June 3, 2013

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

CC:PA:LPD:PR (REG-118315-12)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Health Insurance Providers Fee

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the Notice of Proposed Rulemaking on the Health Insurance Providers Fee ("NPRM"), published in the Federal Register on March 4, 2013, and issued by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS").[1] The NPRM provides guidance on the annual fee imposed on covered entities engaged in the business of providing health insurance for United States health risks, as imposed by Section 9010, of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education and Reconciliation Act of 2010, ("PPACA").[2]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 States. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. These comments

[1] Notice of Proposed Rulemaking on Health Insurance Providers Fee, 7 Fed. Reg. 14,034-14,046 (March 4, 2013) (to be codified at 26 C.F.R. pt 57) [hereinafter referred to as "NPRM"] http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04836.pdf .

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9010, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter referred to as "PPACA"].

have been developed with the input of member companies with an interest in improving the health care system.

OVERVIEW

The Chamber and our member companies want quality health care to be readily available at an affordable price. The Chamber continues to advocate for health care reform that builds on the current employer-sponsored system and uses market-based solutions to lower costs, improve quality, and protect American jobs and the employers who create them. Employer-sponsored insurance remains a crucial element of our health care system – providing the most stable, innovative, and affordable health care coverage to Americans. "Of the 218 million Americans under age 65 who had health coverage of any sort in 2010, 157 million (or more than 70 percent) were covered through an employer"[3] even though the PPACA's employer mandate does not go into effect until 2014. Given our commitment to employer-sponsored health insurance, the Chamber and our members urge the Departments to promulgate rules that will further strengthen and expand the positive health impact that these programs have on employees.

Across the country, employers are providing coverage for millions of Americans. Ninety-eight percent of large firms (199 employees or more) and 61% of firms with below 199 employeesoffer coverage.[4] The business community offers coverage in great numbers even though it is increasingly becoming a struggle. Family coverage currently averages $15,745 – that is a 97% increase since 2002.[5] This has far outpaced the growth in wages (33%) and inflation (28%).[6] Given these statistics, it is no wonder that the affordability of coverage is a top concern for employers. The PPACA imposes a number of taxes and fees which will increase the cost of coverage. One such fee is the Health Insurance Providers Fee (or "the fee") which the NPRM addresses. We urge the Treasury and the IRS to follow long-standing tax policy principles to mitigate the unnecessary excess costs that improper tax treatment of the fee would impose on businesses and workers in the form of higher premiums. We also request specific clarification in the final rule that stop loss coverage is not a covered entity and therefore not subject to the fee.

REVISE TAX TREATMENT TO MITIGATE PREMIUM INCREASES

Fee Should Be Excluded From Gross Income for Reporting Purposes

Under the PPACA, the annual fee on health insurance providers (or covered entities) is treated, for tax purposes, as a tax under Section 9010(f), which cannot be taken as a deduction for federal income tax purposes. The Congressional Budget Office (CBO) recognized and informed

---

[3] Employer-Sponsored Healthcare: What Happens Now? The 2012 Survey On Employer Health Benefit Plans and Preferences Conducted by the Oliver Wyman Health & Life Sciences Practice, by Mindy Kairey and John Rudoy http://www.oliverwyman.com/media/OW_EN_HLS_PUBL_2012_Employer_Sponsored_Healthcare_What_Happens_Now.pdf.

[4] Kaiser Family Foundation, "2012 Employer Health Benefits Survey" Accessed at http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf 05/29/2013.

[5] Ibid.

[6] Ibid.

Congress and the President that a large portion of these fees will be passed through to policy holders in the form of higher premiums. The NPRM requests comments on whether the final rule should reflect that any recoveries of the tax by the carriers be explicitly labeled as income. We believe the final rule does not need to reflect that any recovered tax is income because existing tax law well establishes what is considered income. However, based on long-standing federal income tax principles, the final regulations should recognize the application of well-established tax policy, case law and rules that may apply and permit any fees recovered from policy holders to be excluded from the health insurance companies' gross income if the conditions of the tax policy and rules are met. We cite the attached legal analysis from Skadden, Arps, Slate, Meagher & Flom which provides a thorough explanation of the extensive case law that supports this rationale. This opinion was written by a team including Ken Gideon, Former Assistant Secretary of the Treasury for Tax Policy and Chief Counsel for the Internal Revenue Service.

Specifically, as the analysis explains, because there is a direct connection between the fee paid to the government by the insurance providers and the amounts recovered, the payment of the fee and the recovery of the fee amounts should be considered a single integrated transaction. Under the well-established "tax benefit rule," since the fee is not deductible by the insurance company, the fees recovered from policy holders should not be included in the insurance company's gross income. In short, the PPACA's specific reference to the deductibility of the tax is a distinct and different concept under tax principles than how the tax is treated for reporting of gross income.

