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BY CERTIFIED MAIL AND EMAIL (Elaine.H.Christophe@irs.gov)

Yvette B. Lawrence
Internal Revenue Service
Room 6129
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Excise Tax Under Section 4980B of the Internal Revenue Code
Response to Request for Comments, 77 Fed. Reg. 7,239 (Feb. 10, 2012)
Regulation Project Number: REG-120476-07

Dear Ms. Lawrence:

Proskauer Rose LLP, on behalf of itself and certain of its clients, appreciates this opportunity to submit comments regarding the excise tax regulations under Sections 4980B and 4980D of the Internal Revenue Code of 1986, as amended (Code). Proskauer is an international law firm providing a wide variety of legal services to clients worldwide. In particular, Proskauer advises many large employers that are subject to the continuation coverage provisions of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA)[1] and to the portability, access, renewability, and market reform requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[2] Proskauer also advises third-party administrators that assist employers and plan administrators in complying with their COBRA and HIPAA responsibilities.

Issue # 1: The regulation should clarify that third-party administrators that provide only COBRA administration services, and that do not administer claims under a group health plan, are not statutorily liable for the excise tax under Code section 4980B.

Under Code section 4980B, the party liable for the excise tax is the employer, if the plan is not a multiemployer plan, or the plan, if the plan is a multiemployer plan.[3] The statute further provides that "[e]ach person who is responsible (other than in a capacity as an employee) for administering or providing benefits under the plan and whose act or failure to act caused (in

[1] *See* ERISA §§ 601 - 608, 29 U.S.C. §§ 1161 – 1168.

[2] *See* Code §§ 9801 *et. seq.*

[3] *See* Code § 4980B(e)(1)(A).

whole or in part) the failure"[4] is liable for the excise tax if such person assumed, under a legally enforceable written agreement, responsibility for the performance of the act to which the failure giving rise to the excise tax relates.[5] The corresponding regulation re-states the statutory rule but in a slightly different manner. The regulation provides that the excise tax is also imposed on a person involved in the provision of benefits under a plan, such as a third party administrator (TPA) that administers claims under the plan, if the person assumes, under a legally enforceable written agreement, the responsibility for performing the act to which the failure to comply with COBRA continuation coverage requirements relates.[6]

Over the course of the almost three decades since COBRA's enactment, an industry has emerged that focuses on providing COBRA administration services to employers and plan administrators that are subject to COBRA continuation coverage requirements. These COBRA administrators undertake to assist employers and plan administrators only with the administrative aspects of COBRA: sending completed COBRA notices, receiving COBRA election forms and transmitting enrollment selections to employers/plan administrators, and collecting premiums for COBRA continuation coverage and forwarding those premiums to employers/plan administrators. COBRA administrators that provide purely COBRA-related services not only do not provide benefits or administer claims under the underlying group health plan, but they regularly communicate that point to affected qualified beneficiaries.

Due to the prevalence of COBRA administrators that do not provide benefits or administer claims and the need for certainty and clear rules regarding the liability for excise taxes under COBRA, the Internal Revenue Service (Service) should revise Treas. Reg. § 54.4980B-2, Q/A-10(b) to clarify that TPAs that perform COBRA administrative functions but do not provide benefits or administer claims under group health plans for which they provide services are not liable for the excise tax imposed by Code section 4980B(a). In this regard, we request that the Service add the following language at the end of Treas. Reg. § 54.4980B-2, Q/A-10(b): "A person who is not involved with the provision of benefits or administration of claims under the plan, and who provides only ministerial administrative functions attendant to another person's obligation to offer COBRA continuation coverage under a group health plan, is not liable for the excise tax (even if such a person has assumed, under a legally enforceable written agreement, the responsibility for performing the act to which the failure to comply with the COBRA continuation coverage requirements relates)."

In the current business environment where so many TPAs provide COBRA administrative services on behalf of group health plans without being involved in any actual benefit claims administration, we believe it is necessary to have express regulatory guidance clarifying the status of these COBRA service providers vis-à-vis the COBRA excise tax. This result is consistent with the implication of the statute and existing regulations. This result also reflects

[4] *See* Code § 4980B(e)(1)(B).

