes within this comment refer to sections of the Tax Code in chapter 26 of the United States Code.

[3] The thresholds are $10,200 for self-only coverage and $27,500 for non-self-only coverage, subject to certain adjustments specified in the statute. 26 U.S.C. § 4980I(b)(3)(C).

[4] These comments are included as an attachment to this current response.

government of any State or political subdivision thereof, or by any agency or instrumentality of any such government."[5] Because this government plan provision does not list or even mention plans administered by an Indian Tribe or Tribal organization, despite specifically addressing state and federal government plans,[6] well-recognized rules of statutory interpretation require that Tribal plans be considered exempt from the excise tax.[7]

- In the event that the IRS construes Section 4980I as applying to Tribal employers who administer their own plans,[8] the statute taxes excess benefit provided to employees covered "under any group health plan made available to the employee by an employer which is excludable from the employee's gross income under section 106 [of the Tax Code], or would be so excludable if it were employer-provided coverage (within the meaning of such section 106)."[9] Because coverage for Tribal member employees is not excluded from income pursuant to Section 106, but rather by virtue of Section 139D, it is not included in the scope of taxable benefits for purposes of Section 4980I and should accordingly be exempt from the excise tax.

[5] 26 U.S.C. § 4980I(d)(1)(E).

[6] The IRS has recognized that the government-specific clause must be read as an integrated whole with the introductory language in 26 U.S.C. § 4980I(d)(1)(A), noting that the fact that the government clause only mentions "civilian" governmental plans implicitly means that Congress intended that military governmental plans are not subject to the excise tax. Notice 2015-16 at 8. This interpretation, and the government plan clause generally, would not make sense if Congress had intended that the excise tax apply to any government plans other than those specified in paragraph (d)(1)(E). *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a[ ] harmonious whole'") (citation omitted).

[7] For example, statutes relating to Indians must be "construed liberally in favor" of Tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In addition, statutes of general applicability that interfere with rights of self-governance, such as the relationship between Tribal governments and on-reservation Tribal businesses and their employees, require "a clear and plain congressional intent" that they apply to Tribes before they will be so interpreted. *See, e.g., E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (Age Discrimination in Employment Act did not apply to employment discrimination action involving member of Indian Tribe, Tribe as employer, and reservation employment); *accord Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (Fair Labor Standards Act did not apply to dispute between Navajo and non-Navajo Tribal police officers and Navajo Nation over "work [done] on the reservation to serve the interests of the tribe and reservation governance").

[8] Tribal employers who purchase group health insurance for their employees would not be liable for the tax, as liability for the tax is limited to "coverage providers," which in those cases would be the health insurance issuer rather than the employer itself. 26 U.S.C. § 4980I(c). Any reference to Tribal employers in this comment is therefore limited to those employers administering self-funded plans.

[9] 26 U.S.C. § 4980I(d)(1)(A).

TSGAC hereby incorporates by reference these comments on the excise tax, and request that the IRS expressly recognize that plans offered by Tribes and Tribal organizations are exempt from the tax pursuant to the plain language of Section 4980I.

To the extent that the IRS ultimately construes Section 4980I as applying to Tribal employers, notwithstanding the statutory provisions noted above, TSGAC offers the following comments regarding a matter of particular concern on which the IRS solicits input.

Specifically, we believe that Notice 2015-52's proposed excise tax payment/reimbursement methodology, under which the "administrator" of a self-insured plan (if determined to be an entity other than the employer itself for purposes of Section 4980I) would pay the tax on the employer's behalf and then bill the employer for the cost after grossing up the amount of the entity's non-deductible excise tax to account for income tax on the reimbursement, is impermissible as a matter of statutory interpretation and very problematic as a matter of tax policy. We elaborate below.

II. DISCUSSION.

Section 4980I(c)(1) states that the "coverage provider" is liable for paying the excise tax. In the context of self-insured plans, the coverage provider is "the person that administers the plan benefits."[10] According to Notice 2015-52, because the latter phrase is undefined in the Code or related statutes:[11]

> [T]he excise tax will be paid . . . by the "person that administers the plan benefits" (which may, in some instances, be the employer) in the case of self-insured coverage. It is expected that, if a person other than the employer is the coverage provider liable for the excise tax, that person may pass through all or part of the amount of the excise tax to the employer in some instances. If the coverage provider does pass through the excise tax and receives reimbursement for the tax (the excise tax reimbursement), the excise tax reimbursement will be additional taxable income to the coverage provider. Because § 4980I(f)(10) provides that the excise tax is not deductible, the coverage provider will experience an increase in taxable income (that is not offset by a deduction) by reason of the receipt of the excise tax reimbursement. As a result, it is anticipated that the amount the coverage provider passes through to the employer may include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur (the income tax reimbursement).[12]

[10] 26 U.S.C. § 4980I(c)(2)(C).