From a broader policy perspective, excluding the recovered fees from the insurers' gross income would help minimize the impact of the fee on premium costs. In contrast, if insurance providers are required to include the recovered fees in gross income, recovery of the total cost of the fee would include the additional federal income tax, resulting in even higher premium costs for affected employers.

Taxing the Health Insurance Provider Fee Will Increase Premiums Even Further

Instead, the NPRM's proposed ill-advised tax treatment of the fee will not only *further* exacerbate premium increases that will result from the health insurance providers fee, but will collect more federal revenues than required under the PPACA's provision:

> If the Treasury Department determines that the recovery of the fee from policyholders is gross income of the Covered Entities, the additional costs to the Covered Entities of the federal income taxes on that gross income is also expected to be passed on to policyholders. Thus, it is the policyholders, rather than the Covered Entities, that have the largest stake in this issue. Excluding the recovered fee amounts from the Covered Entities' gross income will still result in the Covered Entities paying the full amount of the health insurance providers fee imposed by PPACA (e.g., the full $8 billion Fee for 2014), but will also result in policyholders paying less for health insurance coverage than they will pay otherwise.[7]

[7] Skadden, Arps, Slate, Meagher & Flom, "Annual Fee Imposed on Health Insurance Providers under Section 9010 of the Patient Protection and Affordable Care Act: Exclusion from Gross Income of Recoveries of the Fee from Policyholders," page 1.

In addition to Skadden's legal analysis which outlines case law supporting the exclusion of the health insurance providers fee from gross income for reporting purposes, the Chamber cites a report done by Quantria Strategies which qualifies the effect that the proposed tax treatment of the fee would have on premium increases. By choosing to "tax the tax," Treasury will cause consumer and employer premiums to increase from $45 to $70 billion dollars *more* than the health insurance providers fee statutory provisions require, according to an analysis done by Quantria Strategies.

> The premium increases attributable [under the NPRM's proposed tax treatment of the fee] for taxable health insurers could be as high as $70 billion more than the fee itself. To cover Federal income taxes due, taxable health insurers will need to collect $1.54 from customers for each $1 of premiums attributable to the health insurer fee.[8]

A similar analysis was done by Milliman, which estimated that "the Federal government will collect an additional $61 billion from increased corporate taxes related to the fee's implementation."[9] This excess taxation will occur because the NPRM implies that they will apply federal income tax to the health insurance provider fee premiums that insurers collect and then forward to IRS. This excess taxation represents around one-third of the total premium impact of the tax and is not required under the statute.

Treasury Has the Authority to Reduce the Harm

The Treasury Department has the authority to save consumers and employers $45 to $70 billion in premium costs over the next ten years by clarifying in the final rule that they do not intend to "tax the tax." Numerous IRS rulings and court cases establish that the recovery of costs is not taxable, provided that no tax deduction was claimed for the cost, which it is not for the health insurance providers fee. The Skadden opinion also analyzes precedent to conclude, "Similarly, when a taxpayer is reimbursed for costs that primarily benefit another person [as the health insurance provider will be by premium payers for the health insurance provider fee it will then pay to the federal government], the reimbursements are not included in the taxpayers' gross income, notwithstanding an incidental or indirect economic benefit to the tax payer."

The Treasury and IRS have completely shirked their responsibility to comply with the President's Executive Orders. Failure to address adequately the economic impacts and alternatives involved in this rulemaking contradicts the President's stated intent that the rulemaking process be transparent and be driven by a focus on reasoned determination that its benefits justify its costs. Such an omission is arbitrary and warrants a complete reissue of the NPRM with such analysis included.

STOP LOSS COVERAGE IS NOT HEALTH INSURANCE COVERAGE

---

[8] Quantria Strategies, LLC, Prepared by Mary M. Schmitt and Judy Xanthopoulos, "Effect of the Health Insurer Fee in the Affordable Care Act (ACA) on Health Insurance Premiums" June 3, 2013.

[9] Milliman Research Report, Prepared by Mathieu Doucet and Julia Yahnke, "ACA Health Insurer Fee: Estimated Impact on the U.S. Health Insurance Industry," April 2013.

