July 16, 2012

Submitted electronically via http://www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (REG—136008—11)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice of Proposed Rulemaking: Fees on Health Insurance Policies and Self-Insured Plans for the Patient-Centered Outcomes Research Trust Fund (REG—136008—11)

Sir or Madam:

We write to provide comments on behalf of the American Benefits Council ("Council") in response to the notice of proposed rulemaking entitled "Fees on Health Insurance Policies and Self-Insured Plans for the Patient-Centered Outcomes Research Trust Fund" that was published in the Federal Register on April 17, 2012 ("Proposed Regulations"). The Council represents primarily large employers and other organizations that collectively either sponsor or administer health and retirement benefits covering over 100 million Americans.

The Council appreciates the opportunity to provide additional comments[1] with respect to the implementation of new sections 4375, 4376, and 4377 of the Internal Revenue Code of 1986, as amended ("Code"), which impose a fee on issuers with respect to "specified health insurance policies" and on employers with respect to "applicable self-insured health plans" to partially fund new comparative clinical

[1] *See* Council Letter dated September 6, 2011, *available at* http://americanbenefitscouncil.org/documents/hcr_pcori_irs-cmnts_090611.pdf.

effectiveness research relating to patient-centered outcomes through the Patient-Centered Outcomes Research Trust Fund ("PCORI Fee").

The Proposed Regulations include several important clarifications regarding implementation of the PCORI fee. In particular, we appreciate the confirmation in the Proposed Regulations that excepted benefits are excluded from the definition of both "specified health insurance policy" and "applicable self-insured health plan," thus ensuring parity for self-insured and insured coverage. Our additional comments regarding the Proposed Regulations are below.

IMPLEMENTATION OF TRANSITION RULES

As requested in our letter dated September 6, 2011, given the administrative complexity in determining the PCORI Fee that an employer must pay, the Council urges the Service to provide a transition period allowing good faith compliance for the first two years the PCORI Fee is in effect. Such good faith compliance may include counting employees (and not spouses and/or covered dependents) as covered lives for such years.

Transition rules could also provide employers with additional options in determining an administratively practicable way of determining the PCORI Fee as they develop implementation systems. For example, such a transition rule might permit employers to pay a flat PCORI Fee based on the number of employees in its controlled group as opposed to the employer being required to calculate the number of covered lives (including spouses and dependents) enrolled in its subject group health plans.

APPLICATION OF DOUBLE-COUNTING RULE TO BOTH INSURED AND SELF-INSURED PLANS

The PCORI Fee is assessed based on the "average number of lives covered under the policy" or "plan." We appreciate the resolution of double-counting issues with respect to multiple self-insured benefits maintained by the same plan sponsor that have the same plan year. More specifically, we appreciate that the Proposed Regulations permit, for purposes of Code section 4376, "two or more arrangements established or maintained by the same plan sponsor that provides for accident and health coverage . . . other than through an insurance policy and that have the same plan year may be treated as a single applicable self-insured health plan for purposes of calculating the fee imposed by section 4376."

DETERMINING "AVERAGE NUMBER OF LIVES COVERED UNDER THE PLAN"

We appreciate that the Proposed Regulations permit issuers and plan sponsors to count actual enrolled participants, use a snapshot method or a Form 5500 method in determining the average number of lives covered under a plan.

In addition to these methods, we reiterate the request in our letter dated September 6, 2011 that issuers and employers be permitted to determine the number of covered lives using a "dependency" coefficient in lieu of having to count the actual number of covered lives enrolled in a given plan. Under this approach, issuers and employers would be permitted to determine the number of covered lives by multiplying the number of enrolled plan participants by a "dependency" coefficient greater than 1 that is reasonably determined to approximate the number of covered lives under the plan. Additionally, to facilitate close approximations of actual enrollment, issuers and employers should be permitted to use a different dependency coefficient for different categories of participants, including, but not limited to, active/retiree status and part-time/full-time status. This approach, if permitted, would be less costly and burdensome to administer and should facilitate the prompt payment of the fee.

In addition to the above, we also request that the Service issue a rule that permits issuers and employers to use any other reasonable method that the plan consistently uses to count covered lives for accounting valuation, pricing or other plan design purposes.

INTERACTION OF COBRA WITH THE FEE

The Proposed Regulations do not address the treatment of COBRA continuation coverage for purposes of the PCORI Fee. COBRA coverage is arguably not "established or maintained by an employer for the benefit of its employees," given that it is mandated by federal law. Since employers are required by federal law to offer COBRA coverage, it would seem inappropriate to impose a PCORI Fee on employers with respect to such coverage. Doing so would raise the cost of an employer's ability to comply with the federal COBRA continuation coverage requirements. Accordingly, the Council urges the Service to issue guidance expressly excluding COBRA coverage from the PCORI Fee.

INTERACTION OF RETIREE COVERAGE WITH THE FEE

The Proposed Regulations provide in a footnote that Code sections 4375 and 4376 may apply to a retiree-only plan because, although Code section 9832 excludes group health plans that have less than two participants who are current employees (such as retiree-only plans) from certain provisions, such exclusion does not apply to Code

sections 4375 and 4376. The Proposed Regulations go on to state that Code section 4376(c)(2)(A) indicates that an applicable self-insured health plan includes a plan established or maintained by one or more employers for the benefit of their employees or former employees.

