ALLIANCE TO FIGHT THE 40

Stop the 40% tax on health benefits

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

Notice 2015-52—Request for Comments Regarding the Excise Tax on High Cost Employer-Sponsored Health Coverage

Ladies and Gentlemen:

The Alliance to Fight the 40 (the Alliance) submits comments to the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) in response to Notice 2015-52 (the Notice) regarding Section 4980I of the Internal Revenue Code (the 40 percent tax). Notice 2015-52 supplements Notice 2015-16 that also described and requested comments on various substantive provisions of the 40 percent tax. The 40 percent tax was added to the law by the Affordable Care Act (ACA) and first applies to taxable years beginning after December 31, 2017.

The Alliance is a broad based coalition comprised of public and private sector employer organizations, unions, health care companies, businesses and other stakeholders that support employer-sponsored health coverage. The Alliance is working to ensure that the employer-sponsored health care coverage that protects over 150 million Americans across the country remains an effective and affordable option.

We appreciate the approach Treasury and IRS are taking to seek input on the many complex factors affecting the implementation of the 40 percent tax prior to issuing proposed regulations. We hope to work collaboratively with the Administration to address the challenges arising from the tax. The Alliance, however, remains concerned about the lack of available regulatory options to mitigate negative effects the 40 percent tax will have on working individuals and their families, and will continue to pursue legislative opportunities to repeal the tax.

Nonpartisan studies show that the 40 percent tax on benefits will not apply just to plans with more generous benefits, but will also affect modest health plans with more expensive

premiums because they have greater numbers of women, older workers, retirees or employees or families with serious health conditions.[1] Additionally, because the tax is based on the cost of coverage (i.e., premiums), rather than the value of the coverage, the tax will have a disproportionate effect on employers that are located in higher-cost areas of the country. Furthermore, because the cost of coverage on which the tax is based includes benefits in addition to core medical coverage, employers will need to terminate or modify certain health benefit arrangements – such as wellness plans, on-site medical clinics, flexible spending arrangements, health reimbursement arrangements, employer and employee pre-tax health savings account contributions, employee assistance plans, and specified disease plans – that may have the benefit of reducing health care cost over time and also maintaining quality health care. For these reasons, this tax will cause millions of individuals to experience an increase in their out of pocket health care costs and cuts to their benefits.

When Section 4980I was enacted, it was touted as a tax designed to decrease the growth in health care costs. Unfortunately, the unprecedented complexity of the tax will impose significant additional costs and administrative burdens on employers who will be required to calculate the excess benefit subject to the tax by combining multiple employer-sponsored benefit plans, assess available adjustments to the applicable dollar threshold, determine the amount of the tax on a monthly basis, and allocate the proportionate share of the tax to the vendors that would be liable for it. This process will be burdensome and challenging (especially for small businesses) and will increase the cost of offering health care coverage without increasing the value or quality of care.

For these reasons, the Alliance urges Treasury and IRS to use the full scope of administrative and regulatory authority to provide employers with flexibility to administer the 40 percent tax and to minimize employers' administrative burden and protect employees with high health care needs because of chronic conditions or other factors.

Summary of Comments

The 40 percent tax is a non-deductible excise tax on the cost of employer-sponsored health coverage that exceeds certain thresholds that may be imposed on plans that cover retirees, small businesses, federal, state and local government workers, and employees of charitable and non-profit organizations, as well as employees of private businesses.

The Alliance requests that Treasury and IRS provide employers and insurers with flexible rules to calculate the cost of coverage, with adequate safe harbors that permit employers to design their health plans to avoid wasting limited health care dollars on paying the tax and the complicated requirements for calculating the cost of coverage. The Alliance's specific

[1] The Kaiser Family Foundation study found that 19 percent of employers already in 2015 have a plan that would exceed the threshold when flexible spending accounts are included in the calculation. By 2028, 42 percent of employers would have plans with costs that exceed the threshold for some or all employees.

comments in response to the Notice are consistent with these objectives and are described below.

- **Persons liable for the 40 percent tax** -- The Alliance supports the proposal to determine whether the employer that sponsors a self-insured health benefit plan or its third party administrator is considered the party who is liable for paying the 40 percent tax. The Alliance believes that it would dramatically simplify employers' administration of the 40 percent tax if the employer is considered the party liable for paying the tax.