We urge the Treasury and IRS to clarify that stop loss coverage is not subject to the annual health insurance providers fee since it is not "health insurance coverage" under IRC Section 9832(b)(1)(A). Stop loss coverage is offered by various entities to cover aggregate group and individual losses that exceed certain agreed upon thresholds. Such coverage is provided to an employer maintaining a self-funded group health plan, and in such cases, the self-funded group health plan is providing health coverage to individual participants, not the stop loss insurer. The stop loss coverage caps the plan's risk in connection with self-funding claims. Thus, stop loss coverage is appropriately considered as liability insurance within the meaning of IRC Section 9832(c)(1)(C). In addition, given this characteristic of stop loss coverage, and also in light of the fact that such coverage generally is not treated as health insurance under state law,[10] such coverage should not be considered as a "hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organizational contract" within the meaning of IRC Section 9832(b)(1)(A).

The final rule promulgated on the fees to fund the Patient-Centered Outcomes Research Institute (the "PCORI fee") involves a different statutory definition of health insurance than is applicable under the health insurer fee. However, we think the PCORI fee regulations provide a useful definition of stop loss coverage that could be incorporated into guidance on the health insurance provider fee. In particular, Treas. Reg. Section 46.4375-1(b)(1)(iii) defines a "stop loss policy" as:

> … an insurance policy in which—(A) The insurer that issues the policy to a person establishing or maintaining a self-insured health plan becomes liable for all, or an agreed upon portion of, losses that person incurs in covering the applicable lives in excess of a specified amount; and (B) The person establishing or maintaining the self-insured health plan retains its liability to, and its contractual relationship with, the applicable lives covered.[11]

The Chamber recommends that the IRS confirm that stop loss coverage is not subject to the annual health insurer fee since such coverage is not "health insurance coverage" within the meaning of IRC Section 9832(b)(1)(A).

WAIVE EXPATRIATE HEALTH COVERAGE FROM FEE

In this worldwide economy, an increasing number of employers maintain globally mobile workforces who need health insurance coverage that crosses national boundaries. This insurance is provided both by United States licensed health insurers by United States employers on employees living overseas (whom we will call "expatriates"), as well as foreign insurers licensed outside the United States for foreign employers on employees living in the United States (whom

[10] The Model Stop Loss Insurance Model Act, as adopted by the National Association of Insurance Commissioners (NAIC), precludes issuance of stop loss insurance with thresholds below a prescribed level. Implicitly, policies with lower thresholds would need to be regulated under another regime. Stop loss coverage that satisfies the requirements of this Model Act is not regulated under any of the NAIC Model provisions that apply to health insurance.

[11] Final Rule on Fees on Health Insurance Policies and Self-Insured plans for the Patient Centered Outcomes Research Trust Fund, 77 Fed. Reg. at 72,729 (Dec. 6, 2012).

we will call "inpatriots"). As the preamble to the NPRM correctly highlights, application of the fee in this context raises serious questions and challenges, both from a policy and a technical perspective.[12] This concern comes for the inability to enforce the requirement in parity as statutorily required and enacted in the law.

The PPACA imposes the health insurance providers fee on the premiums for both "expatriates" (U.S. citizens living abroad)[13] and "inpatriots" (foreign citizens living in the U.S.)[14], under Section 9010 (d)(1) and 9010 (c)(3)(B) respectively. However, it will be impossible for the U.S. Department of Treasury to collect the fee from foreign carriers who are generally not subject to U.S. taxing jurisdiction. This would create a disparate application – where the equation and statute is enforced on one side, but not on the other. By enforcing the fee on expatriate coverage, the unfair application of the requirement will: first, exacerbate the cost and complexity of sending American employees abroad; and second, distort the international market place, directly disadvantaging U.S. employers and health insurers. Therefore, to provide the parity that the law intended, we recommend that the IRS waive the application of the health insurance providers fee on expatriate policies.

However, if the final rule retains the NPRM's definition of "health insurance" without modification, then the same tax treatment of the fee must apply for all non-domestic companies, including non-domestic affiliates of U.S. insurers (and without regard to whether such non-domestic affiliates have made an election under Section 953(d)). To do otherwise, would convey a substantial competitive benefit on foreign insurers to the detriment of those non-domestic affiliates without any technical or tax policy basis for doing so.

IMPROPER COST-BENEFIT ANALYSIS AND NO ECONOMIC IMPACT ANALYSIS

In the NPRM, the Treasury and IRS state that "It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined by Executive Order 12866, as supplemented by Executive Order 13563. Therefore a regulatory assessment is not required."[15] The implication is that Treasury and the IRS believe that the annual cost impact is less than the $100 million threshold that triggers the obligation to submit its analysis of costs and benefits to the Office of Management and Budget for review. However, no facts, calculations or analysis are presented to support this conclusion; such an unsupported statement is the quintessence of an arbitrary rulemaking decision.

