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Internal Revenue Service
Room 5230
PO Box 7604 – Ben Franklin Station
Washington, DC 20044

Submitted via e-mail: notice.comments@irscounsel.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 2015-16, 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 continues to greatly appreciate the Treasury Department's 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. As noted on the call, RILA and its member companies will provide the Department with additional operational information as this process develops. RILA is also a member of the National Coalition on Benefits (NCB), and supports the sentiments conveyed in the letter submitted by NCB.

Penalizing Efforts to Improve the Health and Well-being of Employees and their Families

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.

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.

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. 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.

Statutory Complications

Through discussions with the Treasury Department, it is RILA's understanding that due to statutory requirements and interpretation by the Joint Committee on Taxation, there may be limited ability through the regulatory process to provide employers with flexibility under 4980I as was provided in the final rules for 4980H. While RILA will pursue advocacy efforts on Capitol Hill to make changes in the statute, we would like to provide information regarding why the statutory requirements are complicated and unworkable in the employer-sponsored health system.

There is no one-size-fits-all employer-sponsored plan, and not all benefit offerings fit neatly in the same basket. Using the COBRA system as the basis of cost calculation is confusing and might not accurately determine how employer plans and benefit offerings operate. COBRA coverage does not include other benefit offerings such as on-site clinics and employee pre-tax contributions to consumer directed health products.

COBRA is a small portion of total benefits spending today, accounting for medical plan costs, and attempting to predict the spending for a whole year up front is volatile and unpredictable. Applying the COBRA calculation to the other benefits under 4980I becomes even more complicated and administratively burdensome as employers may contract with different vendors for different benefit offerings. Inaccuracies would drive administratively burdensome corrections for all.

Additionally, using the CPI-U to index the excise tax does not accurately reflect medical costs or inflation. As a result, the excise tax will affect a much larger number of benefit offerings at a much lower level over time. The result of inaccurately indexing is similar to the plaguing problem of the alternative minimum tax (AMT), which was never intended to impact such a large portion of the population as it does today.

Exclusions in Calculation

Employee pre-tax contributions in consumer directed health products
RILA strongly urges the exclusion of employee pre-tax contributions to consumer directed health products (CDHPs) from the excise tax calculation, and believes Treasury is well within their regulatory authority to provide safe harbors from including pre-tax contributions in the calculation. Many retailers currently offer health savings accounts (HSAs) and health flexible savings accounts (FSAs) to their employees. Retailers have made a significant investment in encouraging their employees to make more informed decisions and be better consumers of their own health care. Many retailers have moved away, and more will be moving away, from the prescriptive fee-for-service system to a high deductible health plan with a CDHP system – putting the individual employee in the driver's seat of their own health decisions.

Including the employee pre-tax contribution in the excise tax calculation would penalize employers who encourage their employees to invest in their own health decisions. There are a finite amount of services that can fit into the statutory limits of $10,200 and $27,500. For every dollar that an employee decides to invest on a pre-tax basis into his or her CDHP, is a dollar less that an employer can spend for the benefits package without being subject to the excise tax.

It would be extremely difficult for an employer to predict the level of pre-tax contributions an employee will make to a CDHP. There are extremely wide variations in employee pre-tax contributions, and employers cannot predict this nor want to have the ability to control this decision. For example, if the basic medical plan offering at the self-only level was calculated to be $7,500 and one employee contributes $500 into an HSA and $500 into an FSA, the calculation would be $8,500 and thus not full under the excise tax. However, if another employee decides to make a contribution to an HSA of $3,000 and $1,000 into an FSA, and has self-only medical plan coverage at a value of $7,500, the total value would exceed the $10,200 limitation and thus be subject to the excise tax.

On-site and in-store clinics
RILA strongly supports excluding services offered in on-site and in-store clinics from the excise tax calculation, per section 2791 of HIPAA, section 733 of ERISA, and IRS code section 9831 which exclude on-site clinics as health plans. Retail employers are in the unique position of having on-site clinics in a retail store or pharmacy, which are available to both their employees and customers. These clinics provide conveniently accessible care to not only retailers' employees but also their customers and the community. At in-store clinics, highly trained medical clinicians, such as physician assistants and nurse practitioners who are licensed in many states to dispense basic medications, administer vaccines and treat common non-emergency illnesses and ailments such as influenza and sprains.

In-store clinics provide many advantages for individuals and the health care system itself such as: providing affordable and accessible, non-emergency health care to individuals who otherwise may have to wait for appointments with a traditional primary care physician or provider; reducing emergency room visits; improving primary care access by providing easy, affordable options for frontline patient care, especially in medically underserved areas; providing convenient, one-stop shopping for patients who can fill needed prescriptions easily and begin

treatment for their diagnosis without delay; reducing the need for specialized, expensive equipment because clinics offer standard care for common ailments; and streamlining costs and passing savings along to patients.

Additionally, like other large businesses, retailers are increasingly establishing on-site clinics in their corporate headquarters, at distribution centers, or in a corporate office park that is shared by other businesses. These on-site clinics offer similar, valuable services to treat common illnesses and ailments as the in-store clinics, and are staffed by highly trained medical clinicians. On-site clinics provide convenient access for employees, cut down on lost productivity or leave to travel off-site for treatment, and alleviate higher costs associated with emergency room or physician office visits. Employers who are in the same geographic proximity are also innovatively joining forces to open on-site clinics to share in the operating expenses. These clinics may be housed in an office park and the services are available to employees of different businesses. Sharing the operating costs of an on-site clinic, such as rent and utilities, with other businesses in the area helps an employer provide services, like annual flu shots, to their employees which may not have been fiscally feasible otherwise.

