



December 1, 2023

Internal Revenue Service
Attn: CC:PA:LPD:PR
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on IRS REG–115559–23, Excise Tax on Designated Drugs

On behalf of National Taxpayers Union (NTU), the nation’s oldest taxpayer advocacy organization, we write with brief comments on your notice and request for public comments on the Internal Revenue Service (IRS) REG–115559–23, Excise Tax on Designated Drugs.

Introduction

NTU is the nation’s oldest taxpayer advocacy organization, founded in 1969. For nearly as long, our experts and advocates have engaged federal policymakers on important questions surrounding tax administration, taxpayer rights, and IRS services. NTU served on the National Commission on Restructuring the IRS in 1996 and 1997, which later became the basis for the 1998 IRS Restructuring and Reform Act (RRA). More recently, we provided technical assistance to Congress for what became the Taxpayer First Act (TFA) of 2019 and worked with stakeholders across government to ensure its enactment into law.

This year our research affiliate, National Taxpayers Union Foundation, initiated the Taxpayers for IRS Transformation (Taxpayers FIRST) project, which draws on experts from government, academia, and the private sector to “assist IRS officials and policymakers so that the new funding is spent effectively, improves taxpayer services, upgrades outdated technology, and helps efficiently reduce the tax gap while respecting and strengthening taxpayer rights and due process.”¹

Comments

By way of background, NTU opposed enactment of many portions of the Inflation Reduction Act, including Subtitle B and specifically, Section 11003 creating Section 5000D of the Internal

¹ For additional information, see: <https://www.taxpayers-first.org/>.

Revenue Code. As NTU wrote earlier this year of the new excise tax in Section 5000D:

There is no pretense of a given product being routinely sold between a private sector business and customer, and therefore a flow of commerce; the rate is consciously designed to force companies to the government's price negotiating table. Nor is the tax designed at a level to specifically offset the cost of providing government service. Nor is the tax firmly linked to a quantifiable externality, such as providing routine law enforcement or funding harm reduction. In the highly unlikely event that any receipts would ever accrue from the new drug excise, so far there appears to be little indication as to the mechanism for how such collections would be applied to staving off the looming bankruptcy of Medicare Part A, or to reducing Part D's overhead costs.²

Furthermore, the tax under Section 5000D is currently the subject of multiple legal challenges against its constitutionality, including its potential contradiction with the "Excessive Fines" clause in the 8th Amendment.

Nonetheless, the IRS has been charged with creating regulations that attempt to put into practice this tax. Given this situation, NTU offers the following recommendations:

Utilize more tools to discover the true paperwork burdens behind the tax. The Service perceptively noted in its Paperwork Reduction Act estimate in 115559-23 that, "Because the section 5000D tax is a new tax that has never been reported to the IRS, the Treasury Department and the IRS do not have historical data on the number of affected taxpayers." Given the intended punitive, coercive nature of the tax, it is possible that 0 taxpayers will ultimately be filing for excise tax payments. If, however, any taxpayers are forced to file under Section 5000D, we caution that the paperwork burden estimate of 6.9 hours could be far too low.

For nearly 25 years, our research affiliate has compiled an annual analysis of tax-related paperwork burdens at the federal level, studying intensely the IRS' and OMB's compilation of burden estimates based on information collections.³ We have also urged taxpayers to offer comments on information collections.⁴ In our experience, the elements of recordkeeping, planning, and learning about a new law or change to the law tend to be underestimated for their impact, while the actual preparation and filing of the return can sometimes be overestimated. This comports with the observation of Professor James L. Payne, who wrote:

Against [the] tendency to overreport [filling out tax returns] is a tendency to overlook many types of tax compliance activities when they take place in small, undramatic ways... One compliance task that is almost certain to be underreported is learning about

² <https://www.ntu.org/publications/detail/three-strikes-and-its-out-drug-price-negotiation-scheme-is-bad-economic-health-care-and-tax-policy>.