[5] *See* Code § 4980B(e)(2)(A).

[6] *See* Treas. Reg. §4980B-2, Q/A-10(b).

the intention of the lawmakers who enacted the tailored excise tax sanction under 4980B in 1988. The legislative history to the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) states that only entities responsible for administering or providing benefits under the plan are liable for the tax, and gives as examples of such entities health maintenance organizations, insurance companies and plan administrators.[7] Accordingly, we believe that it is appropriate to clarify this ambiguity in favor of excluding from the list of potentially liable parties to the excise tax those COBRA administrators that provide only ministerial COBRA notification and premium collection services.

Issue # 2: The regulation should clarify how the COBRA excise tax applies as between employers and service providers who might be responsible for the same COBRA violation.

Despite the fact that, as explained above, COBRA administrators do not have statutory liability for the excise tax under Code section 4980B(a), some COBRA administrators may have contractual liability to pay the COBRA excise tax for COBRA failures caused by their actions in the course of providing administrative services. Also as explained above, TPAs that administer claims under a plan have statutory liability for the COBRA excise tax. In either case, if the TPA pays the excise tax for a particular COBRA violation (whether on behalf of the employer pursuant to contractual liability or on behalf of itself pursuant to statutory liability), the regulation should be clear that there is no authority to then make a claim against the employer for the same violation. Similarly, if the employer has paid the excise tax with respect to a particular violation, it should be clear that there is no further recourse against a COBRA administrator with respect to the same violation.

The TAMRA legislative history explains that employers and TPAs should be jointly and severally liable for the excise tax. In explaining the various persons who are liable for the tax, the relevant committee report provides that certain other persons are liable in addition to the employer, "i.e., the IRS can collect the tax from the employer or from one of such other persons."[8] The lawmakers did not intend for the Service to collect the same tax twice.

This is particularly important in a case where, for example, one party involved (either the TPA or the employer) has argued successfully for a reduction in the excise tax because the error was due to reasonable cause and not willful neglect. In such a case, if the Service were to audit the other party involved (either the TPA or the employer), the Service should not be able to assert an additional penalty amount against that other party for the same COBRA violation for which a tax was paid (or for which a tax was abated due to reasonable cause and not willful neglect).

Accordingly, we believe that Treas. Reg. § 54.4980B-2, Q/A-10 should be modified to specify that if one party involved with respect to a group health plan and COBRA violation has either paid the appropriate COBRA excise tax or had that tax reduced or abated by the Service, then no

[7] *See* H. Rep. No. 100-795, 100th Cong. 2d Sess., p. 488 (1988) (House Ways and Means Committee Report to TAMRA). [Emphasis added.]

[8] *See id*. [Emphasis added.]

additional tax is owed for the same violation by any other party involved with the group health plan.

Issue # 3: The regulation should be revised to articulate basic standards for defining correction for certain COBRA violations.

The COBRA excise tax is generally $100 per day for each qualified beneficiary who is harmed by the violation during the "noncompliance period," which begins on the date of the COBRA violation and ends on the earlier of (1) the date of "correction" for each qualified beneficiary who is harmed by a violation; or (2) the date that is six months after the last day of the otherwise applicable maximum COBRA coverage period (generally 18 or 36 months), without regard to the payment of a premium.[9] Correction occurs when a violation is retroactively undone and the qualified beneficiary (or his or her estate) is placed in a financial position that is as good as it would have been if the violation had not occurred.[10] For these purposes, it is assumed that the qualified beneficiary would have elected to receive the maximum amount of benefits permissible under the group health plan in question.[11]

However, if a COBRA violation is due to reasonable cause and not to willful neglect and the violation is corrected within thirty days following the date that any person liable for the excise tax knew, or exercising reasonable diligence would have known, of the violation, then no excise tax applies.[12] To apply the thirty-day correction rule, there are two elements that must be met: (1) correction must be made within the specified thirty-day period (*i.e.*, within thirty days of when any person liable for the excise knew, or exercising reasonable diligence would have known, of the violation), and (2) the actual correction must meet the undefined statutory standard for "correction" (as explained above).

