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Established 1983



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May 15, 2015

Internal Revenue Service

CC:PA:LPD:PR (Notice 2015-16), Room 5203
P.O. Box 7604

Ben Franklin Station, Washington, DC 20044

By electronic mail to
notice.comments@irs.counsel.treas.gov

Comments on IRS Notice 2015-16

Dear Service Representative:

The Association of Federal Health Organizations ("AFHO") appreciates this opportunity to comment on the Internal Revenue Service's Notice No. 2015-16 concerning the Affordable Care Act's ("ACA") excise tax on high cost employer sponsored health coverage (hereafter the "excise tax"). AFHO is a trade association composed of Federal Employees Health Benefits ("FEHB") plan carriers that provide health benefits coverage to over 3,000,000 Federal and Postal employees and annuitants.¹

Premium Calculation Issue

Notice No. 2015-16 explains (p. 3) that "Generally, the cost of applicable coverage under [I.R.C.] § 4980I is 'determined under rules similar to the rules' under COBRA for determining the COBRA applicable premium." Congress exempted FEHB plans from the COBRA continuation coverage requirements. Congressional Research Service Report on Health Insurance Continuation Coverage under COBRA, at 2 (July 11, 2013) (available at <https://www.hsdl.org/?view&did=741235>). The FEHB Program's COBRA analog is known as temporary continuation of coverage ("TCC"), 5 U.S.C. § 8906a. The TCC premium is the sum of the government and employee contributions for coverage under the selected FEHB plan. 5 C.F.R. § 890.1109(a).² We ask that the Service direct the use of this TCC rule for purposes of calculating the cost of applicable FEHB plan coverage.

¹ AFHO members reserve the right to submit individual organization comments to the Service on Notice 2015-16.

² Similar to COBRA a 2% administrative charge is added to the TCC premium. 5 C.F.R. § 890.1113(a). It is our understanding from Notice No. 15-16 at 3-4 that this 2% administrative charge is not counted toward the excise tax thresholds.

Limited Purpose Dental and Vision Flexible Spending Accounts

We also ask the Service to expressly exempt contributions to flexible spending accounts ("FSAs") limited to dental and vision care purposes from the definition of applicable employer sponsored coverage for excise tax purposes. It is logical to extend the exemption for limited scope dental and vision benefits (Notice, pp. 9 - 10) to limited purpose dental and vision FSAs. The Service previously adopted this suggested approach with its high deductible health plan ("HDHP") definition under IRC § 223. See Rev. Rul. 2004-45.

Health Plan Funded HRA Reimbursements and HSA Contributions

Consumer-driven FEHB plans typically offer a HDHP option that allows for funding of a health savings account ("HSA") and a health reimbursement account ("HRA") option. Notice No. 2015-16 indicates that HRA reimbursements and employer contributions to HSAs will be included in the excise tax calculation. IRS Notice No. 2015-16, at 6-8. However, FEHB consumer-driven plan HRA reimbursements and contributions to HSAs are built into the plan's premium for TCC purposes. Consequently, the Service's approach would result in double counting of coverage costs in such instances. To avoid that inequity, we ask the Service to exempt from the cost of coverage for excise tax calculation HSA contributions and HRA reimbursements funded from a health plan's COBRA or TCC calculated premium.

On-Site Medical Clinics

IRS Notice No. 2015-16 (pp. 8-9) explains that

[IRC] Section 4980I(d)(1)(B)(i) [the high cost coverage excise tax provision] excludes from the definition of applicable coverage each of the excepted benefits listed in [IRC] § 9832(c)(1), other than the [IRC] § 9832(c)(1)(G) exception for on-site medical clinics. Accordingly, coverage provided through an on-site medical clinic generally is applicable coverage. Treasury and IRS, however, anticipate that the forthcoming proposed regulations will provide that applicable coverage does not include on-site medical clinics that offer only de minimis medical care to employees.