³ See, for example, <https://www.ntu.org/foundation/tax-page/complexity-2023-65-billion-hours-260-billion-what-tax-complexity-costs-americans>

⁴ See <https://www.ntu.org/foundation/detail/public-comments-on-irs-tax-forms-can-help-ease-filing-burdens>.

tax requirements. Throughout our lives, we spend a great deal of time reading about tax requirements and discussing tax issues with friends and acquaintances. All this attention is unlikely to be specifically recalled as tax compliance labor... On balance then, the self-report of tax compliance activities would seem to have two offsetting biases: the tendency to exaggerate intense work done on a frustrating task, and the tendency to overlook smaller tasks and “background” tax compliance activities.⁵

Section 5000D will require the creation of a recordkeeping and reporting infrastructure for affected taxpayers who have little to no experience with any kind of federal excise tax. Furthermore, the calculation of “U.S. sales” of a given drug falling under Subtitle B’s provisions is not necessarily an easy matter of retrieval from a central computer. Sales at many points in the distribution chain would need to be compiled in specific format, for a precise calculation of tax that will require the taxpayer to tabulate figures on a daily basis for properly tabulating the period of “noncompliance.” We would submit that a company with billions of dollars in sales for a given drug would need many staff working far more than 6.9 hours each quarter to properly fulfill. We hasten to add that fiduciary responsibilities to shareholders as well as internal controls to satisfy corporate accounting standards would necessitate creation of an “audit trail” – information that would be curated and stored in case the Service made inquiries or initiated an examination about a firm’s quarterly filing. Finally, employees at the firms will need special training to effectively comply with the new excise tax reporting requirements.

We therefore believe that the actual paperwork burden estimate could be multiples of the 6.9 hours reported here.

We also believe that a Regulatory Flexibility Act analysis would be helpful for this regulation, despite 115559’s statement that such an analysis is not required. It is quite possible that taxpayers, especially importers, of certain drugs could require smaller entities in their sales and distribution chains to provide corroborating information for the data that would need to be reported quarterly.

The discovery process for arriving at an accurate paperwork burden estimate will be difficult in this case. Still, we believe that the Service should give thorough consideration to the burdens we outlined above. Studying the very large burdens associated with reimplementing of the Superfund Excise Tax could provide some insight on tax reporting infrastructure issues. Even inviting excise tax professionals in other fields to a symposium on the uniquely challenging tax in Section 5000D could assist as well.

Provide as many taxpayer protections as possible. Although we view Section 5000D as a whole to be problematic, a few steps have been taken by the Service to provide the beginning of what could be more robust protections for taxpayers forced to contend with the tax. For example, Notice 2023-52, in explaining Subtitle B’s provisions on how the rate of tax is calculated,

⁵ See Payne, James L., *Costly Returns: The Burdens of the U.S. Tax System*, ICS Press, 1993, p. 21.

announced that “forthcoming proposed regulations” won’t force a manufacturer to embed the tax in the invoice price of a drug. This is at least a small nod toward fair tax administration. So are the proposed provisions in 115559-23 that would provide an exception from semimonthly deposit requirements, considering the untenable financial position in which taxpayers would find themselves in its absence.

The Service should resist any attempts to weaken or roll back these already minimal protections and should consider additional steps. For one, setting a retroactive applicability timetable to the 4th quarter of 2023 should be reconsidered, in light of this tax being completely new to both the Service and to those who may find themselves liable for it. Moreover, the Service should consider sales-reporting and calculation “safe harbors” that will recognize the contradictory task at hand: implementing a harsh tax whose clear legislative intent is as a cudgel to force taxpayers to negotiate drug prices with the government instead.

Furthermore, the Service should clarify how dispute resolution is to take place between taxpayers and the government over excise tax reporting, calculation, and other compliance matters. In a late 2022 rulemaking, the Service proposed to formally limit access to the Independent Office of Appeals for certain excises falling under the Alcohol and Tobacco Tax and Trade Bureau.⁶ Some appeals mechanism needs to be considered ahead of time for Section 5000D – if not through the Independent Office of Appeals, then through a separate Alternative Dispute Resolution process.⁷

Conclusion

NTU and others continue to hold that the tax established under Section 5000D is severely flawed and should either be struck down by the courts or repealed by Congress. Until that time, even the minimal considerations of sound tax administration call for additional, careful forethought toward the burdens, design, and dispute mechanisms surrounding Section 5000D. Thank you for your consideration, and we are at your service for any questions you may have.

Sincerely,

Pete Sepp, President

⁶ See our comments on this rulemaking at <https://www.ntu.org/publications/detail/ntu-offers-comments-to-irs-on-resolution-of-federal-tax-disputes>.

⁷ See our comments on IR-2023-136 here: <https://www.ntu.org/foundation/detail/comments-on-irss-dispute-resolution-program>.