

October 1, 2015

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Internal Revenue Service
Room 5203
PO Box 7604 – Ben Franklin Station
Washington, DC 20044

Submitted via e-mail: notice.comments@irs.counsel.treas.gov

The Retail Industry Leaders Association (RILA) welcomes the opportunity to provide comments to the Internal Revenue Service (IRS) and U.S. Department of the Treasury regarding Notice 2015-52, a request for information on implementation of the Excise Tax on High Cost Employer-Sponsored Health Coverage (section 4980I) under the Affordable Care Act (ACA), also known as the 40 percent excise tax.

RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA members offer health coverage to millions of American workers and their families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs.

RILA appreciates the Treasury Department's continued willingness to engage in direct conversations with our retail member companies regarding this matter, and various other employer requirements under the ACA. Our comments below incorporate information that was conveyed to the Treasury Department recently via conference call. RILA is also a member of the National Coalition on Benefits (NCB), and supports the sentiments conveyed in the letter submitted by NCB.

Person that administers the plan benefits/tax liability

As RILA has reiterated to the Department and IRS many times, there is no one-size-fits-all employer-sponsored plan, and not all benefit offerings fit neatly in the same basket. The benefits and services that go into the calculation of the excise tax are numerous and as such, do not come from the same vendor or third party administrator (TPA).

Employers typically contract with multiple coverage providers to administer benefits to their employees. For example, an employer may contract with one TPA to administer its major medical plan, another TPA to administer a wellness program, and a vendor to run its on-site clinic. As noted on the September 9 conference call with the Department, one RILA member company currently uses nine separate TPAs to administer the benefits and services that would come under the 40 percent excise tax calculation.

RILA recommends that the Department and IRS use the second approach described in Notice 2015-52 that the “person” which has the ultimate authority, responsibility or decision making be the employer and not TPAs. The ability for a self-insured employer to pay the 40 percent excise tax directly is of the utmost administrative importance. Requiring employers to pay the excise tax through TPAs would be an administrative nightmare of epic proportions.

Interaction between other ACA requirements and 4980I

Health plan structures and benefit offerings, and complying with all aspects of the ACA cannot be thought of in a vacuum. On the one hand, the ACA is mandating employers to invest in the health of their employees by requiring various benefit offerings, while on the other hand, the ACA’s 40 percent excise tax is penalizing employers who do so.

As Department officials noted on our call, there could be instances in which employer plans meeting the minimum value threshold of 60 percent under section 4980H could be subject to the excise tax. RILA recommends that the Department and IRS create a safe harbor under 4980I so employers which are meeting the minimum value requirements under 4980H are not exposed to the excise tax.

Aside from complying with the ACA-mandated benefits, there are certain benefits that employers offer voluntarily, like access to on-site clinics and executive physicals, which would also be subject to the excise tax. It does not seem logical for employers to be penalized for offering benefits that help to improve the health and well-being of their employees.

The 40 percent excise tax runs counter to the goal of investing in a healthy workforce, and may stifle employers’ ability to create innovative plan designs and willingness to incorporate such things as consumer directed health products, wellness programs, and on-site clinics into their coverage structures. Under the 40 percent excise tax, employers may be forced to scale back their investment in these important benefits, which are increasingly valued by employers and employees alike. The 40 percent excise tax may also stifle employees’ willingness to invest in their own medical savings.

Non-calendar year plans/determination period/run-out period

Due to the nature of the retail industry where busy business seasons often occur during the fall and end of the year, many retailers utilize a non-calendar year plan year so employees’ focus and company resources are not taken away from the business of selling goods and services in order to make benefits selections and implement a new plan year. RILA urges the Department and IRS to develop rules that provide flexibility for employers utilizing a non-calendar year plan year.

Additionally, RILA strongly recommends the Department and IRS to consider the timeline for employer compliance under other aspects of the law, specifically the W2 reporting and 6055 and 6056 reporting, when developing the regulations under 4980I. Planning and budgeting for ACA compliance is a multi-step, multi-year process for employers. As RILA has noted to the Department and IRS numerous times, employers see ACA compliance on the whole, and not siloed under specific sections of the law or code. RILA member companies can provide

additional information on the timeline of compliance should it be of help to the Department and IRS.

Further, RILA relayed concerns on the conference call about how to determine the cost of coverage at the end of the calendar year and specifically, the concern that the run-out period of 90 days would not be sufficient. As noted, there are instances that a run-out period could take as long as six months. RILA recommends the Department and IRS consider a longer run-out period and take into consideration costs of claims when they are paid out, not the cost of the claim when it occurs. The claim charge could change multiple times before the final rate is determined.

Conclusion

Long before the enactment of the ACA and its employer requirements, retailers embraced the concept that investing in a healthy workforce today not only lays the foundation for a healthier society but also ensures the development of a more productive workforce which is able to enjoy a higher quality of life. For decades, RILA's member companies have strived to provide their employees and families with quality, affordable health coverage and benefits.

RILA is extremely concerned about the impact of the 40 percent excise tax on employer plans and availability of benefits to millions of retail employees and their families. Employers have been actively engaged for years in developing innovative approaches to encourage preventive health care to improve employee health outcomes.

Regulations must take into consideration the uniqueness of plan benefit design and covered population within the self-insured market, specifically in the retail industry. RILA strongly urges the Department to use its regulatory authority to provide employers with multiple safe harbors and calculation methods to determine the excise tax, and transition relief as was provided under 4980H.

Employer-sponsored coverage is the crown jewel of the American health care system. RILA is committed to ensuring employer-sponsored health coverage remains a viable option for the nearly 170 million Americans receiving coverage today. RILA looks forward to continuing to provide constructive business-operation information and policy recommendations to the IRS and the Treasury Department as the ACA regulatory development and implementation process proceeds.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.