

Notice 2015-16

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Submitted electronically via <http://regulations.gov/>

CC:PA:LPD:PR (Notice 2015-16)
John Koskinen, Commissioner
Internal Revenue Service
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Washington, DC 20044

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Re: Notice 2015-16; Excise Tax on High Cost Employer-Sponsored Health Coverage

Dear Commissioner Koskinen:

The Business Roundtable is an association of chief executive officers of leading U.S. companies. Together, our member companies employ nearly 16 million individuals and provide healthcare coverage to more than 40 million American workers, retirees and their families. Business Roundtable is invested in addressing healthcare costs that hamper essential economic growth.

I am writing on behalf of the Business Roundtable in response to the IRS guidance related to the Excise Tax on High-Cost Employer-Sponsored Health Coverage (Notice 2015-16). We strongly believe that the impact of this tax will have broader implications than first anticipated by the Joint Tax Committee (JTC), and have been provided information that as many as 25 percent of employers' plans may be subject to the tax. A sampling of Business Roundtable members showed that some member companies expect to see liability under the excise tax in 2018, and nearly all members believe their plans eventually will incur liability. This tax liability could result in significant costs to our members and their employees who rely on their healthcare coverage. It is our hope that, as we work through this regulatory process, the statute will be interpreted with a broader lens, considering the impact and potentially negative consequences that could result from injudicious implementation of the excise tax.

When implementing the excise tax, Treasury and IRS must bear in mind the intent of the law. This tax was intended to be “avoided,” encouraging employers to drive greater efficiencies in benefit plan design and marketplace improvements.

A recent JTC analysis demonstrates this view, discussing the origin of federal revenues stemming from the excise tax on high-premium insurance plans over the 2016-2025 period, stating:

Roughly one-quarter of that amount will stem from excise tax receipts, and three-quarters will come from the effects on revenues of changes in employees’ taxable compensation. In particular, CBO and JCT anticipate that many employers and workers will shift to health plans with premiums that are below the specified thresholds to avoid paying the tax, resulting generally in higher taxable wages for affected workers.¹

Therefore, the regulatory structure must acknowledge three variables that restrict employers’ ability to avoid the tax. First, there are certain mandatory benefit offerings in the law that cannot be avoided. Second, there are geographic and age variations in various employer plans that make avoidance more difficult. Third, employers use and value the flexibility allowed under ERISA to design, offer and administer unique plans to their employee population. As a result, we seek your support in acknowledging these constraints when drafting implementing rules.

Definition of Applicable Coverage

Many of the issues contained in the proposed guidance relate to what is “applicable coverage” and how to determine the value of such coverage. While there may be questions as to what mechanism is used to evaluate the applicable coverage that exceeds a specific dollar limit, the key policy question relates to what benefits are included, and at what valuation. The following provides an overview of Business Roundtable’s concerns on these matters, and encourages Treasury and IRS to reconsider some positions within the Notice.

Determination of Cost of Applicable Coverage

There are currently several mechanisms to determine the value of health benefit coverage, and each has varied rules and requirements. It is our belief that neither of the current vehicles, COBRA or W-2, take into account what benefits should be included in the calculation; appropriately aggregate and adjust for the variation in the benefit value; or consider exceptions contained in the law for certain types of employees (e.g. high-risk professions). As a result, we encourage Treasury and IRS to consider a calculation that permits flexibility for plan sponsors to use **actuarial methods** to create a benefit plan cost that more adequately represents the **value of the plan, without regard to age and geography**.

¹ See Congressional Budget Office, The Budget and Economic Outlook: 2015 to 2025, at 124. (January 2015).

Determination of Included Benefits in the Applicable Coverage

We also believe that the “plan” should encompass major medical and prescription benefits, but should exclude wellness programs; on-site medical clinics; employee contributions to a health savings account (HSA), health reimbursement account (HRA) and flexible spending account (FSA); and any benefit that can be treated as an “excepted benefit,” such as dental or vision benefits. We strongly encourage Treasury and IRS to consider excluding wellness programs, on-site medical clinics, and dental and vision benefits regardless of whether they are offered as fully insured, self-insured, or as part of an overall wellness program.