[11] *But see infra* for a discussion of why this interpretation is not accurate.

[12] Notice 2015-52 at 7.

In the context of self-insured plans, the IRS accordingly proposes that (1) the employer will calculate its excise tax liability; (2) pass that information to "the person that administers the plan benefits," which the IRS believes may be the employer, a third party administrator (TPA), or some other entity as determined on a case-by-case basis; (3) that third party (if not the employer) will pay the excise tax; (4) the third party will then bill the cost onto the employer; (5) the employer will reimburse the third party the amount of the Section 4980I excise tax; and (6) in addition, the third party (either as part of the excise tax pass-through or as a separate process) will bill the employer an additional sum to reflect the third party's increase in taxable income in the form of the excise tax reimbursement that it receives from the employer and the grossed up amount of the income tax reimbursement itself. We do not believe that this convoluted scenario is permissible as a matter of reasonable statutory interpretation and the clear statutory intent.

First, the IRS's interpretation would impose an effective tax rate on an employer that exceeds the rate specified in Section 4980I. In the event that an employer provides excess benefits, Section 4980I(a) imposes an excise tax "*equal to* 40 percent of the excess benefit."[13] But by authorizing a TPA to pay the excise tax and bill the employer, and to additionally bill a grossed up income tax amount to cover the TPA's own income tax liability with respect to the reimbursement payment, the employer's liability for tax does not *equal* forty percent of the excess benefit; it *exceeds* it.

For example, in the event of an employer's $2,500 excess benefit, and assuming an effective income tax rate on the TPA of twenty percent, the TPA would pay the excise tax of $1,000, and then bill the employer for that amount, plus the $250 the TPA will owe in income tax on the reimbursement of the non-deductible excise tax and related reimbursement of the income tax itself. That would mean that a Tribe, or any other tax-exempt entity operating a self-insured plan through a taxable TPA, would actually pay $1,250 of tax on an excess benefit of $2,500, or an effective tax rate of fifty percent.[14]

In addition, the application of this proposed methodology leads to a vicious cycle of increasing excise tax liability for the employer. In determining the cost of applicable coverage subject to the excise tax, Section 4980I(d)(2)(A) provides that "any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account." While the drafters acknowledge in the Notice that the computation of the excess benefit under the employer's plan will not include the excise tax reimbursement, the Notice indicates that reimbursement of the TPA's income tax most likely will be added to the cost of coverage subject to the Section 4980I tax.[15]

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[13] 26 U.S.C. § 4980I(a) (emphasis added).

[14] *See* Notice 2015-52 at 8-9 (explaining tax calculation formula under the scenario envisioned by the drafters of the Notice).

[15] Notice 2015-52 at 7-8. However, this interpretation is at odds with the plain language of Section 4980I(d)(2)(A) noting that any portion of cost of coverage "which is attributable to the tax imposed under this section shall not be taken into account." The income tax should be considered to be "attributable to the tax imposed under" Section 4980I and subsequently excluded; if not, the IRS is essentially admitting that it has

In practice, this means that should any ultimate implementing regulations treat the TPA as the person administering the plan benefits, and implicate the proposed pay-and-reimburse model, employers will be stuck in a cycle through their reimbursement of the TPA's income tax expenses will subsequently increase the employer's own cost of coverage. Unless the employer amends its plan, this increase is coverage cost will subsequently increase the employer's excise tax liability and its TPA income tax reimbursement obligation. This itself will once again increase the deemed cost of coverage and further gross up the employer's excise tax liability, thus triggering the entire cycle in perpetuity.

This has the potential to drastically compound an employer's effective liability under the statute *without any increase of benefits under its plan*. For instance, one Tribe has calculated that it would be liable for approximately $250,000 in penalties on an excess benefit of $625,000. Applying the IRS's "income tax liability" formula would result in an additional $62,500 owed to a TPA with a marginal income tax rate of 20%, which would then increase the Tribe's cost of coverage to $712,500 and its excise tax payment to $275,000: a $25,000 increase in liability. In imposing the Section 4980I excise tax as being "equal" to forty percent of the excess benefit, Congress simply did not leave room for an interpretation under which the end-result is an effective tax rate will almost always exceed this stated statutory amount if a TPA is responsible for administration of the plan under the terms established by the employer.