- **Timing of the determination of the cost of applicable employer-sponsored coverage (applicable coverage)** -- Employers must make benefit design decisions and budget for their health care expenses well in advance of the plan year. This means that employers will need to assess any potential excise tax well in advance of the health care plan year. Employers will need to determine the cost of the coverage, the threshold amounts, and the adjustments to the thresholds prior to the beginning of the year. The Alliance recommends that all information to be provided by IRS and Treasury that is necessary for employers to determine whether the cost of their health plan options exceeds the thresholds – including the indexed threshold amounts and age and gender adjustment table – be provided well in advance of the applicable taxable period. The Alliance further recommends that regulatory guidance provide that employers be given the choice of calculating the cost of applicable coverage in advance of the taxable period or at the end of the taxable period.

- **Exclusion from the cost of applicable coverage amounts attributable to the 40 percent tax** -- The Alliance supports the proposal to exclude from the cost of the applicable coverage the reimbursement of the 40 percent tax imposed on the insurer or third party administrator and the income tax attributable to the reimbursement.

- **Employer Aggregation** -- The Alliance recommends that Treasury and IRS provide flexible employer aggregation rules. There are circumstances when it will be appropriate for controlled group members to aggregate and pool the health claims of their employees and other circumstances where the controlled group members may need to be disaggregated.

- **Determination of age and gender adjustment** -- The Alliance believes that the age and gender adjustments must ensure that employers will not be penalized for hiring older Americans and/or women. The Alliance also urges Treasury and IRS to provide information related to the age and gender adjustment well in advance of the taxable period to provide employers with sufficient time to complete the calculation and to minimize employers' administrative burdens. The Alliance also has a number of

comments about how to ensure that an age and gender adjustment can be operated with minimal administrative burden.

- **Coordination between Sections 4980H shared responsibility payments and the 40 percent tax** -- The Alliance supports a rule where no 40 percent tax applies with respect to employer-sponsored health care coverage that meets the "minimum value" standard if the plan has an actuarial value of 90% or below. The Alliance has members that offer health plans in high cost areas with an older, sicker population are expected to trigger the tax in 2018. Such employers such as these are faced with the untenable choice of paying either a nondeductible 40 percent tax under section 4980I or nondeductible penalties under the employer shared responsibility provisions of section 4980H.

- **Calculation of cost of coverage and geographic adjustments** -- The Alliance urges Treasury and IRS to provide regulatory guidance that would permit small employers to calculate the cost of coverage based on a standard population in a standard-cost region of the country. This approach is consistent with the methodology that large multi-state employers use to calculate the COBRA rates for their health care coverage.

Comments and Recommendations

The Notice requests comments on the administrative and procedural provisions of Section 4980I. Comments are requested on: (i) the person liable for the excise tax; (ii) the timing of the determination of the cost of applicable employer-sponsored coverage; (iii) the exclusion from cost of applicable coverage of amounts attributable to the 40 percent tax; (iv) employer aggregation; (v) the determination of the age and gender adjustments; (vi) coordination between Sections 4980H and the 40 percent tax; and (vii) other items.

This letter responds to the request for comments on the procedural categories. Because the procedural issues are so closely interconnected with the substantive provisions of Section 4980I, this letter will also reiterate comments on the definition of applicable employer-sponsored coverage and the determination of the cost of applicable employer sponsored coverage, among other substantive provisions.

A. Persons liable for the 40 percent tax

The Alliance supports the second approach outlined in the Notice to determine the party who may be liable for the 40 percent tax in the case of self-insured employer-sponsored health plans. The Alliance members believe that it is important to provide employers with flexibility to administer the 40 percent tax provisions and, in particular, to identify the party responsible for the payment of the tax.

Section 4980I(c)(1) imposes the excise tax on the "*coverage provider*." In the case of insured group health benefits, the coverage provider is the insurer. In the case of self-insured health

benefits, the coverage provider is "*the person that administers the plan benefits*."