As noted in our letter dated September 6, 2011, while retiree coverage may be subject to the PCORI Fee because it is "established or maintained by an employer for the benefit of its employees or former employees," the Council urges the Service to consider the public policy merits of excluding retiree health coverage from the PCORI Fee and to make use of its broad regulatory authority under the Code to except such coverage from the PCORI Fee. Employers provide a valuable benefit to retirees by, in many cases, voluntarily offering retiree coverage to their employees.

Given the costs associated with providing retiree health coverage and the lack of available alternatives for individuals pre-65, the Council requests that the Service issue guidance confirming that the PCORI Fee will not be imposed with respect to retiree health coverage to help ensure that employers remain willing and able to provide this coverage, at least through the start of 2014 when more purchasing options should become available by reason of the state-based exchanges per PPACA. Subjecting retiree-only coverage to the PCORI Fee may lead employers to cease offering this very valuable benefit, particularly since such coverage would likely become more expensive by virtue of the application of the PCORI Fee.

ADDITIONAL CLARIFICATION REQUESTED REGARDING EXPATRIATE COVERAGE

We very much appreciate the exception provided in the Proposed Regulations that clearly excludes from the definition of "specified health insurance policy" any group policy issued to an employer if the facts and circumstances show that the group policy was designed and issued specifically to cover primarily working employees who are performing services and residing outside of the United States ("Expatriate Plans").

Based on the text of the Proposed Regulations, including the preamble, additional clarification would be helpful to confirm our reading of the Proposed Regulations that similar self-funded Expatriate Plans are also excepted for purposes of the PCORI Fee. The Proposed Regulations make clear that Expatriate Plans are excluded from the PCORI Fee if they are insured. We believe the Proposed Regulations are somewhat unclear in addressing the treatment of self-insured Expatriate Plans.

An "applicable self-insured health plan" is defined in the Proposed Regulations generally to mean a plan that provides for accident or health coverage if any portion of the coverage is provided other than through an insurance company and is established or maintained by some formulation of employers or employee organizations. "Accident and health coverage" is defined to mean any coverage that, if provided by an insurance

policy, would cause such policy to be a specified health insurance policy. Thus, it would appear that, to the extent a self-insured Expatriate Plan would constitute an excluded Expatriate Plan if it were insured, such a self-insured Expatriate Plan is excepted from the PCORI Fee. However, in the preamble discussion of the exception for Expatriate Plans, the preamble refers only to "policies," which suggests that only insured plans are eligible to be excepted from the application of the PCORI Fee. We suspect this is not the case for the reasons discussed above, but clarification in this regard would be helpful to eliminate any doubt.

On a related topic, as noted above, the Proposed Regulations except a group health plan if the facts and circumstances show that it is an Expatriate Plan, i.e., a group policy designed and issued specifically to cover primarily employees who are working and residing outside of the United States. The Proposed Regulations go on to state that "an individual residing in the United States" means an individual who has a place of abode in the United States. We appreciate that, for purposes of determining whether an individual's place of abode is in the US, an insurer or plan sponsor can rely on the address on file for such individual in determining whether such individual (or his or her spouse, dependents, or other beneficiaries). As with respect to the above discussion regarding Expatriate Plans, it seems that a self-insured plan would also be able to rely on the addresses on file for purposes of determining whether the plan is an Expatriate Plan excepted from the PCORI Fee. However, because the Proposed Regulations use the term "primary *insured*" (emphasis added) in describing when an issuer or plan sponsor can rely on the address on file, we request that the Service provide more explicit confirmation that the reliance rule may apply with respect to both insured and self-insured plans/policies.

THIRD-PARTY REPORTING AND PAYMENTS

In our September 6, 2011 letter, the Council requested that guidance be issued permitting a third party, such as a third-party administrator ("TPA"), to pay the PCORI Fee as an agent of a plan sponsor. In addition, the Council requested that the Service create a separate form pursuant to which the PCORI Fee would be transmitted, which would allow employers to delegate payment responsibility to a TPA or other third party, as appropriate.

The Proposed Regulations provide that the PCORI Fee will be reportable on existing Form 720 (a federal excise tax return). In addition, the preamble to the Proposed Regulations states that the IRS does not intend to adopt a regime for third parties that is different from the regime for plan sponsors, because the benefits of such a program would be outweighed by administrative burdens. It appears based on the preamble to the Proposed Regulations and on the instructions to the Form 720 that a TPA may not be permitted to report and pay the PCORI Fee on behalf of a plan sponsor. As a result, it appears that plan sponsors that rely on TPAs to maintain administrative records with

regard to their self-insured plans and to ensure that reporting requirements are satisfied may need to implement new procedures to ensure that any PCORI Fee liability is satisfied. This will impose a significant burden on such plan sponsors, and we request that the Service issue guidance permitting TPAs to fulfill payment and reporting obligations with respect to the PCORI Fee on behalf of sponsors of self-insured plans.

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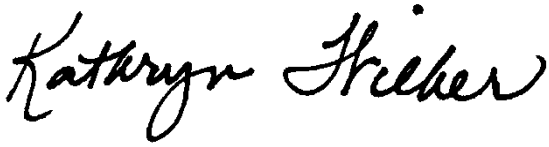
Thank you for the opportunity to provide comments regarding implementation of new Code sections 4375, 4376, and 4377, which impose a fee on issuers with respect to "specified health insurance policies" and on employers with respect to "applicable self-insured health plans" to partially fund new comparative clinical effectiveness research relating to patient-centered outcomes through the Patient-Centered Outcomes Research Trust Fund. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



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