Aside from the thirty-day correction rule, the concept of correction is also relevant to all COBRA violations and the excise tax applies until the COBRA violation is "corrected." Given the importance of "correction" and the ambiguity inherent in having an error "retroactively undone" and the qualified beneficiary placed in a financial position that is as good as he or she would have been in had no error occurred, it is important to have some more definitive standards to apply.

We understand that the determination of whether a violation is "retroactively undone" and whether individuals have been placed in a financial position that is as good as they would have

[9] *See* Code § 4980B(b)(1) and (2). If a violation occurs with respect to more than one qualified beneficiary who are members of the same family, then the amount of the excise tax is $200 per day with respect to all qualified beneficiaries who are members of that family. *See* Code § 4980B(c)(3)(B).

[10] *See* Code § 4980B(g)(4).

[11] *See* Code § 4980B(g)(4) (last sentence). *See also* H. Rep. No. 100-795, p. 488.

[12] *See* Code § 4890B(c)(2).

been in had no error occurred is inherently factual.[13] Despite the factual nature inherent in determining how to correct for any COBRA failure, we believe the Service can establish some basic parameters for correcting certain common COBRA violations.

Notice Violations. A group health plan must provide notice to covered employees and their spouses, at the time they become covered under the plan, of their COBRA continuation coverage rights (this notice is referred to as the initial COBRA notice).[14] Further, a plan administrator must notify qualified beneficiaries of their rights to elect COBRA following qualifying events (this notice is referred to as the COBRA election notice).[15]

In connection with a failure to provide the initial COBRA notice, rarely, if ever, will any specific harm be caused to a qualified beneficiary or potential qualified beneficiary that cannot be "retroactively undone" simply by furnishing the initial notice by sending it to the last known mailing address, to the extent possible. Also, the idea of placing the individual in the financial position that he or she would have been in had the error not occurred has very little meaning in the vast majority of instances where the only violation is a failure to provide the initial COBRA notice.[16] This is true for many reasons, including:

(1) Where the qualified beneficiary is the employee and the qualifying event is one in which the employee does not have the obligation to notify the plan administrator of the qualifying event (such as termination of employment or death), presumably the employee will receive the COBRA election notice in the future.

(2) In our experience, summary plan descriptions contain sufficient language to instruct the employee/qualified beneficiary that he or she has the obligation to notify the plan administrator of certain COBRA events (such as a divorce or a dependent ceasing to be eligible for the plan).

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[13] Case law under COBRA has approved correction for adversely affected qualified beneficiaries in terms of providing retroactive reimbursement of medical expenses through the COBRA coverage not offered correctly (or at least the opportunity for COBRA coverage) with an adjustment for premiums that should be paid and attorney's fees and notice penalties under the Employee Retirement Income Security Act of 1974, as amended (in some cases). *Shephard v. O'Quinn*, Case No. 3:05-CV-79 (E.D. Tenn., April 26, 2006); *Starr v. Metro Systems, Inc.*, 2005 WL 2216288 (D. Minn., Sept. 12, 2005); *Brown v. Neely Truck Line, Inc.*, 884 F. Supp. 1534 (M. D. Ala. 1995); *Ward v. Bethenergy Mines, Inc.*, 851 F. Supp. 235 (S.D. W. Va. 1994). Although these standards of correction are instructive, they are not necessarily the same as what would apply for excise tax purposes. To our knowledge, there are no cases interpreting how to implement correction for excise tax purposes.

[14] *See* Code § 4980B(f)(6)(A).

[15] *See* Code § 4980B(f)(6)(D).

[16] We note that the failure to provide the initial COBRA notice does not really cause any financial harm if there are no other COBRA violations involved. Indeed, any other violations that might stem from a qualified beneficiary not knowing of his or her rights due to a failure to be provided with the initial notice would be separate violations (such as a failure to provide a qualifying event notice) and not really a direct cause of the failure to provide the initial COBRA notice.

(3) In a divorce situation, there are often attorneys involved who will inform their clients that COBRA continuation coverage is available to the spouse following the divorce.

Therefore, it would seem reasonable to create a presumption that full correction for a failure to provide an initial notice has occurred once the participant and spouse (if any) have been provided[17] with an updated initial COBRA notice.

