

APR 28 2015



Anthony M. (Tony) Parasida
Senior Vice President
Human Resources & Administration
Corporate Offices

The Boeing Company
100 N Riverside Plaza MC 5203-6028
Chicago, IL 60606-1596

April 24, 2015

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

CC:PA:LPD:PR (Notice 2015-16)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2015-16, Excise Tax on High Cost Employer-Sponsored Health Coverage

Dear Commissioner Koskinen:

Thank you for the opportunity to comment on Internal Revenue Service Notice 2015-16, which was issued on February 23, 2015, regarding the excise tax on employer-sponsored health coverage under Internal Revenue Code (IRC) Section 49801.

The Boeing Company (Boeing) provides high quality health care coverage to nearly 500,000 individuals, including employees, retirees, and dependents, and spends over \$2.5 billion annually on health and insurance-related benefits. Boeing is committed to offering high-quality coverage and reducing health care costs through innovative delivery system reform, consumer-friendly plan designs, and industry-leading wellness programs. As an employer that largely self-insures its health plans, we voluntarily assume the risk for providing this coverage to our employees, retirees, and dependents.

IRC Section 49801 provides that if the aggregate cost of applicable employer-sponsored coverage provided to an employee exceeds a statutory dollar limit, the amount which exceeds such dollar limit is subject to a 40 percent excise tax. We appreciate the Internal Revenue Service (IRS) providing potential approaches regarding the assumptions to be relied upon for the purposes of assessing and calculating the excise tax on employer-sponsored health coverage (hereafter referred to as "the excise tax"). After reviewing the Notice, we are concerned about the potentially significant cost impact of this tax to companies like Boeing that offer self-insured health plans to their workforces nationwide. As the regulatory process continues, we look forward to working with the Department of the Treasury and the Internal Revenue Service to provide additional comments regarding the impact the non-deductible tax may have on our ability to offer competitive benefits to our workforce. Our comments on the areas outlined in IRS Notice 2015-16 that are of greatest concern and likely would have material impact on our workforce and company follow.



Health Savings Accounts (HSAs)

The Notice indicates that employer contributions to an HSA will be considered applicable employer-sponsored coverage. The Notice further indicates that employee pre-tax contributions to an HSA will be considered employer contributions and consequently included in the cost of applicable employer-sponsored coverage. It is Boeing's position that employee pre-tax contributions to an HSA should not be included in the cost of applicable coverage. IRC Section 4980I does not require that employee pre-tax HSA contributions be included in the cost of applicable employer-sponsored coverage. IRC Section 4980I(d)(2)(C) states that HSA coverage will be considered applicable employer-sponsored coverage only "under an arrangement under which the employer makes contributions described in subsection (b) or (d) of section 106 [of the Code]" and that, in determining the "cost" of that coverage, the cost "shall be equal to the amount of employer contributions under the arrangement."

In describing the cost of applicable employer-sponsored coverage for health care flexible spending arrangements (health FSAs), IRC Section 4980I(d)(2)(B) – the paragraph immediately preceding the discussion of HSAs – *clearly delineates between "employer contributions under any salary reduction election under the arrangement" and true employer FSA contributions themselves*, directing that both types of health FSA contributions must be included in the cost of coverage. Despite the fact that both types of contributions are regularly made under an HSA featured in an employer's cafeteria plan as well, IRC Section 4980I(d)(2)(C) does not include a reference to employee pre-tax HSA contributions made through a "salary reduction election" that might otherwise be deemed to be employer contributions – the only reference is to "employer contributions" themselves. In other words, where Congress intended to include both employee pre-tax contributions and actual employer contributions as part of the cost of applicable employer sponsored coverage, Congress made that clear in the language of the statute. *Under generally accepted principles of statutory construction, Congress's clear difference in its choice of statutory language should be given deference.*

Importantly, high-deductible health plans (HDHPs), coupled with HSAs, are an increasingly important part of employer health care strategies as employers shift toward incentivizing employees to understand the cost of benefits in order to become better consumers of health care. Removing the opportunity for pre-tax payroll deductions will not eliminate the income tax deduction for those contributions; it will make it onerous for individuals by requiring the deduction to be taken at year-end on employees' tax returns. Finally, including pre-tax employee contributions as applicable coverage is likely to cause employers to allow only after-tax instead of pre-tax employee contributions to HSAs, which in turn will discourage employees from considering a lower cost health plan. This result is counter to one of the law's objectives of encouraging enrollment in cost-effective plans.

On-site Medical Clinics

The Notice indicates that while IRC Section 4980I does not categorically exclude on-site medical clinics from the definition of applicable employer-sponsored coverage, Treasury and IRS anticipate that clinics that provide only "de minimis medical care to employees" will not be considered applicable employer-sponsored coverage. Boeing supports the approach described in the Notice for defining what types of on-site clinics provide only "de minimis medical care to employees." It is important to Boeing to maintain



these ancillary programs, which are free to our employees and are of high value to our business and employees, from a worksite safety and productivity perspective.

