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*Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow*

September 6, 2011

*Submitted via e-mail: Notice.Comments@irsounsel.treas.gov*

The Honorable Douglas H. Shulman  
Commissioner of Internal Revenue  
CC:PA:LPD:PR (Notice 2011-35)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**Re: Notice 2011-35 – Request for Comments on Funding of Patient-Centered Outcomes Research Through Fees Payable by Issuers of Health Insurance Policies and Self-Insured Health Plan Sponsors**

Dear Commissioner Shulman:

The National Business Group on Health is pleased to respond to the Request for Comments on Funding of Patient-Centered Outcomes Research Through Fees Payable by Issuers of Health Insurance Policies and Self-Insured Health Plan Sponsors.

The National Business Group on Health represents approximately 330 primarily large employers, including 66 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 50 million American employees, retirees, and their families. Our members employ and provide health benefits for employees through a variety of benefit arrangements, including self-insured and insured major medical coverage, health flexible spending accounts (health FSAs), health reimbursement arrangements (HRAs), on-site health centers, and wellness programs. In addition, our members often operate multiple lines of business and tailor employee benefit arrangements to the specific needs of each line of business.

As our members prepare for implementation of the Patient Protection and Affordable Care Act (Affordable Care Act), a primary concern will be minimizing the administrative and cost burdens associated with Affordable Care Act requirements. Allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing benefit arrangements will reduce these burdens and allow plan sponsors to devote more resources toward maintaining and improving health benefits for their employees.

Therefore, the National Business Group on Health welcomes the Service's efforts to reduce the administrative burden of complying with sections 4375 and 4376 of the Internal Revenue Code (Code). **Specifically, the National Business Group on Health supports:**

- (1) **Excluding health FSAs, HRAs, all on-site health centers, and wellness programs from the definition of "applicable self-insured health plan" under Code § 4376;**
- (2) **Allowing plan sponsors flexibility in determining the average number of lives covered under a plan; and**
- (3) **Allowing plan sponsors to pay §§ 4376 and 4376 fees on a plan year basis.**

We provide further discussion of these recommendations and responses to the Service's specific requests for comments below.

#### **I. Applicable Self-Insured Health Plan under § 4376**

The National Business Group on Health supports the Patient-Centered Outcomes Research Institute's purpose of assisting patients, clinicians, purchasers, and policy-makers in making informed health decisions by advancing comparative clinical effectiveness research. Given the substantial funding that employer-sponsored plans will provide for the Institute, we believe a substantial portion of the Institute's funding should be dedicated to issues pertaining to the working age population, including treatment for cardiovascular disease, musculoskeletal conditions, diabetes, and mental health. In addition, our members believe that the fees that will fund the Institute should be assessed in a fair and consistent manner that takes into account the variety of health plan arrangements that our members provide their employees.

Many National Business Group on Health members offer health benefits that consist of multiple components. For example, a member may sponsor a self-insured group health plan providing major medical coverage that, in combination with a health FSA, wellness program, and on-site health center, provides a complete package of health benefits for employees and their dependents. These components may constitute a single group health plan or separate group health plans, as defined by ERISA. Because these components are available simultaneously to plan participants as a single package of benefits, the National Business Group on Health believes that § 4376 fees should apply to the entire package of benefits available to any given participant and not individually to each component that constitutes a group health plan.

We believe that this approach would be consistent with Congressional intent, as indicated by the exception in Code § 4375 for excepted benefits described in Code § 9832(c). For our members, health FSAs, HRAs, wellness programs, on-site medical centers, and other health benefit arrangements may not fall within the definition of "excepted benefit" under Code § 9832(c)—often because they provide more extensive benefits than those under §

9832(c). But like excepted benefits, these benefits merely supplement major medical coverage. Assessing § 4376 fees for such benefits would result in a plan sponsor paying these fees multiple times for a single employee's health benefits, which we do not believe was the underlying intent of § 4376. Furthermore, individual plan participants may participate in some of these benefits but not others (for example, by participating in a health FSA but not using an on-site health center). Tracking the number of participants and beneficiaries for each such benefit could present substantial administrative difficulties for our members. Therefore, we recommend that the Service clarify in regulations that these types of benefits, provided they only supplement major medical coverage, will not fall within the definition of "applicable self-insured health plan" under § 4376 such that they are subject to § 4376 fees.

## **II. Average Number of Lives Covered Per Plan**

The National Business Group on Health supports the Service's proposal of a safe harbor for purposes of determining the average number of lives covered under a plan under §§ 4375 and 4376. A safe harbor would make §§ 4375 and 4376 fees more predictable for plan sponsors and simplify the process of determining the number of employees for which fees must be paid. We urge the Service to allow plan sponsors flexibility in making this determination. Our members' plans cover very large numbers of employees and often customize benefit offerings based on the needs of individual lines of business.

Furthermore, for some plans, our members do not track the exact number of dependents participating in a plan. Therefore, we recommend that the Service allow plan sponsors to determine the average number of lives covered under a plan based on:

- The number of participants reported on a plan's Annual Return/Report of Employee Benefit Plan (Form 5500); **or**
- The number of participants and the average number of covered dependents for the prior plan year, as determined by the plan sponsor or a third-party administrator.

## **III. Transition Rule**

Finally, we encourage the Service to allow plan sponsors flexibility in reporting and paying §§ 4375 and 4376 fees. Annual enrollment and many plan administrative tasks occur on a plan years basis, and plan sponsors will need additional time to make the "average number of lives covered" determination required under Code §§ 4375 and 4376. Therefore, we recommend that plan sponsors be permitted to report and pay §§ 4375 and 4376 fees within 90 days after the close of a plan year (rather than on the same calendar date). This time period would allow plan sponsors to make the necessary calculations and minimize reporting errors. We also recommend allowing third-party administrators to act on behalf of plan sponsors in complying with § 4376 fee requirements.

Again, thank you for considering our comments and recommendations on the Patient-Centered Outcomes Research Trust Fund fees under Code §§ 4375 and 4376. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,

A handwritten signature in cursive script that reads "Helen Darling".

Helen Darling  
President