Similarly, in the case of a plan administrator's failure to provide the COBRA election notice in a timely manner, the notion of retroactively undoing the violation and placing the qualified beneficiaries in the financial position they would have been in had no error occurred is challenging without guidance as to what that really means. Even where a qualified beneficiary wants to elect COBRA coverage, the violation of failure to deliver the COBRA election notice should be corrected by the plan administrator providing the COBRA election notice to affected qualified beneficiaries and making the COBRA coverage available if they elect and timely pay for it.

If correction does not occur until after a complete analysis of the financial position of the affected individuals, then the statutory thirty-day rule would effectively be meaningless. When even basic violations involve multiple qualifying events, multiple qualified beneficiaries who are not part of the same family, and/or multiple group health plans, either because a large employer offers more than one plan or because a COBRA administrator's computerized system creates the same error with respect to the group health plans of multiple employers, it is impossible for the plan administrator and/or COBRA administrator to know of the exact financial position of everyone who could be affected by a failure to provide any COBRA notice. Also, just as in the case of a failure to provide the initial notice, the likelihood is that most affected individuals will not have incurred significant financial harm because most individuals who failed to receive the election notices do not even want to elect COBRA coverage (due to cost, the availability of other coverage, or other reasons). In fact, it has been estimated that the percentage of qualified beneficiaries who elect COBRA continuation coverage is typically between 18% and 26%.[18]

To require that a complete financial analysis of each potentially adversely affected individual be made within thirty-days is not reasonably possible. Therefore, for the thirty-day correction rule to have any real application in the context of COBRA notice violations, "correction" should be deemed to have occurred once a new notice is mailed to the qualified beneficiary's last known address (or otherwise provided in a compliant manner) and the plan administrator has acknowledged the qualified beneficiary's right, if applicable, to retroactive COBRA coverage (subject to payment of the applicable premium) as if the notice had been timely provided.

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[17] We note that "providing" for this purpose generally means sending the notice via first class mail to the qualified beneficiary's or potential qualified beneficiary's last known mailing address. Other methods (such as hand delivery) could also comply.

[18] Katelin P. Isaacs, Cong. Research Serv., RL 34251, Federal Programs Available to Unemployed Workers 8 (2011).

Whether this correction (i.e., sending of the applicable notice) occurs within the thirty-day period such that no COBRA excise tax is owed with respect to the notice violation is appropriately left to the employer/administrator to determine based upon the facts and circumstances. However, establishing a clear standard of correcting a failure to timely provide an initial COBRA notice or a COBRA election notice will ease concern over the uncertainty surrounding this issue.

Accordingly, we recommend that Treas. Reg. § 54.4980B-2 be revised to add a correction standard for COBRA notice violations. This standard could be expressed as follows: "For purposes of Section 4980B(b)(2)(B)(i), any failure to timely provide notice as required by sections 4980B(f)(6)(A) or 4980B(f)(6)(D) shall be deemed to be corrected when the notice is provided to each affected covered employee and spouse of the employee (in the case of a failure under section 4980B(f)(6)(A)) or to each affected qualified beneficiary (in the case of a failure under section 4980B(f)(6)(D)); provided that in the case of a correction of a failure under section 4980B(f)(6)(D), the group health plan also agrees to reinstate COBRA continuation coverage retroactively to the extent applicable for each qualified beneficiary that timely elects and pays for such coverage based on the date of the updated notice. A notice shall be deemed to be provided when it is mailed to the affected employee and spouse or affected qualified beneficiary, as applicable, via first class mail to the individual's last known mailing address."

Premium Violations. A group health plan may charge a qualified beneficiary no more than 102% (150% for disabled qualified beneficiaries after the first 18 months of continuation coverage) of the applicable premium for coverage.[19] Occasionally, a plan administrator will overcharge a qualified beneficiary for COBRA premiums. This can happen due to an inadvertent error of reporting new premium rates to various vendors or a simple error in programming the correct premium into a computerized administration system. In connection with qualified beneficiaries who overpaid their applicable COBRA premiums due to mistaken information provided by the plan administrator, correction should be to provide corrected information about the amount owed and offer to either refund the overpayment, plus interest at the underpayment rate established under Code section 6621(a) or credit the overpayment toward the future premiums owed for COBRA coverage, as elected by the qualified beneficiary. With respect to qualified beneficiaries who received incorrect premium information and failed to elect COBRA coverage, correction should be made by providing correct premium information and affording the individuals an additional period (not to exceed 10 days from the corrected notice) within which to elect COBRA coverage based on the correct premium amounts.