The term – "person that administers the plan benefits" – is not used elsewhere in the Internal Revenue Code, the Affordable Care Act, ERISA, or the Public Health Service Act. Section 4980I(f)(6), however, provides that the "the term 'person that administers the plan benefits' shall include the plan sponsor if the plan sponsor administers benefits under the plan."

The Notice proposes two approaches to determine the person that administers a self-insured health plan and, therefore, is the coverage provider that would be liable for payment of the 40 percent tax.

- Under the first, the person that administers the plan would be the party that is responsible for performing the day-to-day plan administration functions, such as receiving and processing claims for benefits, responding to inquiries, or providing a benefits information technology. Under this approach, Treasury and IRS anticipate that this person generally would be a third-party administrator.

- Under the second approach, the person that administers the plan would be the party that has the ultimate authority or responsibility under the health plan with respect to the administration of plan benefits (including final decisions on administrative matters). Under this approach, Treasury and IRS anticipate that this person would be identified in the plan document and likely would be the employer.

The Alliance strongly supports the second approach. The Alliance urges Treasury and IRS to provide in future guidance that, in the case of a self-insured health plan, the person that administers the plan benefits is presumed to be the party identified in the plan document. This presumption would not apply if the party identified in the plan document does not have the ultimate authority and responsibility for the administration of the plan benefits.

A survey of the Alliance members confirms that employers and the IRS could easily determine the party that administers the plan based on a review of the health plan document provisions and the operation of the plan administration. Generally, the Alliance members' boards of directors have delegated authority to administer their employer-sponsored health plans to a benefits administration committee, which is documented in the health plan document and summary plan description. The benefits administration committee generally has the responsibility to design the terms of the plan, determine which employees are eligible to enroll in the plan, and set the amount of the employee premium payment. The benefits administration committee also selects vendors to serve as a third-party administrator to process claims, but in the cases that we are aware of the employers' benefits administration committees have the ultimate decision making authority with respect to participant claims.

The Alliance members with self-funded plans understand that in this case they would be liable for payment of the 40 percent tax. Retaining the liability would reduce the additional cost and administrative burden of calculating the tax and allocating it to various third party

administrators. Alliance members believe that providing employers with the ability to identify the party that will act as the "person that administers the plan" for the purposes of the tax would provide employers with the flexibility to ensure the tax is paid in the most effective manner based on the employer's unique benefits management structure.

B. Timing of the determination of the cost of applicable employer-sponsored coverage

The Alliance recommends that Treasury and IRS provide in future guidance that employers be given the choice of calculating the cost of applicable coverage in advance of the taxable period or at the end of the taxable period. The Alliance also urges Treasury and IRS to provide an administrable rule for calculating the cost of applicable coverage for employers that sponsor a health benefit plan with a non-calendar year plan year.

(i) Calculation of the cost of core medical health benefits

The Alliance strongly recommends that all information to be provided by IRS and Treasury for employers to determine whether the cost of their health plan options exceeds the thresholds – including the indexed threshold amounts and age and gender adjustment table – be provided well in advance of that taxable period. The Alliance further recommends that regulatory guidance provide that employers be given the choice of calculating the cost of their core medical health benefits either in advance of the taxable period or at the end of the taxable period.

Section 4980I provides that the cost of applicable employer-sponsored coverage will be determined under rules similar to the federal COBRA rules. Section 4980B(f)(4) provides that the COBRA applicable premium is based on the average cost of providing coverage for individuals who are similarly situated, instead of the cost of providing coverage based on the characteristics of each individual. The Notice indicates that in certain circumstances that cost of coverage may be determined retrospectively and that the timing for calculating the cost of coverage for insured plans, self-insured plans and account-based plans may differ.

The Alliance members generally determine the cost of their employer-sponsored coverage in advance of the applicable plan year for purposes of annual budgeting and determining the COBRA applicable premiums (or premiums for other state law continuation coverage purposes). (See discussion below regarding the application of plan year cost to the calendar year taxable period.) The cost of self-insured coverage is determined in advance of the plan year using common actuarial practices based on the employer's medical trend data and other projected expenses; however, the actual cost of the coverage cannot be determined until after the end of the plan year when actual medical claims are known. The cost of insured group health plan coverage is based on premiums provided prior to the beginning of the plan year; however, for experienced-rated insured group health plans, the cost may be adjusted after the end of the plan year based on actual medical claims. Some employers may prefer to fix the cost of the health benefit coverage for purposes of the 40 percent tax prior to the beginning of the plan year based on medical trend and projected expenses in order to

definitively determine whether their health benefit coverage will trigger the tax. Other employers may prefer to determine the cost of the health benefit cost based on the actual medical claims and expenses and would wait to calculate the cost after the end of the plan year.

