Dear Ms. Karen Levin,

Thank you for the opportunity to contribute comments on Notice 2015-52 concerning Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage. We are appreciative of the IRS’ efforts to bring clarity to Section 4980I (Cadillac tax) regarding the upcoming 40-percent excise tax under the Affordable Care Act. However, as the proposed regulations reflect, we believe Indian tribal governments that maintain self-insured health plans for their employees and for their members should be exempt from the Cadillac tax because they are specifically excluded in Section 4980I. Additionally, in this comment letter we highlight the costs and burdens represented by the Cadillac tax, which will likely result in a reduction in health care benefits.

NAFOA is a national non-profit organization representing over 85 tribal governments throughout the United States and many more professionals that provide crucial financial management services to Indian Country. NAFOA was established 33 years ago to address the unique tribal government accounting and extensive capital needs that were overlooked or ignored by traditional banks, investment institutions, and accounting firms. Today NAFOA advocates sound economic and fiscal policy, develops training programs in financial management, and convenes tribal leadership, experienced professionals, and economic partners to meet the challenges of growth and change.

With the Affordable Care Act (ACA) becoming a law in 2010, NAFOA has been committed to providing ongoing education initiatives to help tribal governments comply. Over the past four years, we have hosted several in-person learning sessions at our biannual conferences to provide
Indian Country with important knowledge on provisions of the ACA that affect tribal government finance. NAFOA has also raised the issue of the IRS’ employer mandate reporting requirement in addition to the Cadillac tax during these events. From this feedback, NAFOA is submitting comments in reference to Notice 2015-52.

1. **Indian Tribal Government Exclusion in Section 4980I**
   Indian tribal governments are not mentioned in the statutory language in Section 4980I. The Notice omits any reference to Indian tribal government plans and plans of tribally chartered corporations from both the general rule applicable to employers and the specific rule including certain governmental employer plans. Section 4980I(d)(1) states that “applicable employer-sponsored coverage” includes “coverage under any group health plan established and maintained primarily for its civilian employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any such government.” This section specifically makes reference to federal and state governments and does not mention plans administered by Indian tribal governments.

   The exclusion of Indian tribal government plans is in contrast with other provisions in the ACA. For example, the provision that requires information reporting to employees of amounts spent on health plan items on a W-2 form specifically exempts Indian tribal governments. Other provisions in the ACA, such as Section 6055, which imposes reporting requirements on persons who provide minimum essential coverage, is defined to include plans established and maintained by an Indian tribal government.

   NAFOA believes the omission of Indian tribal governments from Section 4980I was intentional and by not including tribal governments it is assumed they are not subject to the Cadillac tax. NAFOA recommends the IRS address the omission and provide clear guidance on Indian tribal government plans and plans of tribally chartered corporations being exempt from the excise tax to reduce errors of interpretation.

2. **Meaningful Consultation**
   The White House issued a memorandum in November of 2009 stating its commitment to honor the “unique legal and political relationship with Indian tribal governments” through “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications” pursuant to Executive Order 13175. The proposed regulations in Section 4980I have direct and specific tribal implications throughout and specifically as it pertains to costs, among other issues. While the IRS has performed outreach in general on the Affordable Care Act, there has been very limited direct and consistent consultation to Indian Country on Notice 2015-52.
3. **Administrative Burden**

Many tribal governments and tribally chartered corporations employ less than 50 employees and are unlikely to have dedicated human resource staff with skills required to effectively implement the Cadillac tax. The proposed reporting process in Section 4980I is complex and will likely create an administrative burden for employers and others that have responsibilities under the Cadillac tax.

The various tax calculations reflect this complexity. Section 4980I does not clarify if the tax calculations that must be performed will be reported on a yearly or monthly basis, which would then be subject to adjustments retroactively. Additionally, the Cadillac tax is not limited to medical insurance premiums. A single tribal employer could offer employees a Dental plan, Vision plan, Flexible Spending Account (FSA), Health Savings Account (HSA), and an illness plan that would normally be excluded from gross income. Tribal employers would be required to report the share of tax to each individual service provider per employee. Adding to the complexity, each employee may not necessarily select the same benefits choices.

