



Section 4980D Excise Tax

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Recently, many employers are understandably overwhelmed by Section 4980H Employer Shared Responsibility requirements under the Patient Protection and Affordable Care Act (PPACA) and are diligently working to ensure compliance this year. There is, however, another excise tax that many employers may have overlooked but need to be aware of when considering their compliance requirements and potential excise tax exposure: Internal Revenue Code 26 USC §4980D, which assesses an excise tax on employers for failure to meet certain group health plan requirements found under USC Chapter 100.

Unlike 4980H, the 4980D excise tax is not limited to large employers. It is assessed against any employer, regardless of size, that is sponsoring a group health plan and fails to comply with the requirements under Chapter 100 of the Health Insurance Portability and Accountability Act (HIPAA). At this time, the only group health plans completely exempt from 4980D are those sponsored by the federal government. There is a carve out for small employers (2-50) who are offering

Written by Cori M. Cook, J.D.
CMC CONSULTING, LLC

a fully insured product that fails to comply and there are also some penalty exceptions for church plans, however, it is important to remember that church plans are subject to 4980D.

While applicable employers are just now seeing the potential enforcement and impact of the excise tax under 4980H, the Chapter 100 requirements for group health plans and the corresponding section 4980D excise tax for non-compliance have been around since 1996.

The 4980D excise tax of \$100 per affected individual, per day, is assessed against an employer for failure to comply during a non-compliance period (which begins the date the failure occurs and lasts until the date the failure is corrected) and, as you can imagine, can add up very quickly. The potential 4980D excise tax can greatly exceed the potential tax under 4980H and employers can be subject to excise taxes under both code sections. In addition, the Internal Revenue Service (IRS) also imposes a higher penalty, from \$2,500.00 to \$15,000.00, for those employers that have failed to self-report and receive a notice of examination.

Chapter 100 group health plan requirements have since been amended by PPACA and now include, but are not necessarily limited to the following:

- Providing coverage of adult children until age 26;
- Prohibiting rescission of coverage (unless caused by fraud or intentional misrepresentation);
- Prohibiting annual or lifetime dollar limits;
- Prohibiting pre-existing condition exclusions;
- Prohibiting a waiting period in excess of 90 days;
- Prohibiting health related discrimination;
- Providing preventative care coverage;
- Providing patient protections - allowing patients to select their primary care provider or pediatrician from any available participating provider;
- Prohibiting preauthorization referral requirements for obstetrical, gynecological and emergency services;
- Requiring that out-of-network emergency care be adjudicated in accordance with in-network benefit terms;
- Requiring plans to have a claims appeals process including internal appeals and external review processes;
- Providing for non-discrimination;
- Providing women's preventative care services in network (some exceptions are available for religious employers);
- Providing coverage for approved clinical trials;
- Requiring compliance with maximum deductible limits and out-of-pocket maximums;
- Prohibiting discrimination against a provider acting within the scope of license when service is covered under the plan; and
- Providing for multiple notification requirements for participants regarding plan amendments, patient protections, claims appeals procedures and a Summary of Benefits and Coverage (SBC).

Until 2009, there had never been a method for self-reporting the excise tax under section 4980D and the IRS had not historically imposed these excise taxes as part of an audit. However, with the implementation of the PPACA market

reforms, enforcement of this section was necessary to ensure compliance. Form 8928 was created by the IRS shortly before PPACA was signed into law as a way for employers to self-report their 4980D violations.

Section 4980D does limit exposure for unintentional violations by reducing and/or eliminating the excise tax in certain circumstances including: 1) a correction with 30 days; 2) if the employer failed to discover the violation but did exercise reasonable diligence; and 3) if no willful negligence occurred on the part of the employer, capping the tax at a certain amount depending on how large the employer is. It is important to note that the excise tax assessed by 4980D is limited to compliance with Chapter 100 requirements and does not apply to violations of other areas of HIPAA privacy, security or electronic data interchange rules, or the breach notification requirements of the Health Information Technology for Economic and Clinical Health Act (HITECH).

PPACA's most significant amendments to the Chapter 100 requirements include a prohibition on annual or lifetime dollar limits and a requirement to provide preventative care to participants without cost sharing. This posed a problem for those employers who chose not to offer group health plans and instead created arrangements to pay or reimburse an employee's premiums for major medical coverage purchased in the individual market. In 2013, the IRS released Notice 2013-54, which gave guidance to employers regarding 4980D and included information regarding "Employer Payment Plans" (EPPs). It stated that pre-tax payment or reimbursement arrangements (e.g., HRAs) for employee's individual market premiums are considered group health plans subject to the



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market reforms and that they do not comply with the dollar limit or preventative care requirements under Chapter 100.

Employers who maintained standalone HRAs for their employees questioned this rationale, claiming the individual policies their employees obtained satisfied market reforms; thus, the excise tax should not apply to them. However, the Notice addressed this issue, stating that an HRA must be integrated with primary health care coverage provided by the employer to be considered in compliance with section 4980D.

It is important to remember that PPACA's market reforms generally do not apply to those group health plans that have "fewer than two participants who are current employees on the first day of the plan year." Therefore, while HRAs are considered group health plans for the purposes of Section 4980D, an exception may exist for a standalone retiree-only HRA.

Fortunately, in March of 2015, the IRS released Notice 2015-17, which provides clarification and transition relief for employers with EPPs. Specifically, for those smaller employers not subject to the requirements of 4980H, no penalty would be assessed before June 30, 2015, giving them time to remedy their 4980D violations without having to complete Form 8928 and pay the penalty for non-compliance. However, unfortunately, this period has since passed. Employers need to be sure their group health plan is in compliance with Chapter 100 requirements.

It is important to remember that under 4980D, the requirements are imposed on each plan individually. Each group health plan offered by an employer must satisfy the requirements set forth in Chapter 100, as amended, or the employer may be subject to the \$100 per day, per affected individual,



excise tax. A distinction from 4980H, where only one plan being offered to full-time employees and their dependents needs to satisfy the requirements of 4980H to avoid the potential excise tax.

Yet another opportunity for TPAs to educate their clients and assist them in ensuring compliance. It is also important for TPAs to make sure their Administrative Service Agreements address the respective responsibilities and liabilities with regard to 4980D and 4980H and the potential excise taxes arising therefrom. ■

Cori M. Cook, J.D., is the founder of CMC Consulting, LLC, a boutique consulting and legal practice focused on providing specialized advisory and legal services to TPAs, employers, carriers, brokers, attorneys, associations and providers, specializing in health care, PPACA, HIPAA, ERISA, employment and regulatory matters. Cori may be reached at (406) 647-3715, by email at cori@corimcook.com or at www.corimcook.com.