



Submitted via email to Notice.comments@irscounsel.treas.gov

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: IRS Notice 2015-52: High Cost Health Coverage Excise Tax

Dear Sir/Madam:

The Association of Governmental Risk Pools ("AGRiP") respectfully submits these comments in response to Notice 2015-52 and in support of the development of regulatory guidance regarding the Excise Tax on High Cost Employer-Sponsored Health Coverage (the "excise tax").

BACKGROUND

AGRiP's mission is to promote pooling as a practical extension of local government's obligation to be a good steward of public funds. Founded in 1998 and currently headquartered in Latham, New York, AGRiP is a national association of over 200 public entity risk pool members from more than forty (40) states, plus Canada and Australia. Eighty-percent of the more than 90,000 public entities in the United States participate in one or more risk pool, including some thirty (30) public entity health benefits pools or trusts.

For over twenty-five (25) years, public entity health pools have performed the essential government function of providing health benefits to public employees and their dependents at the lowest possible cost to local governments and their taxpayers. The pools are comprised of thousands of school districts, counties, municipalities, authorities and other governmental entities, and are all tax exempt, non-profit and funded by local tax revenues.

Overseen by directors or trustees elected from and by their public entity participants, these pools are established under state intergovernmental cooperation laws which allow their participating municipalities, counties, schools, and special districts to self-fund their health benefits on a pooled basis. Their public employer pool participants are all public entities and the health benefits pools themselves are all governmental instrumentalities funded solely by taxpayers. It is on behalf of these pools, and the public employers they serve, that we are submitting these comments.

OUR CONCERNS

Our principal concern is that the excise tax will impose an undue fiscal burden on public employers and the health benefits pools in which they participate. Although the excise tax is not effective until 2018, it is having an immediate impact on the collective bargaining and budget planning of state and local governments, with the greatest impact on municipal union contracts for fire, police and school district personnel, many of which will expire between now and the end of 2017. Our members are further burdened in some states by statutorily mandated benefits for public sector retirees and their dependents. It is therefore no surprise that the excise tax will have significantly greater impact on public employers than their private counterparts.

We wish to share our comments with a view toward minimizing the impact of the excise tax on our membership and thereby allow them to continue to find cost-effective ways of providing affordable health benefits to all public employees and retirees, and their dependents.

COMMENTS RELATING TO NOTICE 2015-52

AGRiP hereby submits the following comments on the issues raised below by the Treasury Department and the Internal Revenue Service (collectively “the Department”).

1. Persons Liable for the §4980I Excise Tax [Section III]

A. Person that Administers the Plan Benefits [Section III.B]

The Department proposes two approaches for identifying “the person that administers the plan benefits” responsible for paying the excise tax. The first would be to designate the third-party administrator for benefits that are self-insured except where the employer or plan sponsor performs those functions or owns the person or entity that does. The second approach would be to designate the “person that has the 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”. This ultimate authority or responsibility could, according to the Department, include “eligibility determinations, claims administration, and

arrangements with service providers (including the authority to terminate service provider contracts)”. The Department has requested comments as to these approaches to assist the Department in deciding which one is best.

We recommend that the Department adopt the second approach because it will allow AGRiP’s public employer health pools to better manage the excise tax payment process for the benefit of their participating employers. Those employers, in turn, are required by Section 4980I(c)(4)(A) to calculate and report to the IRS and the party responsible for payment the “cost of applicable coverage”, the taxable “excess benefit” and the amount of the excise tax. To avoid compliance issues, health pools will likely assist their employer participants in discharging this responsibility. It is therefore most efficacious for them to also assume responsibility for paying the tax rather than their third-party administrators. This approach would also avoid the “tax on tax” issue flagged by the Department if TPAs, which are not typically tax-exempt, are made responsible for paying the excise tax. Under the TPA approach it would also be difficult to identify the responsible party for employer-sponsored plans that have various TPAs.

2. Cost of Applicable Coverage [Section V]

A. Determination Period [Section V.B]

The Department notes some potential timing issues that are likely to arise for insured and self-insured plans and that may also be unique for HSAs, Archer MSAs, Health Flexible Spending Arrangements (“FSAs”) and Health Reimbursement Arrangements (“HRAs”). The Department has also invited comments as to how payments or discounts paid to or from a coverage provider may be reflected in the cost of applicable coverage.

Given the potential impact on our public employer health pools we recommend that any payments, discounts, rebates or credits should be allocated on a *pro rata* monthly basis for the “applicable calendar year”, i.e. the coverage period in which the rebate, discount, payment or credit is taken or made. These will then be used in determining the “cost of applicable coverage” for that calendar year. This approach will ensure that the excise tax is properly imposed on the true cost of that coverage with a high degree of administrability.