Section 4980I does not mention whether carry-over funds from an FSA or HSA would be applicable to the current period or will be excluded from the aggregate amount. Calculating a 40-percent tax on some benefits and potentially a carry-over will be burdensome. The filing of monthly reporting information will be complicated. Determining each provider’s share of the tax along with the number of filings for each employee required means the chances of errors will multiply quickly.

The costs and administrative burdens represented by the regulations will diminish already limited resources available to support tribal government operations. To effectively implement the proposed regulations and setup compliance procedures, tribal governments will have to hire additional staff to do this work or consultants. Vendors will likely increase their fees to employers to account for the rise in costs associated with the administrative compliance.

4. **Cadillac Tax Will Disproportionality Impact Tribal Governments**

Many tribal governments are located in rural areas where the cost of insurance is likely higher than the annual limit threshold of $10,200 for individual coverage and $27,500 for family coverage. To attract potential employees, tribal governments must offer competitive benefit packages, which are essential in recruiting talent. For example, in the Great Plains it is not uncommon to see a stable number of medical position vacancies at Indian Health Service hospitals. Tribal governments do not have control over market forces and offering premier benefits is necessary to attract talent to the workforce.

The Cadillac tax not only hinders efforts to attract and retain quality employees, but also has significant impacts on the community and places an additional burden on budgets. The Cadillac tax incents tribal employers to reduce benefits and make plan changes. This
tax disproportionately impacts rural tribal governments and is detrimental to not only Indian communities but also the surrounding rural communities. In addition, it separates the divide between governments that have resources to attract talent by providing creative incentives beyond benefits from those struggling governments that have no other options. The Cadillac tax penalizes the struggling governments.

5. **Re-Circulation of Federal Funds**

Tribal governments have a unique legal and political relationship with the federal government, affirmed by treaties, the Constitution, statutes, and federal policy and practice. The support of direct federal funding to tribal governments through grants, cost reimbursement contracts, and services is based on and affirms this unique relationship.

The Cadillac tax is a re-circulation of federal funds from one federal program (tribal service funding) to another (ACA provisions). The tax is indexed to the consumer price index, which means every year an increasing number of tribal government health plans will be subject to the tax. This amounts to essentially paying a higher federal tax each year with more federal funds.

Additionally, Section V, Part C of the notice states that if the coverage provider passes through the Cadillac tax to the employer and receives reimbursement for the tax, the reimbursement will be considered taxable income to the provider. To recoup this income tax on the Cadillac tax, the provider will likely seek to recover the income tax owed by increasing the tribal government’s premium. This results in an even higher Cadillac taxed owed and again leads to using more federal funds to pay the tax. The Cadillac tax takes away from already limited funding for essential public services like law enforcement, education and infrastructure development that most Americans take for granted.

**Recommendations:**

We appreciate the IRS’ efforts to clarify requirements under Section 4980I. In conclusion, Indian tribal governments were specifically excluded from the statutory language in Section 4980I and should not be subject to the Cadillac tax. Additionally, there was inadequate consultation with Indian tribal governments regarding the excise tax and the implementation and compliance will unnecessarily place an administrative burden on tribal governments. This re-circulation of funds amounts to paying a federal tax with federal funds. Finally, the Cadillac tax disproportionally affects Indian tribal governments, where limited access makes the cost of health care higher than in urban areas.

The Cadillac tax reduces the incentives for Indian tribal governments to pay for health care benefits for workers. This goes against the intent of the Affordable Care Act. NAFOA strongly recommends that the IRS clarify in Section 4980I that Indian tribal government employers that maintain self-insured health plans for their employees and for their members are exempt from the Cadillac tax.
These comments represent the common view of a significant number of Indian tribal governments; however, we urge the OMB to carefully consider all comments received by tribal governments and other tribal organizations, such as the National Indian Health Board.

Thank you for your consideration. We look forward to addressing the topics we have raised at your earliest convenience. For further clarification or comments, please contact Jennifer Parisien at (202) 558-8040.

Sincerely,

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