We believe including this standard correction in a revised Treas. Reg. § 54.4980B-2 is appropriate because it puts the qualified beneficiary in a financial position which is as good as he or she would have been in had the failure not occurred.

[19] *See* Code § 4980B(f)(2)(C).

Issue # 4: The regulation should be revised to articulate basic standards for defining correction for the failure to provide HIPAA Certificates of Creditable Coverage.

The excise tax for the failure of a group health plan to comply with the various requirements of HIPAA is very similar to the COBRA excise tax: $100 per day for each qualified beneficiary who is harmed by the violation during the "noncompliance period," which begins on the date of the HIPAA violation and ends on date the violation is corrected.[20] The HIPAA excise tax provision defines "correction" in virtually the same manner as it is defined in the COBRA excise tax provision.[21] The thirty-day correction rule also applies to HIPAA violations.[22] One HIPAA requirement is similar to the COBRA initial and election notice requirements: the requirement that group health plans provide Certificates of Creditable Coverage to individuals within specified time periods following the occurrence of certain events.[23]

Also similar to COBRA, many plan administrators rely on TPAs and insurers to provide these HIPAA notices on behalf of the plans. Consequently, when glitches occur within a TPA's or insurer's computer system, a large number of Certificates of Creditable Coverage may not be provided timely (or at all), creating many of the same issues with respect to correction of the violation that are described above with respect to COBRA notice violations. However, in the case of the failure to provide a HIPAA Certificate of Creditable Coverage, the likelihood that a group health plan participant or beneficiary will incur financial harm is even more remote than in the COBRA context, because when the individual begins to enroll in another group health plan or insurance coverage that imposes a pre-existing condition exclusion, the plan or insurer almost certainly will ask the individual if he or she had prior health coverage and, if so, to provide the Certificate of Creditable Coverage. At that point in time, the individual has the right under HIPAA to request a Certificate of Creditable Coverage from the plan or issuer.[24] In addition, many plans have previously eliminated pre-existing condition exclusions in light of the HIPAA rules and other plans have been or will be eliminating pre-existing condition exclusions due to the requirements of the Patient Protection and Affordable Care Act ("PPACA"). Once the PPACA rules are fully implemented in this regard, it will be essentially meaningless to require the provision of Certificates of Creditable Coverage.

Thus, the failure to provide a HIPAA Certificate of Creditable Coverage should be corrected by the group health plan (or its TPA or insurer, as applicable) providing the notice to the affected individuals. We therefore recommend that Treas. Reg. § 54.9801-5 be revised to add a correction standard for HIPAA Certificate of Creditable Coverage violations. This standard

[20] *See* Code § 4980D(b)(1) and (2).

[21] *See* Code § 4980D(f)(3).

[22] *See* Code § 4980D(c)(2).

[23] *See* Code § 9801(e).

[24] *See* Code § 9801(e)(1)(A)(iii). This assumes individual will enroll in the subsequent plan or coverage within 24 months of when coverage was lost under the plan that did not provide the Certificate of Creditable Coverabe.

could be expressed as follows: "For purposes of Section 4980D(b)(2)(B), any failure to timely provide notice as required by section 9801(e)(1) shall be deemed to be corrected when the notice is actually provided to each affected individual. A notice shall be deemed to be provided when it is mailed to the affected individual via first class mail to the individual's last known mailing address."

Issue # 5: The regulation and Form 8928 and instructions should provide express standards applicable to the Service's waiver of the COBRA Excise Tax where payment of the tax would be excessive relative to the failure involved.

