



AMERICAN BENEFITS
COUNCIL

December 5, 2008

VIA FEDERAL EXPRESS AND ELECTRONIC DELIVERY

Internal Revenue Service
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

**RE: PROPOSED REGULATIONS REGARDING COMPARABLE CONTRIBUTIONS
TO HEALTH SAVINGS ACCOUNTS AND REQUIREMENTS FOR FILING OF
EXCISE TAX RETURNS (REG-120476-07)**

Dear Sir or Madam,

The American Benefits Council (the Council) appreciates the opportunity to comment on the proposed regulations regarding employer comparable contributions to health savings accounts (HSAs) and the taxpayer requirements for filing of excise tax returns with respect to Internal Revenue Code sections 4980B and 4980F (Proposed Regulations).¹ The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We focus most of our comments in this letter on the Proposed Regulations regarding the COBRA excise tax provision and the use of new proposed Form 8928. Notably, many of the comments expressed herein apply equally to the Proposed Regulations regarding the reporting and payment of other excise taxes, such as those required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), although we do not expressly address those excise tax provisions in this letter.

At the close of this letter, we also address the portion of the Proposed Regulations that provides an exception from the general prohibition against employers making greater contributions to highly compensated employees. As discussed below,

¹ All references to the "Code" hereinafter are to the Internal Revenue Code of 1986, as amended.

the Council supports the proposed rule because it allows employers to more fully maximize the cost savings and coverage opportunities for their employees, as provided by HSAs and high deductible health plans.

PROPOSED REGULATIONS REGARDING THE COBRA EXCISE TAX PROVISION

The Council recognizes that the COBRA excise tax has been in the Code since 1988 and appreciates the Treasury Department's current efforts to develop a set of rules and related forms for the filing and payment of the excise tax. The Council and its membership remain committed to providing comprehensive health benefits coverage and continuation coverage to employees. Nonetheless, as more fully discussed below, there are many open questions regarding the general operation of the COBRA excise tax provision under Code section 4980B. These questions include, among others:

- What constitutes a reportable violation for purposes of Code section 4980B;
- How to determine when a reportable violation has occurred or otherwise commenced;
- The general availability of the self-correction provisions contained in Code sections 4980B(b)(2)(B)(i) and 4980B(c)(2), and what constitutes a valid self-correction with respect thereto;
- How the maximum penalty provisions of Code section 4980B dovetail with the statutory rules apparently imposing joint and several liability on responsible parties; and
- How the Proposed Regulations interact with the proposed rulemaking issued on July 1, 2008, which provides for an automatic six-month extension for the filing of the proposed Form 8928, but does not provide for a corresponding extension regarding the payment of any excise taxes.

Given the many open issues with respect to the operation of Code section 4980B, the Council is concerned that the Proposed Regulations could lead to significant confusion and unintended detrimental consequences for employers and third party administrators who otherwise seek to comply with their COBRA obligations. As discussed below, the Council is also concerned that the Proposed Regulations would severely limit the self-correction opportunities otherwise provided by Congress when it enacted COBRA. Therefore, unless and until additional proposed guidance is issued that establishes a workable COBRA excise tax regime – one that provides clear rules for responsible parties as to (i) how and when to determine excise tax liability, and (ii) the ability for utilizing existing self-correction opportunities – the Council requests that the Proposed Regulations not be finalized.

Please note that the following discussion is intended only to highlight some of the numerous issues that remain unanswered under existing guidance with respect to the scope and operation of the COBRA excise tax provision and is not intended to be an exhaustive list.

What Constitutes a Reportable Violation for Purposes of Code Section 4980B?

In certain instances, it may not be clear to employers or third party administrators as to whether a reportable violation has occurred for purposes of Code section 4980B. For example, the Department of Labor (DOL) has issued regulations requiring the distribution of two additional COBRA notices not otherwise required by Code section 4980B and the Treasury regulations thereunder. These two notices are (i) the notice of early termination of COBRA coverage, *see* DOL Reg. § 2590.606-4(d), and (ii) the notice of unavailability of COBRA coverage, *see* DOL Reg. § 2590.606-4(c) (collectively, DOL Notices). Because these DOL Notices are not imposed upon responsible parties by Code section 4980B and the regulations thereunder, it is unclear to the Council as to whether a party's failure to provide one or both of the DOL Notices would give rise to a reportable excise tax liability for purposes of Code section 4980B.

Even if the Proposed Regulations do apply to one or both of the DOL Notices, it is not clear how a responsible party can/should determine the start of the noncompliance period under Code section 4980B for purposes of self-reporting and paying any COBRA excise tax owed. This is because the timing rules for distribution of the DOL Notices are not very specific. For example, with respect to the DOL Notice regarding early termination of COBRA coverage, the DOL regulations require only that the notice be provided "as soon as practicable" after the termination of coverage. Absent a specific date requirement, it is impossible for employers and third party administrators to calculate and self-report with certainty any COBRA excise tax owed.