Second, and as noted above, the IRS states that this payment and reimbursement process is necessary because "Section 4980I does not define the term 'person that administers the plan benefits'" who is liable to pay the tax.[16] But this is not accurate: Section 4980I(f)(6) defines the "person that administers the benefits" as the "plan sponsor if the plan sponsor administers benefits under the plan," while Section 4980I(f)(7) then defines "plan sponsor" through the incorporation of section 3(16)(B) of the Employee Retirement Income Security Act of 1974. This provision states in relevant part that the plan sponsor in this context is "the employer in the case of an employee benefit plan established or maintained by a single employer."[17]

We believe that the most natural reading of these provisions as a whole is that the employer should be considered the person that "administers benefits" under the plan, in that the employer has the ultimate administrative authority to set the plan terms, pick the TPA and usually make final benefit decisions. If that were the case, the employer itself would calculate and pay the tax, without having to involve third parties. That seems a much more logical application of the tax than the complex TPA reimbursement scenario Notice 2015-52 suggests, particularly with respect to any Tribe or other tax-exempt employer.[18]

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created the income tax payments sua sponte, without statutory authorization, and in violation of the statutory forty percent excise tax responsibility.

[16] Notice 2015-52 at 7.

[17] 26 U.S.C. § 4980I(f)(7) (incorporating by reference 29 U.S.C. § 1002(16)(B)(i)).

[18] In addition, the Indian canons of construction demand that the agency avoid such an anti-Tribal interpretation of an unclear statute. *See, e.g.*, *Montana*, *supra*.

Third, as a matter of practical implementation and tax policy, requiring that employers coordinate tax payments with a TPA invites a host of administrative difficulties that would not exist if employers simply paid the tax themselves.[19] For example, Section 4980I(e) penalizes the "coverage provider" for failure to properly calculate and pay the tax, which, per the Notice, would mean the TPA. But how will the TPA ensure that the employer has properly calculated the tax amount, which it would then send to the TPA for payment? What recourse would the TPA have if the employer failed to calculate the tax amount accurately and in a timely manner? Would the TPA face a compliance penalty for failure to remit the correct amount of tax based on calculations for which it was not responsible? This would seem to suggest that TPAs would have to oversee or otherwise "check the work" of the employer in order to insulate themselves from liability; would the TPA be authorized to pass through the costs of these added burdens to the employer? Would such pass throughs increase the employer's cost of coverage?[20]

These are just some of the many difficulties and potentially lawsuit-inducing adversarial situations that could arise under Notice 2015-52's pay and reimburse model. As a practical matter, Congress cannot have intended to subject both employers and TPAs to the cost of undertaking such a complex and expensive system, particularly as compared to the relatively straightforward option of simply having the plan sponsor (the employer, in the case of a self-insured plan) calculate and pay the excise tax on its own. Absent any clear statutory direction for doing so, the IRS should not unnecessarily complicate an already complicated calculation.

III. CONCLUSION.

Section 4980I has the potential to seriously affect Tribes' ability to structure employee benefit packages in accordance with Tribal-specific needs. Because the statute excludes Tribes from the list of covered governmental entities, and by its terms does not apply to health benefits provided by a Tribe or Tribal organization to a member of an Indian Tribe, the TSGAC does not believe that Tribal employers who administer their own plans should be subject to the excise tax. Should the IRS disagree on this point, however, we believe that the Notice 2015-52's proposed pay and reimburse model will impermissibly inflate Tribes' excise and income tax based liabilities far beyond the statutory rate specified in Section

[19] The IRS acknowledges this point when it requests comments on a number of difficult issues related to the implementation of this process, such as the manner in which the employer can reimburse the TPA for the income tax-specific portion of the transaction, the discussed issue of whether the income tax payment goes towards cost of coverage, the formula used when calculating the income tax, and other issues. *See* Notice 2015-52 at 7-9.

[20] In addition to these tax compliance issues, there would be a number of new contractual issues that would arise out of the employer–TPA relationship once this new tax goes into effect, such as the need to verify the TPA's marginal income tax rate on which a portion of the claimed reimbursement is based. While those matters are separate from the tax compliance issues themselves, they would result from an unnecessary and questionable interpretation of tax law.

4980I. The IRS should abandon this payment model both as a matter of law and tax policy in favor of allowing employers to calculate and pay the tax themselves on any excess benefits they may provide.

Thank you for the opportunity to engage with the IRS on this matter. TSGAC stands ready to work with the IRS on any necessary follow up issues and looks forward to a continued open dialogue on the excise tax. Should you need additional information or have questions regarding these comments, please contact me at (860) 862-6192; or via email: lmalerba@moheganmail.com. Thank you.

Respectfully submitted,

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