Wellness programs are a tool for employers to engage their employees in proactively improving their health and incentivize them for making an effort. Changing behavior is critical to reducing healthcare costs. The more employers support corporate wellness programs and incent their employees’ wellness efforts, the more likely they are to see their investment in wellness directly lowering overall healthcare costs. If healthcare costs decrease due to wellness programs, this is consistent with the intent of the excise tax, which is to lower the overall costs of coverage. In the same vein, on-site medical clinics are intended to provide employees with a convenient place to seek treatment and care. By encouraging employees to seek treatment for symptoms early, on-site medical clinics help keep employees healthy and, regardless of the services offered, should be excluded from the definition of applicable coverage. Executive physicals should be excluded as well, as they serve a similar purpose.

We believe that HSA, HRA, and FSA contributions should not be included in the calculation, regardless of whether the contribution was pre- or post-tax. Judgments related to contributions, such as whether to contribute and how much, are not always made by the employer, and the employer should not be taxed for employees’ decisions about if and how much to contribute. If the agency goes forward with the anticipated treatment of employee pre-tax contributions to HSAs, many employer plans that provide for HSA contributions will be subject to the excise tax as early as 2018, unless the employer limits the amount an employee can contribute on a pre-tax basis. Additionally, the tax on high-cost employer-sponsored plans was designed to lower employer contributions to healthcare benefits and encourage employees to spend healthcare dollars wisely, making overuse of medical care less attractive. Many Business Roundtable members have begun encouraging employees to participate in and contribute to an HSA or FSA to accomplish this goal. To count these monies toward the taxable amount would be disruptive and would go against the spirit and intent of this newly imposed excise tax, and we ask that employer and employee contributions not be included in the calculation.

The Business Roundtable also believes that *any* benefit that may be treated as an “excepted benefit” should be excluded. There are several types of excepted benefits, those that are always treated as excepted benefits because they are not considered health coverage (e.g., accident only coverage, disability income insurance, or workers’ compensation), and those that are treated as excepted benefits if they are offered separately or are not an integral part

of the plan, including limited-scope dental or vision benefits, and long-term care benefits. The Business Roundtable urges Treasury and IRS to exclude all benefits that may be treated as excepted benefits —although included in the plan — from calculations for purposes of the excise tax.

Aggregation

The Business Roundtable strongly supports broad flexibility for employers to aggregate or disaggregate all plans or plan options that are offered to an employer's employees and retirees. We believe, as stated above, that such flexibility should be allowed in recognition of the variation in the number of plans or plan options that employers may offer to their employees, and a recognition that the employees' plans may vary in cost but not necessarily in the underlying value. The costs may be different because of geography, age and other factors. However, as a result of guaranteed issue, limitations on pre-existing condition requirements, the employer obligation to offer coverage with a minimum value under the Affordable Care Act, and other changes that have occurred over the past decade, employers should have some flexibility in aggregating or disaggregating to find the most accurate "value" for the employee's coverage. Requiring employers to revise or conform their plan documents to meet one test used to measure the underlying "value" of the employee's election seems counterintuitive and inflexible.

Even the statute offers some flexibility by providing that a plan may treat pre-65 retirees and post-65 retirees as similarly situated beneficiaries. Section 49801 only requires that rules similar to those in § 4980B(f)(4) be used to calculate the aggregate cost of an employee's applicable coverage. This language suggests that Treasury and IRS have flexibility around what rules apply to determining the cost of applicable employer-sponsored coverage—as long as those rules *do not preclude* employers from treating pre-65 and post-65 retirees as similarly situated beneficiaries. In addition, nowhere in § 4980B(f)(4) is "similarly situated beneficiaries" defined. There is nothing preventing Treasury and IRS from further fleshing out § 4980B(f)(4) and defining "similarly situated beneficiary" as broadly as possible in subsequent regulations.

In addition, if there are some benefits that are counted toward coverage or if pre-tax employer contributions are included, we would like to stress the importance of these aggregation rules. Given that the employer does not know or have control over an employee's pre-tax contributions, employers are not in a position to be strategic in the design of their plans to offer the highest value to their employees without triggering the tax. One large Business Roundtable member company estimates that, if aggregation does not allow for the flexibility to aggregate by "benefit package," they will be subject to the excise tax nearly 10 full years sooner even though the value of their plans will remain constant.