The Alliance urges Treasury and IRS to provide in future guidance that employers that sponsor self-insured medical health plans may determine the cost of the coverage either in advance of the plan year by using common actuarial methods to calculate the cost or after the end of the plan year based on actual medical claims and expenses. The Alliance further urges Treasury and IRS to provide in future guidance that employers that sponsored insured group health plans with an experience-rated policy may determine the cost of the plan after the end of the plan year by taking into account the experience rated adjustment. The Alliance believes that a rule providing employers with the choice of the timing and manner of determining the cost of coverage could be developed based on rules similar to the rules for determining the COBRA applicable premium.

(ii) Calculation of cost of applicable coverage for insured experience-rated plans

As explained in the Notice, experience-rated arrangements may provide for payments to be made to or from an insurance company after the end of a coverage period that relates to the coverage provided during that coverage period. In general, an experience-rated insurance contract refunds premiums to the group plan policyholder if the claims experience is less than expected. (For example, Health Insurer A underwrites Policy A sold to Group Health Plan B with an expected claims experience of $20x. Policy A's actual claims experience for the year is $15x and, as a result, Health Insurer A refunds premiums associated with the reduced claims experience of $5x to Group Health Plan B.)

In the case of employers that sponsor group health plan coverage that is an experience-rated arrangement, the Alliance recommends that regulatory guidance provide that the employer is permitted to calculate the cost of the coverage following the end of the taxable period by taking into account reduction in the cost due to the premium rebate.

(iii) Calculation of cost for medical savings account-based arrangements

The Alliance reiterates comments made by multiple commenters in response to Notice 2015-16 that certain account-based arrangements should not be included in the definition of applicable employer-sponsored coverage and, therefore, there should be no need to calculate their cost. Specifically, the Alliance urges Treasury and IRS to provide in future regulatory guidance that health savings account (HSA) contributions not be included in the definition of applicable coverage if the HSA is not considered a group health plan. In addition, the Alliance recommends that Treasury and IRS provide employers with relief on a permanent or, at minimum, an interim basis by excluding health flexible spending arrangements (health FSAs) from the definition of applicable coverage. HSAs and health FSAs increase consumer

awareness of their health spending, which is consistent with the legislative objective behind Section 4980I to reduce the growth in health care cost and spending.

At a minimum, the Alliance urges Treasury and IRS to adopt regulatory guidance that provides employers with flexible and administrable options. The Alliance agrees with the objective expressed in the Notice to identify an administrable approach to calculate the cost of account-based health care coverage such as HRAs and health FSAs. The Alliance urges Treasury and IRS to further simplify the approach to calculating the cost of these account-based plans, as described below.

- With respect to an HRA that is integrated with a self-funded employer-sponsored health plan, no separate cost calculation should be required because the cost of the employer HRA credits are already taken into account in determining the cost of the integrated health plan. To be required to calculate the cost of the HRA separately would add needless administrative burden.

- With respect to other types of HRAs, including a stand-alone retiree HRA or an HRA that is not integrated with a self-funded employer-sponsored plan, the Alliance recommends that employers be given the option to determine the cost of this type of HRA either based on actual claims or based on the notional credits, provided that the method of calculating the cost is applied consistently. Under the actual claims approach, the cost for this type of HRA would be based on a reasonable actuarial projection of future annual claim payments under the terms of the arrangement. Under the notional credit approach, the cost of the HRA could be determined based on a pro-rata allocation of the contribution over the period of time to which the contribution applies.

- If health FSAs are included in the definition of applicable coverage, the Alliance urges Treasury and IRS to reduce the complexity of calculating the cost of coverage by allocating the contributions over the period to which the contribution relates (generally, the plan year). Furthermore, the Alliance agrees with the approach proposed in the Notice to avoid double counting amounts associated with employee salary deferrals.