B. Exclusion from Cost of Applicable Coverage of Amounts Attributable to the Excise Tax and the Income Tax Reimbursement Formula [Sections V. C & D]

The Department correctly recognizes a significant “tax on tax issue” which will arise when the taxpayer is a taxable entity; for example, where AGRiP’s health pool TPAs are made responsible for paying the excise tax. As already noted, that is one of the reasons we do not support the use of TPAs for that purpose. We have no comment as to the income tax reimbursement formula because that would not impact AGRiP’s tax exempt public employer health pools if they, and not their TPAs, are responsible for

the payment of the excise tax. We do, however, recommend that the Department allow separate billing of the excise tax payment.

C. Allocation of Contributions to HSAs, Archer MSAs, FSAs, and HRAs and the Cost of Applicable Coverage under FSAs with Employer Flex Credits [Sections V. E&F]

The Department raises the question of how best to determine the cost of applicable coverage for various account-based arrangements, which cost is tied to employer and employee contributions. We endorse the “safe harbors” proposed by the Department for the allocation of employer and employee contributions on a monthly *pro rata* basis regardless of when those contributions are made during the applicable calendar year. We also endorse the “safe harbor” whereby the cost of applicable coverage for the plan year would be the amount of an employee’s salary reduction without regard to any “carry-over” amounts.

With respect to allocating FSA amounts between non-elective flex credits and salary reduction contributions when the total amount reimbursable under the FSA exceeds the salary reduction contribution limit under Code Section 125(i), we encourage the Department to provide a safe harbor that (i) permits the *pro rata* monthly allocation of both non-elective flex credits made newly available for the current year and salary reduction contributions (which would include the maximum reimbursable amount of non-elective flex credits contributed to the FSA up front), and (ii) excludes from the cost of applicable coverage all carryover amounts up to \$500 regardless of whether these carryover amounts are comprised of non-elective flex credits or salary reduction contributions. This would be consistent with the proposed safe harbor with respect to salary reduction contributions. For administrative simplicity, we also support the Department extending this proposed safe harbor to situations when the total amount reimbursable under the FSA does not exceed the salary reduction contribution limit under Code Section 125(i).

Before the Department issues proposed regulations addressing how account-based arrangements should be factored into the applicable cost of coverage, we encourage it to keep in mind that many employers have set up these arrangements with plan years that differ from the calendar year. We recognize the inherent complexity of calculating the cost of these account-based arrangements and how this complexity may discourage employers from offering them in the future.

3. Age and Gender Adjustment to the Dollar Limit [Section VI]

A. Determination of Age and Gender Distribution and the Development of Age and Gender Adjustment Tables [Sections VI. A & B]

We agree with the method proposed by the Department to determine the age and gender distribution of an employer's health plan enrollees in calculating the appropriate adjustments to the baseline per employee dollar limits for 2018. While we cannot suggest any alternative approaches for the development of age and gender adjustment tables, we do recommend that the Department adopt a "snapshot" method for determining the age and gender characteristics of an employee population such that employers could establish their health plan age/gender enrollee profile on the first day of the plan year.

4. Notice and Payment [Section VII]

A. Notice of Calculation of Applicable Share of Excess Benefit [Section VII.A]

Consistent with our recommendation below as to the payment of the excise tax, we recommend that employers be required to provide the requisite notice under Section 4980I(c)(4)(A) to the "coverage provider" by no later than July 31 of the year following the "applicable calendar [taxable] year" for which the cost of coverage is determined. That should give participating employers in AGRiP's health pools sufficient time to calculate the cost of applicable coverage and the taxable "excess benefit" as well as the amount of the excise tax itself. As a result, AGRiP's health pools and their participating employers will have more time to take into account any "run-out" for account-based arrangements.

B. Payment of §4980I Excise Tax [Section VII.B]

We fully endorse the Department's suggestion that the IRS designate a single quarter for the payment of the excise tax much like the PCORI fee. With employers required to comply with the notice requirement by July 31 in the year after the applicable calendar year, we recommend that the excise tax be paid with the filing of a Form 720 for the third quarter of that year, or by no later than October 31 of that year.

5. Interaction Between Section 4980H (Assessable Payments Under the Employer Mandate) and Section 4980I (High Value Plan Excise Tax) [Section VIII]

The Department has also invited comments on the circumstances in which the interaction between the provisions of Sections 4980H and 4980I might raise concerns and whether and how "these provisions might be coordinated consistent with the statutory requirements of these provisions and in a manner that is administrable for employers and the IRS". Consistent with comments offered by

other stakeholders, we are concerned that in complying with the employer mandate many public employers who participate in AGRiP's health pools will offer "Bronze" level equivalent health plans that will be subject to the excise tax.

We therefore urge the Department to adopt a "safe harbor" exempting employers that only offer a "Bronze" level equivalent plan to their employees. It would be inequitable to subject those employers to this onerous excise tax when they must offer those plans simply to comply with the Section 4980H employer mandate.

Thank you for considering our comments. If you have any questions or would like to discuss these comments further, please do not hesitate to contact me at (518) 220-0336 or agergen@agrip.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Gergen", with a long horizontal flourish extending to the right.

Ann Gergen
Executive Director
Association of Governmental Risk Pools