Notice 2015-16

American Bankers Association
HSA Council

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May 15, 2015

Karen Levin
Office of Associate Chief Counsel (Tax Exempt and Government Entities)
CC:PA:LPD:PR (Notice 2015-16)
Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044.

By email to: Notice.comments@irscounsel.treas.gov

Dear Ms. Levin:

We appreciate the opportunity to comment on the potential regulatory approach the IRS describes in Notice 2015-16 with respect to implementing Section 4980I, *Excise Tax on High Cost Employer-Sponsored Health Coverage.* We are concerned the approach identified in Section III(D) of the Notice will have a negative impact on the availability and use of Health Savings Accounts (HSAs).

Currently, nearly 20 million Americans are covered by an HSA-qualified plan that enables them to fund their healthcare with an HSA. The members of the ABA's HSA Council[1] are concerned that this section of the health reform law may result in a net reduction in health coverage, exactly contrary to the intent of the Affordable Care Act (ACA).

Importantly, we note that the threshold for tax liability is indexed to the Consumer Price Index (CPI) instead of medical inflation, suggesting that instead of being just a tax on high cost employee health benefits, as congress intended, the excise tax is instead going to tax all health benefits eventually. As benefits costs rise faster than the threshold for tax liability, the inevitable result is that the tax will be levied on all benefit plans, not just the most expensive. We urge the IRS to consider this unintended consequence when issuing proposed rules.

In general, nothing in the ACA undermines the statutory tax treatment of contributions to Health Savings Accounts (HSAs) and the HSA-qualified plans necessary to contribute to them. Namely, that their timing, size and circumstances of deductibility described in 26 U.S.

[1] The ABA HSA Council is made up of financial institutions, health insurers, third party administrators and technology companies working to represent consumers insured with Health Savings Account qualified health plans. The Council is part of the American Bankers Association in Washington D.C.

Code Section 223 remains intact. The challenge is that Notice 2015-16, in its literal interpretation of Section 4980I, fails to adjudicate the difference between employer's dollars contributed to an employee's health plan for the purposes of this tax and the employee's own money contributed to the employee's own HSA, which the employee solely owns, except to say that after-tax contributions do not count towards the excise tax calculation.

Treatment of contributions is important since it directly affects the benefit choices employers will make to avoid or delay as long as possible, liability for the excise tax under this section. Already, benefits advisors are counseling their employer clients to reduce or eliminate contributions to their employees' HSAs as a tactic for avoiding tax liability. Dissuading employer contributions, as the excise tax clearly does, has the effect of thwarting employee contributions as well.

One of the largest HSA Custodians and an HSA Council board member reported that, "When employers funded employee HSAs, **84 percent** of plan participants opened an account, but **only 34 percent** did so without employer funding." In addition, dissuading employer contributions has disproportionately higher effects on older members, families, and those with chronic conditions:

a. Account contributions tend to increase as employees age and prepare for retirement; and,
b. Individuals who have a chronic condition (diabetes, COPD, etc.) contribute more, presumably because they know they'll be using the account frequently.

Neither population will be better-off if employers limit or eliminate contributions to their older or sicker employees in order to avoid tax liability.

Another dynamic of HSA-qualified plans is the incentive-based nature of their operation. Many employers have instituted comprehensive wellness programs, rewarding employees monetarily for enrolling in weight loss programs, smoking cessation, and exercise classes. There are also examples in the marketplace of monetary rewards for completing bio-metric screening and achieving bio-metric benchmarks.

These incentives have the cumulative effects of encouraging their subscribers towards healthier life choices; however, to the extent that the financial rewards available in these plans increase the cost of applicable coverage above the statutory threshold triggering the excise tax, employers may elect to discontinue offering incentives. These collateral degradations to the quality of health coverage were not the intended effect of Section 4890I. The law was enacted to encourage the opposite effect.

Ownership

All funds contributed to an HSA, either by the employer or the employee, are the employee's property, not the employer's. These funds are not the property of an employer and never can be; they are not held in trust by the employer for the employee's benefit but instead are the sole property of the employee.

This ownership paradigm extends to contributions to the account, irrespective of source. HSAs are not products administered by an employer for the benefit of an employee. If an employer chooses to contribute to an employee's HSA, the funds deposited to the HSA cease being the employer's and become the employee's property immediately upon deposit.

More to the point, an employee can use the funds in his HSA for any purpose, so long as he pays the applicable income tax and the 20% penalty associated with non-qualified distributions. In fact, the ability to use these funds as you choose is why the Department of Labor (DOL) concluded in Field Assistance Bulletin (FAB) 2004-1[2] that, "HSAs generally will not constitute employee welfare benefit plans" at all. DOL reasoned that,

> *HSAs are personal health care savings vehicles rather than a form of group health insurance. For example, funds deposited in an HSA generally may not be used to pay health insurance premiums, and the beneficiaries of the account have sole control and are exclusively responsible for expending the funds in compliance with the requirements of the Code.*

More than any other feature, this ability to use your own money as you see fit is what constitutes ownership and ***ownership has to mean something***; it can't be the case that the excise tax rules lump HSAs into the same category as every other product because HSAs are the only product where someone other than the employer owns a portion of the dollars being counted.

In our view, because of how different HSAs are, the IRS has the necessary discretionary authority to characterize employee contributions to the employee's HSA, even if facilitated by the employer through Section 106 authority, as "excludable" without also being included in the definition of "applicable coverage" precisely because employers don't own any of the money in an employee's HSA. Funds in an HSA are the property of the beneficiary and are non-forfeitable under 26 U.S. Code Section 223 (d)(1)(E).

We respectfully request that IRS exempt employee contributions from the calculation of the excise tax.

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[2] DOL Field Assistance Bulletin, 2004-1, April 7, 2004.

We appreciate the agency's willingness to provide insight into the proposed rulemaking early in this process. It's critical that providers of HSA-qualified plans and the consumers we serve have the timeliest information possible about potential changes to their health insurance. We are anxious to continue working with the IRS on such an important part of ACA implementation.

Sincerely,

JKA McKechnie

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