(iv) Calculation of cost for the taxable period

The Alliance urges Treasury and IRS to construct an administrable rule to calculate the cost of applicable coverage for employers that maintain non-calendar year plans.

Section 4980I provides that the 40 percent tax is imposed on the basis of the taxable period. Section 4980I(f)(8) defines taxable period to mean the "calendar year or such shorter period as the Secretary may prescribe." The statute also gives Treasury and IRS the authority to set

forth different taxable periods for employers of varying sizes. The Notice states that Treasury and IRS anticipate that the taxable period will be the calendar year for all taxpayers.

A significant number of the Alliance members sponsor health plans with a non-calendar year plan year. Of note, the Alliance members that provide coverage for government employees generally operate with a non-calendar year plan year. For these non-calendar year plans, the COBRA coverage premiums (or other applicable state law continuation coverage premiums) and budgeting cost is determined in advance for the plan year. Furthermore, the plan administration, including the selection of an insurer or other vendor, is on a plan year basis. If the cost of the plan is required to be determined on a calendar year basis, these employers would have the administrative burden of recalculating the cost of the health benefits options mid-year. More importantly, employers and their vendors may unexpectedly become subject to the 40 percent tax for a particular calendar year because of an unexpected mid-year spike in cost.

One approach the Section 4980I regulations could take to accommodate employers with non-calendar year plans would be to permit the employer to use, for a particular taxable period, the cost of applicable coverage for the plan year ending within or at the end of that taxable period. This rule should also provide that the threshold amounts and adjustments in effect as of January 1 should apply for all plan years beginning in that calendar year.

C. Exclusion from the cost of applicable coverage

The Alliance strongly supports the proposal to exclude from the cost of the applicable coverage the reimbursement of the 40 percent tax imposed on the insurer or third party administrator and the income tax attributable to the reimbursement.

In determining the cost of applicable coverage subject to the 40 percent tax, Section 4980I(d)(2)(A) provides that "any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account." The Notice states that this provision indicates the tax reimbursement should be excluded from the cost of applicable coverage. The Notice further provides that Treasury and IRS are also considering whether some or all of the income tax reimbursement could be excluded from the cost of applicable coverage, provided that the amount is separately billed.

The Alliance urges Treasury and IRS to exclude from the cost of applicable coverage not only the reimbursement of the non-deductible 40 percent tax, but also amounts attributable to the tax including the tax on income from the receipt of the reimbursement payment. The Alliance also urges Treasury and IRS to exclude from the cost of applicable coverage other premium taxes and fees (such as the ACA Section 9010 health insurance fee and state premium taxes) that are not included in the cost for health care coverage.

Coverage providers, specifically health insurance issuers, may become subject to the non-deductible 40 percent tax, even if they structured their group health plans to ensure that the

cost of coverage is below the threshold due to other employer-sponsored benefits, such as HRAs, that are included in the cost of the insured coverage when this occurs. To avoid this unintended consequence, health insurance issuers likely will require the employer policyholder to make reimbursement payments sufficient to make them whole for any related liability. Regulations should make clear that the total amount the employers are required to pay to reimburse a health insurance issuer should be excluded from the cost of applicable coverage.

The Notice proposes two possible approaches to determine the amount of the income tax reimbursement that would be excluded from the cost of applicable coverage. The first approach would use the coverage provider's actual marginal tax rate in the reimbursement formula. Under this approach, the coverage provider would be made whole because it would use its actual marginal rate, including federal, state, and local income taxes, for the taxable period. The Alliance disagrees with the suggestion in the Notice that this approach would be administratively challenging because the insurer would not be able to determine its actual marginal tax rate until after the end of the taxable period. Alliance members working in this space state that they can reliably estimate their marginal tax rates prior to the beginning of the year. The Alliance recommends that regulatory guidance provide that health insurers may use a reasonable estimate of their marginal tax rate to determine the amount of the income tax reimbursement excluded from the cost of coverage.