RILA remains very concerned that inflexible, one-size-fits-all federal regulations may stifle employers' ability to establish and operate on-site and in-store clinics, and wellness programs. In cases of both the retail store-based clinics and workplace on-site clinics, a retail employer may contract with a third-party vendor or local health system to administer the services and operate the clinic. Not only would it be extremely difficult to track an employee's utilization of services in a clinic not operated by the employer, but tracking utilization would pose significant privacy concerns that may be in violation of HIPAA regulations. An employer does not and should not know which individual employees are using clinics and for which ailments they are receiving treatment.

Furthermore, a retail employer may pay a flat fee or overall utilization charge to a vendor or third-party administrator and not know on an individual-by-individual basis the cost of services. It would be difficult to spread these overall costs across their entire workforce population because, for geographic reasons, not all employees would have access to a particular clinic's services and it would be ill-advised to generalize who may or may not have access to services. In other cases, a workplace on-site clinic is open to all employees regardless of whether or not they are enrolled in the employer's health plan. Couple this scenario with the fact that on-site services are not included in COBRA coverage calculation today is ever more reason to exclude these services from the excise tax calculation.

Employee assistance programs

Recently, the IRS reviewed employee assistance programs (EAPs) as excepted benefits under the ACA and concluded that EAP plans meeting the following three criteria points are exclusions to health care coverage: does not provide significant benefits in the nature of medical care; does not require the EAP service to be exhausted before participants can be eligible for another group health plan; and eligibility is not dependent on participation in another group health plan. As such, it would be inconsistent to include EAPs in the calculation of the excise tax.

Executive physicals
RILA supports excluding executive physicals from the excise tax calculations. These physicals provide employees with important preventive screenings and overall health evaluations. As stated above, there is a finite amount of services that can be included in the statutory limits under the excise tax. Employers need certainty for planning purposes. Without excluding such services as executive physicals and pre-tax employee contributions in CDHPs, it would be very difficult for an employer to account on an individual-by-individual employee basis for the services under the limit. Including executive physicals and CDHP pre-tax contributions in the calculation runs the risk of employers discontinuing to offer these services and products.

Limited scope dental & vision plans
RILA agrees with the Department that limited scope dental and visions plans, both fully-insured and self-insured, should be excluded from the calculation of the excise tax. IRS code section 9831 identifies these benefits as exclusions. The removal of stand-alone plans from the employer mandate but the inclusion of them in the excise tax calculation would be inconsistent.

Employer Flexibility

No standard self-insured plan and workforce
As RILA has noted to the Department in previous regulatory comment letters and conversations, there is no standard workforce population or standard employer plan in the self-insured market. RILA is concerned that regulations may be written to standardize coverage offerings based on the fully-insured market or medal-level plans in the Exchange program. 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.

Non-calendar year plans
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 to develop rules that provide flexibility for employers utilizing a non-calendar year plan year.

Aggregation and actuarial value
As RILA member companies recently stated to the Department, overall, it is important to incorporate aggregation into the excise tax calculation process to smooth out variances in coverage from employee to employee. The impact of the excise tax would be significant without aggregation, as it would accelerate the time frame of impacting more health plans and at lower value rates.

While the ability to aggregate and disaggregate is paramount, so is the need to provide employers with flexibility and safe harbors to determine which methods and calculation best fits their offerings. RILA will continue to engage the Department directly in conversations about

aggregation/disaggregation and actuarial value and other calculation methods. The actuarial value method may work the best for many employers if the calculation takes into account medical plans and not the other services that RILA supports excluding from the calculation. Additionally, it may be beneficial to allow employers to use existing, traditionally recognized actuarial standards and not impose additional calculations. Above all, employers need to be provided with flexibility in order to best predict costs. RILA will provide the Department with additional feedback in the coming months.

Collection of excise tax

RILA strongly urges the Department to enable employers to pay the excise tax directly and not require all employers to remit the tax through a third-party administrator. The ability for a self-insured employer to pay the tax directly is administratively important. The regulations should provide employers with the flexibility to choose to pay directly or through a third-party administrator should, for instance, an employer with a fully-insured plan feel that scenario is a valuable option.

Health Reimbursement Arrangements

Similar to HSAs and FSAs, health reimbursement arrangements (HRAs) are becoming an increasingly important health coverage delivery method for many employers. For some retail employers, an HRA with a high deductible health plan is a more viable coverage option for their variable workforces. As the Department develops regulations, it is important that costs of an HRA as part of a medical plan not be double counted. RILA and its member companies will provide the Department with additional operational feedback as the process develops.

Conclusion

From discounted prescription drugs and in-store clinics to creatively designed employee health and wellness programs, retailers have excelled in providing quality, affordable, and convenient options to both consumers and employees. Innovations such as these should be encouraged, not stifled or limited in any way. Private-sector innovation is a critical component of meeting the health care needs of Americans.

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.