De minimis medical clinics according to Notice No. 2015-16 provide free first aid to current employees during working hours. The Service solicited public comments on whether this de minimis exception should be expanded. We suggest that it be expanded in the following respects:

1. Domestic On-Site Medical Clinics

Federal law, 5 U.S.C. § 7901, authorizes the heads of federal departments and agencies to create by contract or otherwise "a health service program to promote and maintain the physical and mental fitness of employees under [their] jurisdiction." Similarly, the U.S. Postal Service has a National Medical and Occupational Health Program "consisting of administrative functions, wellness initiatives, and other medically related activities designed to address the health and safety of employees in the workplace."

These programs provide similar services.

Civil Service, 5 U.S.C. § 7901	U.S.P.S. (https://about.usps.com/manuals/elm/html/elmc8_030.htm)
Treatment of on-the-job illness and dental conditions requiring emergency attention and Referral of employees to private physicians and dentists	Managing the care of acutely ill or injured employees
Pre-employment and other examinations	Determining medical ability of applicants and employees to perform the functions of the job
Preventive programs relating to health	Providing preventive medical programs in health counseling, education, and training and Providing immunization services and participating in community health programs such as blood pressure, glaucoma, and diabetes assessments and blood bank programs

Preventive services often are offered to family members as well as employees. The services for civil service employees typically are provided by Federal Occupational Health ("FOH"). FOH is a non-appropriated Health and Human Services agency that provides occupational health and wellness services exclusively to federal employees. Sources:

<https://foh.hhs.gov/library/factsheets/interagency.pdf> and
http://foh.hhs.gov/library/factsheets/FOH_FactSheet.pdf.

In order to avoid unintentionally subjecting the federal government and other responsible employers to this excise tax and to be consistent with the colloquy in Notice No. 2015-16 (p. 9), we suggest that the Service expand the exclusion from applicable coverage to include all four of these limited services and broadly construe "preventive services" to include screening tests, immunizations, allergy injections, and tobacco cessation programs at a minimum.

These occupational health programs also provide services "which most employees likely would not consider part of their health coverage." IRS Notice No. 2015-16, at 9. For example, the Postal Service's program includes

- a. Managing applicant and employee drug and alcohol testing programs.
- b. Managing compliance with the regulatory requirements of the:
 - i. Department of Transportation,
 - ii. Office of Workers' Compensation Programs,
 - iii. Occupational Safety and Health Administration, and
 - iv. Other entities for which program compliance is required.

- c. Managing the medical records of applicants and employees.
- d. Providing recommendations regarding physical capabilities, limitations, accommodation, and rehabilitation of disabled employees or applicants.
- e. Assisting in the prevention of job-related injuries and illness.
- f. Collecting and analyzing epidemiologic data to detect statistical trends in occupational illness or injury.

The costs of such services, which principally relate to exempted workers' compensation coverage and legal compliance for employers, should not be included in the cost of applicable coverage for excise purposes.

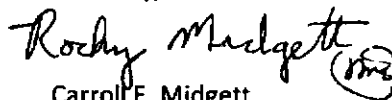
2. Expatriate On-Site Medical Clinics

The U.S. State Department's Office of Medical Services ("MED") generally provides healthcare to U.S. government employees and their families who are assigned to U.S. embassies and consulates worldwide. Source: <http://www.state.gov/m/med/>. MED's essential services go well beyond the limits that the Service is contemplating for this excise tax exclusion.

We urge the Service to exclude from the cost of applicable coverage for excise tax purposes all employer sponsored health care facilities for expatriate employees. Unlike health care flexible spending accounts, these essential services cannot be terminated in order to avoid the excise tax. Furthermore, excluding expatriate health clinics from the cost of applicable coverage for excise tax purposes would be in keeping with the Expatriate Health Coverage Clarification Act of 2014 (Division M of the Consolidated and Further Continuing Appropriations Act, 2015), which generally exempts expatriate group health plans from the excise tax.

Thank you for considering these comments.

Sincerely,



Carroll E. Midgett
Chairman

cc: Board of Directors

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