The second approach would use a standard marginal tax rate. The Alliance members support this approach only if the standard marginal rate is set as a prescribed rate that reflects a representative marginal tax rate. In order to be representative, the standard marginal rate would need to include federal, state and local income taxes, and should also include the ACA Section 9010 health insurance provider fee and state premium taxes.

The reimbursement to health insurers for the 40 percent tax creates an administrative burden for employers with insured group health plans that would not exist for employers with self-funded plans determined liable for the tax. The Alliance observes that this discrepancy creates an additional incentive for employers to self-insure.

D. Employer aggregation

The Alliance recommends that Treasury and IRS provide flexible aggregation rules. There are circumstances when it will be appropriate for controlled group members to aggregate their health plan and other circumstances where the controlled group members should be disaggregated.

Section 4980I(f)(9) provides generally that, for purposes of § 4980I, all employers treated as a single employer under subsections (b), (c), (m), or (o) of § 414 are treated as a single employer.

The Alliance urges Treasury and IRS to provide in future guidance that, for purposes of calculating the cost of applicable coverage, employers may permissively aggregate the medical claims of all employees enrolled in a common health benefits program offered by a group of employers treated as a single employer under the Section 414 controlled group rules. The Alliance supports permitting employers to pool their claims experience for benefits offered to a common group of employees, even if employees are employed by different entities within the controlled group. The Section 4980I aggregation provision contemplated supports this position. This would also support the policy of reducing the disproportionate impact on sicker workers and dependents in high cost geographic regions.

The Alliance also recommends that future guidance permit employers to disaggregate controlled group members that offer a unique health benefit program to their employees. Oftentimes, members of a controlled group may operate autonomously. In this situation, it may not be appropriate to aggregate the medical claims of the employees of one controlled group member with the employees of another member.

E. Age and gender adjustment

The Alliance supports establishing an adjustment table that would be made available for employers to determine the threshold adjustment based on the employer's workforce. The Alliance recommends that Treasury and IRS provide in regulatory guidance that the threshold amounts and age and gender adjustment tables be published well in advance of the taxable period. Ideally, the release of this information would be provided in advance of, or coincide with the release of the limits for high-deductible health plans (HDHPs), which is released in May for the upcoming calendar year. In order for employers to determine the potential for triggering the 40 percent tax and, therefore, whether they will need to re-design their health benefits or budget for the tax, employers will need to assess whether the cost of their health benefits exceed the thresholds, as adjusted. Employers will need to make this assessment well in advance of the beginning of the plan year; to make the assessment employers will need the indexed threshold amounts and the age and gender adjustment tables.

The Alliance recommends that Treasury and IRS permit employers to choose any snap shot date during the year, provided the same date is used each year, to determine the age and gender characteristics of the employee population. The Notice proposes to require employers to determine the age and gender of each employee as of the first day of the plan year. This date will not work because employers will need to determine the age and gender composition of its employee population well in advance of the first day of the plan year to assess whether the cost of its health coverage options may exceed the threshold.

The Alliance recommends that Treasury and IRS use a national workforce table that includes individuals who are employed and seeking employment. The Notice proposes to use a Bureau of Labor Statistics (BLS) table that is limited to employed individuals. We believe that using a BLS table that includes the national workforce, broadly defined as those who are employed

and those who are seeking employment, is consistent with the Section 4980I(b)(3)(C)(iii) statutory provisions.

The Alliance agrees with the proposal in the Notice that adjustments and calculations should be determined separately for self-only coverage and for other than self-only coverage.

The Alliance further recommends that Treasury and IRS provide that the employer's employee population characteristics be determined based on the enrolled employee populations. Basing the age and gender adjustment only on the employees enrolled in health care coverage is appropriate because the cost of applicable coverage is driven exclusively by the employees who are enrolled in coverage. Furthermore, using the enrolled employee population is consistent with the proposal in the Notice to make the adjustments and calculations separately for self-only coverage and other than self-only coverage. To perform these calculations separately, the employer must determine the numbers of employees who actually enrolled in each coverage tier.

