



June 3, 2013

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Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted electronically via www.regulations.gov

To Whom it May Concern:

I am writing on behalf of The National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. We are pleased to provide comment on the proposed rule regarding the Patient Protection and Affordable Care Act's (PPACA) Health Insurance Providers Fee (Fee) published in the *Federal Register* on March 4, 2013.

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize their health insurance coverage. The range of employers represented by NAHU members spans from self-employed individuals and Mom and Pop businesses to Fortune 100 companies. Of significance, many of our members are also the owners of their own independent small businesses.

NAHU members and their employer clients have significant concerns about the new health insurance fee addressed in the proposed rule, since it will increase the cost of health care coverage for consumers and employers in every state. This new fee will be imposed on all individual and fully insured group health insurance policies sold in this country from 2014 on forward, which means that Americans who work for and own small businesses around the country are disproportionately affected. While the tax technically falls on insurers, the Congressional Budget Office has confirmed that the tax "would be largely passed through to consumers [small-business owners and their employees] in the form of higher premiums for private coverage."

NAHU members know all too well that any requirement that increases the cost of health insurance for small business owners and the self-employed makes offering affordable coverage, or any coverage at all, to employees more difficult. NAHU members have reason to believe that when the new fee is combined with myriad new compliance responsibilities that employers must now perform on behalf of their employees, it could cause many companies reevaluate their benefit choices.

In addition to the general negative economic impact of the proposed new health insurance fee will have on small business owners, NAHU has concerns that the way that the proposed rule is currently structured, it will *further* exacerbate the cost of the health insurance providers fee.



Under PPACA, the annual fee on health insurance providers is treated, for tax purposes, as a nondeductible excise tax and the PPACA specifically referenced the concept of deductibility as it relates to the treatment of the tax. The Congressional Budget Office (CBO) recognized and informed 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 proposed rule 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, we do believe that based on long-standing federal income tax principles, that final regulations should recognize the application of well-established tax policy 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.

By choosing to "tax the tax", the Department of 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 released by the US Chamber of Commerce. This excess taxation will occur because the proposed rule 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.

Fortunately, NAHU sees a legal path for the Department of Treasury and the IRS to significantly reduce the financial impact of the new fee on the American health care consumer. According to Skadden, Arps, Slate, Meagher & Flom, the Treasury Department has the authority to issue rules that clarify they do not intend to "tax the tax," thereby saving consumers and employers \$45 to \$70 billion in premium costs over the next ten years. 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. It analyzes numerous IRS rulings and court cases to establish that the recovery of costs is not taxable, as long as no tax deduction was claimed for the cost. The Skadden opinion also analyzes precedent to conclude, "Similarly, when a taxpayer is reimbursed for costs that primarily benefit another person, the reimbursements are not included in the taxpayers' gross income, notwithstanding an incidental or indirect economic benefit to the tax payer."

Specifically, because there is a direct connection between the fee paid to the government by the insurance companies 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 companies 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.



We urge the Department of Treasury to utilize its regulatory flexibility to assure that the financial impact of the health insurance providers' fee is no more than it has to be under the statute. In the final rule, we urge you to clarify that you do not intend to tax health insurance providers' fee collections as business revenue. Furthermore, we urge the departments of 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.

NAHU sincerely appreciates the opportunity to provide these comments on the proposed rule, and we look forward to working with you as implementation of PPACA moves forward. If you have any questions, or if we can be of further assistance to you, please feel free to contact me at 202-595-3676 or jwaltman@nahu.org.

Sincerely,

A handwritten signature in black ink that reads "Jessica F. Waltman". The signature is written in a cursive, flowing style.

Jessica F. Waltman
Senior Vice President of Government Affairs
National Association of Health Underwriters