Moreover, as we discuss below, there are numerous questions regarding the scope of the self-correction right provided by Code section 4980B and what constitutes a full and complete self-correction. Absent a more comprehensive set of rules regarding what constitutes a reportable violation for purposes of Code section 4980B, employers and administrators will have a very difficult time understanding their obligations under the existing COBRA excise tax provision and in complying with the requirements for use of the new Form 8928.

When Has a Reportable COBRA Violation Occurred?

A necessary assumption behind the Proposed Regulations and the use of the proposed Form 8928 is that employers and third party administrators will be able to know when a COBRA violation has occurred. For example, it could be very difficult, if not impossible, for many employers with large workforce populations and/or multiple worksite locations to pinpoint the specific date of a COBRA failure for purposes of calculating any excise tax owed. Given the existing complexities with respect to COBRA notice administration for employers, the Council requests the issuance of a set of proposed safe harbor rules that could be used by employers in determining when a COBRA violation has commenced and otherwise ended. Without such safe harbor

rules to look to, it could be very difficult for many large employers to comply with the Proposed Regulations regarding the self-reporting of COBRA excise tax liability.

What Is the General Scope of the Self-Correction Provisions in Code Section 4980B?

Code section 4980B provides two important opportunities for responsible parties to limit or otherwise wholly eliminate COBRA excise tax liability. The first opportunity, as provided by Code section 4980B(b)(2)(B)(i), allows a taxpayer to limit its liability through self-correction by capping the duration of the noncompliance period and thus any resulting excise taxes owed. The second opportunity, as provided by Code section 4980B(c)(2), allows a taxpayer, in certain instances, to wholly eliminate any excise tax liability through qualifying self-correction.

Whether an employer or administrator has incurred a reportable violation for purposes of the COBRA excise tax provision depends on (i) the availability of the two self-correction opportunities provided by Code sections 4980B(b)(2)(B)(i) and 4980B(c)(2), and (ii) what constitutes a full and complete correction for purposes of Code sections 4980B(b)(2)(B)(i) and 4980B(c)(2). Absent additional proposed guidance that helps clarify these two questions, employers and administrators will be unable to determine their liability and corresponding reporting obligations under Code section 4980B.

Code Section 4980B(b)(2)(B)(i). Code section 4980B(b) generally imposes an excise tax based, in part, on the length of the noncompliance period. The “noncompliance period” is defined in Code section 4980B(b)(2) as beginning on the date such failure first occurs. Notably, the “noncompliance period” ends on the earlier of (a) the date which is 6 months after the end of the COBRA coverage period (which is generally 18 or 36 months), or (b) the date the failure is corrected. Thus, to the extent that a failure is corrected, this operates to terminate the noncompliance period and cease the accrual of any additional excise tax liability.

Code section 4980B(g)(4) states that “[a] failure... shall be treated as corrected if... (A) such failure is retroactively undone to the extent possible, and (B) the qualified beneficiary is placed in a financial position which is as good as such beneficiary would have been in had such failure not occurred.” Although Code section 4980B(g)(4) indicates that an employer is obligated to return the individual to the same financial position he or she would have been in but for the notice violation, this is a fairly broad statement that provides little meaningful guidance to parties seeking to self-correct.

The lack of more comprehensive guidance regarding self-correction principles under Code section 4980B makes it very difficult for employers and other responsible parties to know with any reasonable certainty whether they have fully corrected an existing notice failure so that there is no longer a reportable violation for purposes of Code section 4980B. Accordingly, prior to finalizing the Proposed Regulations, the Council requests that Treasury issue additional proposed guidance that provides

employers and administrators with reasonable correction principles and/or safe harbor rules regarding what constitutes an adequate correction for purposes of Code section 4980B.

Code Section 4980B(c)(2). In addition to the self-correction opportunity provided by Code section 4980B(b)(2)(B)(i), Code section 4980B(c)(2) provides that the excise tax shall not apply to failures which are (i) due to reasonable cause and not willful neglect, and (ii) are corrected “during the 30-day period beginning on the 1st date any of the [responsible] persons [] knew, or exercising reasonable diligence would have known, that such failure existed.”

The same comments discussed above with respect to Code section 4980B(2)(B)(i) apply equally to Code section 4980B(c)(2). Additionally, when Congress enacted COBRA, it is significant that Congress did not time the start of the 30-day correction “window” based on the start of the noncompliance period. Rather, as expressly stated in Code section 4980B(c)(2), the 30-day “window” for self-correction under Code section 4980B(c)(2) begins as of the date a responsible party “knew, or exercising reasonable diligence would have known, that such failure existed.” Thus, it is clear that Congress provided for a very generous self-correction right – one without reference to the noncompliance period or the timing for filing annual income tax returns.