The Service has the authority to waive all or part of the COBRA excise tax if a COBRA violation is due to reasonable cause and not to willful neglect and the payment of the tax would be excessive relative to the seriousness of the violation.[25] Although the instructions to Form 8928 indicate that a waiver is available, it is not clear what information a person liable for the tax must submit to the Service to obtain such a waiver.[26]

In this regard, we expect the Service would require that the party demonstrate how the failure is due to reasonable cause and not to willful neglect, how the party monitors COBRA compliance and how the excise tax is excessive to the failure. As such, it would be helpful for the Service to establish standards relating to these factors.

The phrase "due to reasonable cause and not to willful neglect" is not defined in the statute or legislative history to COBRA. However, that phrase is used in other areas of the tax law and has been so used for decades.[27] Presumably, when Congress used the phrase "due to reasonable cause and not to willful neglect," it intended the meaning that this term had in other parts of the Code.[28] In that more general tax context, courts have indicated that "reasonable cause" requires a taxpayer to demonstrate that he or she exercised ordinary business care and prudence but nevertheless failed to comply with the particular tax rule in question.[29] The relevant Treasury

[25] *See* Code § 4980B(c)(5). The TAMRA legislative history to this provision indicates that the conferees intended that the determination of whether imposition of the excise tax would be excessive is to be made based on the *seriousness* of the failure and not on a particular taxpayer's ability to pay the tax. H. Rep. No. 100-1104, 100th Cong. 2d Sess., 27 (1988).

[26] *See* Instructions for Form 8928 (Sept. 2011), Part I ("The Secretary may waive part or all of the excise tax…to the extent that payment of the tax would be excessive relative to the failure involved.").

[27] *See United States v. Boyle*, 469 U.S. 241, 245 (1985) (recognizing that the terms "reasonable cause" and "willful neglect" have been used in tax law since 1916 and have well-established meanings).

[28] "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

[29] *See Boyle*, 469 U.S. at 245, citing *Fleming v. United States*, 648 F.2d 1122, 1124 (7th Cir. 1981); *Ferrando v. United States*, 245 F.2d 582, 587 (9th Cir. 1957); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 770 (2nd Cir. 1950); *Southeastern Finance Co. v. Commissioner*, 153 F.2d 205 (5th Cir. 1946); *Girard Investment Co. v. Commissioner*, 122 F.2d 843, 848 (3rd Cir. 1941).

Regulation sets forth the same standard.[30] Moreover, "willful neglect" is typically defined as meaning a conscious, intentional failure or reckless indifference to the requirements.[31] It would greatly simplify the COBRA correction and tax determination process if the Service were to specifically endorse similar standards with regards to COBRA. We therefore request that the Service determine a standard for COBRA purposes and include it in a revision to Treas. Reg. § 54.4980B-2.

Similarly, in determining whether to exercise its waiver authority, the Service must consider the extent to which those who were liable for the tax monitored their compliance with COBRA.[32] In evaluating a liable person's efforts to comply with COBRA, the Service is supposed to consider the following factors:

1. The quality of the taxpayer's compliance program with respect to, for example, the training of individuals responsible for operational compliance, and the preparation of written instructions for such individuals.

2. The extent to which the compliance program has been designed based on competent professional advice, such as legal and (where appropriate) actuarial counsel, and the extent to which the program has been updated, based on such advice, to reflect changes in the law or in other circumstances.

3. The extent to which the operation of the compliance program is monitored by auditors, taking into account the safeguards established to assure the independence of the auditors.[33]

Because these factors are specifically referenced in COBRA's legislative history, we believe it is appropriate for the Service to explicitly adopt these standards in the context of developing a transparent waiver program. Further, based on the Service's COBRA audit techniques, published on the Service's website last month, it appears that the Service in fact relies upon these factors when determining whether a waiver is warranted.[34] Thus, we believe that the Service should revise Treas. Reg. § 54.4980B-2 to add the standards by which those responsible for providing COBRA coverage may demonstrate that errors were due to reasonable cause and not willful neglect.

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[30] Treas. Reg. § 301.6651-1(c)(1) (defining reasonable cause for failure to file a tax return or to pay tax).