We appreciate the options for blending laid out in the Notice but believe that full flexibility in this area would be most effective as our members continue to work toward offering affordable coverage that meets minimum value requirements. It is important that employers have

flexibility around blending plans—depending on each employer’s unique plan makeup and beneficiary enrollment. Business Roundtable members believe that employers should be permitted, but not required, to blend all plans or plan options. We urge Treasury and IRS to consider allowing employers maximum flexibility in aggregating plans and plan options for purposes of this tax.

Adjustments to Thresholds

Business Roundtable members believe there should be modifications to using the Federal Employees Health Benefits Plan (FEHBP) as the methodology to arrive at an adjustment to the threshold as it relates to age and gender requirements. We do not believe that FEHBP enrollees accurately represent the mix of employees in non-governmental health plans. Business Roundtable members do not wish to skew the threshold adjustments in their favor; they simply want to ensure that the age- and gender-based relative cost factors accurately represent expected cost and value differences.

The Business Roundtable urges Treasury and IRS to support geographical adjustments to the threshold. Some Business Roundtable members have a large number of employees situated in areas of high cost healthcare, such as northeastern states, and should not be disproportionately affected by the excise tax. We encourage Treasury and IRS to consider adjusting the threshold so it will be higher in high-cost areas relative to low-cost areas. This will prevent those employers with a large number of employees in high-cost areas from reaching the threshold artificially early.

Lastly, we have concerns about the indexing of the threshold being tied to CPI-U, which ignores the expected increase in medical costs associated with increased utilization that may not be able to be controlled in the case of certain workforces.

Effective Date of Final Rules

The Business Roundtable encourages Treasury and IRS to consider a long-term transition period for the effective date prior to completion of final rules. Business Roundtable members want to prepare for the implementation of this tax and adjust benefits accordingly; however, they need time to adjust benefit offerings to comply with newly issued guidance related to the excise tax. We would ask that Treasury and IRS establish an effective date of two years following the publication of the final regulation. There are more than 15 occasions where Treasury, IRS, Labor and HHS have delayed the effective date of a provision of the Affordable Care Act (ACA) or where the adoption of good faith compliance was imposed as a result of the need for a transition to comply with the requirements.

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Safe Harbor for Plans Meeting the Minimum Value Test

The ACA requires that large employers offer plans that meet “minimum value.” We believe that if an employer offers a plan that just meets the requirement of offering a 60 actuarial value plan (or 60 percent of the costs of the benefits of the plan), that such an employer should not be required to pay the excise tax if the value of the benefits exceeds the predetermined threshold. If an employer did meet this minimum threshold and reduced benefits, it would cause the employer to potentially pay an alternate fine if any employee did not elect coverage and received a subsidy through the marketplace.

Conclusion

As sponsors of healthcare coverage for more than 40 million Americans, Business Roundtable members are deeply concerned about any new requirements that impose obligations on employers, without permitting flexibility to plan sponsors for the variation of the employees and geography covered under their plans. Any new administrative requirement must be implemented as seamlessly and efficiently as possible and follow the intent of the law, which is to ensure that plans offer value and reduce excess benefits that do not offer value. We believe that offering flexibility to exclude certain mandatory benefits, and to permit appropriate aggregation and an actuarial approach to determining value would be most prudent moving forward.

We also are concerned about issues relating to payment of the excise tax and that Treasury and IRS will fail to broadly define “plan administrator” as most employers sponsoring fully or partially self-funded group health plans exercise some discretionary authority over the plan. Employers want flexibility to either pay the tax directly or permit a third-party administrator or insurer to pay. We look forward to future guidance on this issue and an opportunity to comment.

We encourage you to bear in mind the potential effects the policies may have on employees and their families and examine other, less restrictive policies that would allow employers to offer required benefits without being unnecessarily penalized by the excise tax. We support the goal of ensuring that employers support and encourage the health and well-being of their employee populations, and believe this goal can be met while engaging employees in their health and reducing unnecessary benefits that do not contribute to employees’ overall health and well-being.

Sincerely,

Gary Loveman
Chairman, Chief Executive Officer and President
Caesars Entertainment Corporation
Chair, Health and Retirement Committee
Business Roundtable

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