Cost-Benefit Analysis of Regulatory Alternatives Required

At the very least, the Treasury and IRS have an obligation to state what the annual cost of the NPRM will be and provide the basis for this calculation. Furthermore, the relevant Executive

[12] NPRM, 78 Fed. Reg. at 14,039.
[13] PPACA, Section 9010 "A covered entity means any entity which provides health insurance for any United States health risk during the calendar year in which the fee under this Section is due." 9010(c)(1)"United States Health Risk means the health risk of any individual who is a united states citizen or is a resident of the U.S." 9010(d)(1) & (2).
[14] PPACA Section 9010 "Covered entity includes foreign corporations."
[15] NPRM, 7 Fed. Reg. 14,041.

Orders require Treasury and the IRS to compare the costs and benefits of all regulatory alternatives considered, in addition to the regulatory approach proposed.

The obligation to estimate the economic cost of a regulation is not removed by statutory constraints on regulatory alternatives. The Treasury and IRS should recognize all of the costs and benefits of the proposed regulatory approach and of alternatives not chosen regardless of whether those costs and benefits arise from decisions that are made by the agency under its discretion or from decisions embedded in the underlying statute. Nor should alternatives be excluded from economic analysis because they are not permitted under the relevant statue. Congress and the public will benefit from an explicit and objective presentation of the economic impact of all alternatives, including those that may be excluded from regulatory selection by statutory constraint. The information presented may be useful to inform future statutory revisions.

The Treasury and IRS have seriously misinterpreted the plain language of Executive Order 12866 and confused the general requirement to examine and to consider costs and benefits of alternative regulatory choices with the requirement to submit its analysis to OMB for review in the case where the economic impact is found to be greater than $100 million per year. The finding that the economic impact is less than $100 million per year does not excuse the obligation to calculate and consider economic impact. It only excuses the obligation to submit analysis to OMB for review.

Economic Impact Is In Fact Significant

Furthermore, there is ample evidence that the actual economic cost impact of the NPRM will in fact be significantly greater than $100 million per year. Besides the fact that the regulation is designed to implement the collection of $8.0 billion in fees from the health insurance industry beginning in 2014 (rising to $14.3 billion in 2018 and more thereafter), the Treasury and IRS have made choices within the context of the NPRM that have the effect of adding hundreds of millions of dollars more per year to the cost of health insurance.

In particular, the Treasury and IRS have the obligation to examine and to consider how the regulatory decision to treat (or ignore) the question of inclusion of fee pass-through amounts in the definition of gross revenue for corporate income tax purposes will affect the levels of health insurance premiums. Two studies have extensively examined this issue:

1. Mary Schmitt and Judy Xanthopoulos, "Effect of the Health Insurer Fee in the Affordable Care Act (ACA) on Health Insurance Premiums," Quantria Strategies, LLC, June 3, 2013; and
2. Mathieu Doucet and Julia Yahnke, "ACA Health Insurer Fee: Estimated Impact on the U.S. Health Insurance Industry," Milliman Research Reports, April 2013.

Both of these studies highlight that for-profit insurance providers can be expected to increase premiums by $1.54 for every dollar of the provider fee that they pay if pass-through of fee to customers is treated as gross revenue for corporate income tax purposes. This effect of "grossing-up" the fee pass-through could result in $2.5 billion to $4.3 billion in additional

premium costs to the insured public in 2014, on top of the $8 billion fee itself. While the $8 billion total fee revenue in 2014 is estimated as 1.3 percent of total health insurance premiums, the referenced reports estimate that the effect of subjecting the fee pass-through amount to corporate income taxation would be to increase overall health insurance premiums by 1.7 percent to 2.0 percent. In subsequent years, as the scheduled total fee increases, the annual cost impact on health insurance premiums will increase.

The Treasury and IRS must recognize and analyze these potential costs to consumers and economic impacts on market structure in relation to its regulatory decisions that address this issue. We urge Treasury to utilize its regulatory authority to assure that the financial impact of the health insurance providers fee is no more than it has to be under the statute by clarifying in the final rule that the fee collections will not be taxed.

CONCLUSION

The U.S. Chamber of Commerce urges the Treasury and IRS to continue to work carefully, pragmatically, and cooperatively with the business community to minimize burdens placed on employers and employees as employers work to comply with the law. We continue to be committed to the employer-sponsored system and hope the Departments will consider the effects that various implementation choices will have on employers and their ability to continue to offer the coverage that their employees value. We look forward to continuing to work together in the future.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration, & Employee Benefits
U.S. Chamber of Commerce

Katie Mahoney
Executive Director
Health Policy
U.S. Chamber of Commerce