[31] *See Boyle*, 469 U.S. at 245, citing *Orient Investment & Finance Co. v. Commissioner*, 83 U.S.App.D.C. 74, 75, 166 F.2d 601, 602 (1948); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628, 634 (3rd Cir. 1947); *Janice Leather Imports Ltd. v. United States*, 391 F.Supp. 1235, 1237 (S.D.N.Y. 1974); *Gemological Institute of America, Inc. v. Riddell*, 149 F.Supp. 128, 131-132 (S.D. Cal.1957).

[32] H. Rep. No. 100-795, p. 489.

[33] *Id*.

[34] See http://www.irs.gov/businesses/small/article/0,,id=255893,00.html#_Toc_275 (as visited on Apr. 3, 2012).

Issue # 6: Form 8928 and the instructions should be amended to clarify how the form is to be completed where a third-party service provider may have to report the same violation for multiple qualified beneficiaries in multiple group health plans.

COBRA administrators use computer-based systems to administer their COBRA responsibilities for multiple clients. Further, many large employers sponsor more than one group health plan that covers different groups of employees. Accordingly, when a COBRA violation occurs, it often occurs with respect to multiple qualified beneficiaries who are not part of the same family and perhaps multiple qualifying events. In this situation, the TPAs and/or employers should be able to use one Form 8928 to report the violation for all affected qualified beneficiaries in all group health plans. However, this is difficult to do based on the current Form 8928 and instructions because the factual information required in lines 1, 2, and 3 of Part I, Section A and lines 12, 13, and 14 of Part I, Section B: this information is specific to each qualified beneficiary (and his or her family).

To remedy this situation, we request that Treas. Reg. § 54.6011-2 and/or Form 8928 and its instructions be revised to provide an alternative for situations involving multiple qualifying events, multiple qualified beneficiaries who are not part of the same family, and/or multiple plans. Specifically, an express authorization that persons liable for the tax can use spreadsheet attachments to determine the base amount of tax due as a result of one violation that affects multiple qualifying events, multiple qualified beneficiaries who are not part of the same family and/or multiple group health plans and then use the form to summarize the total tax due as a result of that violation is warranted.

Issue # 7: Form 8928 and the instructions should be amended to more appropriately take into account the period for which no tax is owed due to the failure not being discovered despite the exercise of reasonable diligence.

According to the statute, no excise tax is imposed during any period when no one who could be liable for the tax knew (or exercising reasonable diligence would have known) of a particular violation.[35] Form 8928 and its instructions restate the statutory rule and provide that the noncompliance period begins on the date of the violation regardless of when the error was discovered but that no excise tax applies if it is established to the Service that no one liable for the tax knew, or exercising reasonable diligence would have known, the failure occurred.[36] However, in practice Form 8928 and its instructions do not appropriately address this tax mitigation rule.

Currently, the form requires that the filer enter 0 in line 4 of Part I, Section A of Form 8928 if the failure was not discovered despite exercising reasonable diligence or was corrected within the thirty-day correction period and was due to reasonable cause. It is clear why entering 0 in line 4 makes sense with respect to a failure due to reasonable cause that was corrected within the thirty-

[35] Code § 4980B(c)(1).

[36] Instructions for Form 8928 (Sept. 2011), Part I, Section A, Lines 1 and 4.

day correction period. However, it is unclear why entering 0 in line 4 for a failure not discovered despite exercising reasonable diligence is appropriate, because there is no reason to file Form 8928 and pay the tax if the failure is unknown. Per the statute, no tax is due with respect to a failure during the period for which the failure was not discovered despite exercising reasonable diligence, but Form 8928 does not reflect this statutory rule.

We believe the correct method for incorporating the discovery rule is to reduce the number of days of noncompliance in the reporting period (line 1 of Part I, Section A of the current Form 8928) by the period during which the failure remained unknown while exercising reasonable diligence. Consequently, we ask the Service to revise Form 8928 and its instructions to accurately reflect the way the discovery rule affects the amount of the tax based on the statutory scheme.

We would be happy to discuss our concerns and suggestions in more detail. We hope that a final rule, with the changes that we have recommended, will be adopted promptly.

Respectfully submitted,

PROSKAUER ROSE LLP

By: _____
Paul M. Hamburger

By: _____
Lynda M. Noggle