Notwithstanding Congress’s intent and the express language of Code section 4980B(c)(2), the Proposed Regulations would require that taxpayers file the proposed Form 8928 and pay any resulting excise tax at the same time they file their annual tax returns. Such a rule would seem to wholly disregard the self-correction opportunities provided by Congress, specifically, Code section 4980B(c)(2), by requiring that taxpayers pay an excise tax even before they have either learned of the violation giving rise to the excise tax liability and/or had an opportunity to self-correct. Moreover, it is not entirely clear what would happen under the proposed rule if the taxpayer self-reports the excise tax liability and thereafter self-corrects within the 30-day correction “window,” as permitted by Code section 4980B(c)(2). Presumably the taxpayer would be entitled to a refund, although it remains unclear as to how a taxpayer should go about making a request for such a refund.

For the above reasons, prior to finalizing the Proposed Regulations, the Council urges Treasury to issue additional proposed guidance that fully recognizes the self-correction opportunities provided by Congress in accordance with Code sections 4980B(b)(2)(b)(i) and 4980B(c)(2).

How Can Employers and/or Administrators Invoke the Reasonable Cause Exception?

Code section 4980B(c)(5) expressly allows the IRS in certain instances to waive the excise tax where a violation is due to reasonable cause. The Proposed Regulations do not, however, address how a taxpayer should/could invoke the reasonable cause exception. Moreover, it is unclear how the exception interfaces with the timing for reporting and filing the proposed Form 8928. Accordingly, the Council requests additional proposed guidance that clarifies the interactions between the Proposed Regulations and the reasonable cause exception under Code section 4980B(c)(5).

How Do the Maximum Penalty Provisions of Code Section 4980B Dovetail with the Statutory Rules Imposing Joint and Several Liability?

The COBRA excise tax is based, in part, on the belief that numerous parties involved in the administration of a COBRA-covered plan could be subject to the excise tax provisions for failure to provide the requisite notice. Accordingly, it appears that more than one party could be liable for the excise tax. It is unclear under current guidance, however, whether, and to what extent, one party's payment of an excise tax mitigates and/or eliminates the excise tax liability of a related party. It is also unclear how the statutory excise tax maximums provided for in Code section 4980B(c)(4)(A) apply to taxpayers both individually and in concert. Absent additional proposed guidance on these and other related issues, employers and related third parties will be unable to determine with any reasonable certainty their excise tax liability under Code section 4980B. Accordingly, we request guidance regarding these issues.

How Do the Proposed Regulations Interact with the Proposed Rulemaking Issued on July 1, 2008, Which Provides For an Automatic Six-Month Extension For the Filing of the Proposed Form 8928?

The Council also requests clarification regarding the interplay between the Proposed Regulations and the proposed rulemaking issued by Treasury on July 1, 2008 (73 Fed. Reg. 37389), which provides for an automatic six-month extension of the time to file the proposed Form 8928. Notably, the proposed rulemaking from July 1, 2008 makes clear that although it provides an automatic six-month extension of the deadline for filing a required Form 8928, it does not extend the deadline with respect to the payment of excise tax otherwise owed.

Given that most taxpayers will need to undertake the timely process of calculating any excise tax liability owed for purposes of Code section 4980B and remit any such excise tax in connection with their annual tax returns, it is unclear to the Council what, if any, benefit is conferred on taxpayers by the six-month filing extension. Additionally, if taxpayers choose to avail themselves of the automatic extension, how exactly should these taxpayers remit any excise tax owed? In light of these questions, the Council requests additional guidance regarding the interplay between the Proposed Regulations and the proposed rulemaking issued by Treasury on July 1, 2008.

PROPOSED REGULATIONS REGARDING COMPARABLE EMPLOYER CONTRIBUTIONS TO HSAs

The Proposed Regulations issued on July 16, 2008, also provide an exception from the general prohibition against employers making greater contributions to highly compensated employees (HCEs). Specifically, the Proposed Regulations allow for increased contributions to HCEs where the higher level of funding results from the type of high deductible health plan (HDHP) coverage provided to the HCE. Such a rule recognizes a common manner in which many employers provide important health coverage to employees today. Moreover, such a rule allows employers to more fully maximize the cost savings and coverage opportunities for their employees, as provided by HSAs and HDHPs. Thus, the Council urges that any final rule regarding comparable HSA contributions retain the proposed rule.

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The Council appreciates the opportunity to comment on the Proposed Regulations. We believe that the Council offers an important and unique perspective of both the employer sponsors of COBRA-governed group health plans and the service providers that assist in the administration of such plans, and we look forward to working with you on these important changes.

Sincerely,



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