Finally, the Alliance recommends that Treasury and IRS use a representative national claims database to develop the age and gender adjustment tables, rather than using claim costs under the FEHBP BCBS standard option. Looking at claims from plans offered nationwide will provide a more accurate reflection of the national workforce. There is concern that the population covered under the FEHBP BCBS standard option is relatively older and does not reflect the gender balance of the national workforce and includes the impact of selection. The FEHBP BCBS standard option age and gender claims curve will not be representative of the national workforce clams curve.

F. Coordination between Sections 4980H employer shared responsibility and the 40 percent tax

The Notice requests comments on the circumstances in which the interaction between the provisions of Sections 4980H and 4980I may raise concerns and on whether and how these provisions might be coordinated.

The Alliance urges Treasury and IRS to establish a safe harbor that is consistent with the standards for the type of coverage that is minimally acceptable for an employer to avoid the Section 4980H employer shared responsibility payments. It seems unlikely that Congress intended a 60 percent minimum value plan that employers must offer to employees to avoid the Section 4980H employer shared responsibility payments as the type of "high cost" plans that may become subject to the 40 percent tax. Employers who design their health care offerings to satisfy the minimum value requirement to avoid the Section 4980H excise tax should not be subjected to the Section 4980I excise tax if the cost of the coverage exceeds the applicable dollar threshold.

The Alliance urges Treasury and IRS to establish a permanent safe harbor to ensure plans below a 90 percent actuarial value are not subject to the 40 percent tax. Creating a safe harbor for employees covered by a plan with an actuarial value of 90 percent or below would

eliminate some of the inequities in the application of the 40 percent tax to employers with higher cost employee demographics, in higher risk industries, and in high cost geographies.

The Alliance further recommends that Treasury and IRS provide rules in future guidance that will allow employers to coordinate the administration of the Section 4980H employer shared responsibility payments and 4980I taxes on an entity-by-entity basis.

G. Calculation of the cost of coverage and geographic adjustment

The Alliance urges Treasury and IRS to provide a rule in regulatory guidance that would permit employers to calculate the cost of coverage based on a standard population in a standard-cost region of the country. This approach is consistent with the methodology that large multi-state employers with self-insured plans use to calculate the cost of their health care coverage, including the COBRA rates.

The cost of health care coverage varies significantly from region to region due primarily to differences in provider reimbursement rates. It is not logical that a gold level plan offered on a SHOP Marketplace in New York would be subject to the 40 percent tax when an identical plan offered on a SHOP Marketplace in Alabama would not be subject to the tax. Administering the excise tax without accounting for geographic variation in the cost of coverage would unfairly increase the cost of plans in already high-cost areas.

Section 4980I(d)(2) provides that the cost of coverage is determined based on rules similar to the COBRA rules in Section 4980B(f)(4). The COBRA rules offer Treasury and IRS authority to adjust the cost calculation for employers in high cost geographic areas.

The COBRA "applicable premium" is defined as the cost to the plan for coverage for "similarly situated" beneficiaries. The legislative history of Code section 4980B sheds light on the application of "similarly situated" individuals:

> "[i]n general, similarly situated individuals are those individuals defined by the plan (consistent with Treasury regulations) to be similarly situated and with respect to which no qualifying event has occurred. The Secretary of Treasury is to define similarly situated individuals by taking into account the plan under which the coverage is provided (*e.g.*, high or low option), the type of coverage (single or family coverage) and, if appropriate, regional differences in health costs." H. Conf. Rep. No. 453, 99th Cong., 2nd Sess. 565-566 (emphasis added).

The Alliance urges Treasury and IRS to exercise the full extent of their regulatory authority to adopt rules that would permit employers in higher cost areas to smooth the cost of coverage by treating the employees in high-cost areas as similarly situated to the standard population in a standard-cost region of the country. In this manner, employers would calculate the cost of a particular benefit package based on medical cost in a standard-cost region.

Conclusion

In conclusion, we appreciate that Treasury and IRS recognize the significant impact the 40 percent tax will have on employers who are offering the coverage and benefits required by the Affordable Care Act—and on their employees. We respectfully submit these comments and proposed approaches and look forward to providing additional details as the regulatory process proceeds. Should officials at Treasury or IRS need any further information from the Alliance on these important issues, please do not hesitate to contact us.

Sincerely,

The Alliance to Fight the 40: Stop the 40 Percent Tax on Health Benefits