Specifically, the Notice contemplates treating clinics that meet the criteria described in existing COBRA regulations¹ and that further provide certain services in addition to (or in lieu of) first aid, such as immunizations, injections of antigens provided by employees, the provision of a variety of aspirin and other nonprescription pain relievers, and the treatment of injuries caused by accidents at work (beyond first aid) as excludable from applicable employer-sponsored coverage. Boeing notes that the IRS has already approved this expanded interpretation of "de minimis medical care" for on-site medical clinics in the context of HSA eligibility.² Many employers, such as Boeing, already rely on this expanded definition of on-site medical clinics for purposes of ensuring they do not inadvertently offer disqualifying coverage to their employees who are enrolled in a HDHP with a related HSA. Therefore, Boeing supports the use of this expanded definition of excludable on-site medical clinics, which would avoid the need for employers to track an additional definition of on-site medical clinics.

Importantly, Boeing supports the use of a standard that is based on the nature and scope of the benefits provided at on-site medical clinics, as opposed to a standard based on a specific dollar value. In addition to the potential difficulties of establishing specific dollar values for services received at an on-site medical clinic, a standard tied to nature and scope of benefits aligns with the approach described above taken for COBRA and HSA purposes.

Limited Scope Dental and Vision Benefits, and Employee Assistance Programs (EAPs)

Boeing's self-insured dental and vision plans are a core component of our employee health benefits. The Notice offers encouraging language by suggesting that limited scope, self-insured dental and vision plans be treated in the same manner as insured dental and vision plans, and not considered applicable employer-sponsored coverage. Boeing strongly supports this approach as aligned with the recently issued final excepted benefits regulations under IRC Section 9831 and avoids the scenario of treating the same package of vision and dental benefits differently based on an inconsequential distinction. Boeing urges Treasury to maintain this position.

Similarly, Boeing supports extending the rationale of the recent final excepted benefits regulations issued under IRC Section 9831, which conclude that employee assistance programs and any other programs that meet criteria under the recently amended excepted benefits regulations should not count as applicable coverage.

Determination of Cost of Applicable Coverage

In calculating COBRA rates, some employers today use the actual cost of each plan as the basis for the COBRA rates, while others use an "adjusted cost" that mitigates the impact of adverse selection when

¹ See Treas. Reg. § 54.4980B-2, Q&A-1(d)

² See IRS Notice 2008-59, Q&A-10, describing the types of clinics that would "not provide significant benefits in the nature of medical care."



multiple plans are offered. Boeing recommends adopting the adjusted cost for both the excise tax and COBRA. Below is an example for your consideration.

Begin with the total cost of all self-insured employee plans for the employer – all plan types, for all employees, in all locations. Apportion those costs to each plan based on the relative value of the plans, using standard actuarial factors for plan design differences. Disaggregate the plan costs into Self-Only and Other-Than-Self-Only, but permit aggregation of all rating tiers within Other-Than-Self-Only. (For purposes of this process, the "plan" would generally equate to "benefit package," as described in the Notice.)

Boeing supports this approach because it would base COBRA costs and excise taxes on rates that are more representative of the value of a plan, eliminating the distortions that would otherwise result from adverse selection and geographic cost variations. It would also align with the suggested approaches in the Notice – aggregating by benefit package, disaggregating by Self-Only and Other-Than-Self-Only, and using the same approach for COBRA and excise tax calculations.

In addition to the above approach, we suggest that benefit packages be considered identical if such packages have the same key plan design features and the same plan administrator. In addition, permissive disaggregation should include the following criteria: union groups, geography, and coverage tiers within Other-Than-Self-Only coverage. Finally, we strongly support the statutory provision that would allow employers to aggregate pre-65 and post-65 retirees as "similarly situated beneficiaries." Employers should be allowed to follow this rule, and average the costs of these two groups across populations without affecting retiree contributions or COBRA rates.

Adjustments for High-Risk Professions

Boeing supports the concept of adjusted thresholds for individuals who have higher costs for reasons beyond their control. However, we are concerned with the potential inequity if this concept is extended and only certain occupations or classifications within an occupation are singled out for this adjustment. If Treasury and IRS undertake to further define 'high-risk professions,' care should be taken not to expand those definitions beyond the intent outlined in the statute. The result should not create or foster situations where employers are forced to make changes to plan designs to prevent workforce or personnel issues.

Demographic Adjustments

Boeing supports establishing a safe harbor that appropriately adjusts the dollar limit thresholds for employee populations with different demographics than the national average. We believe a safe harbor would mitigate the impact on employers with mature workforces. The safe harbor should provide for a simple calculation that will not require employers to expend significant resources on an actuarial analysis of their population.

Boeing proposes an approach that compares the average age of the employer population to the average age of the national workforce, as reported by the Bureau of Labor Statistics (BLS). Specifically, if the average age of the employer population is at least one year older than the average age of the national workforce, the excise tax dollar limit thresholds for the employer would be adjusted by an amount equal to the age factor corresponding to the average age of the employer population divided by the age factor



corresponding to the average age of the national workforce. The age factors would be based on the factors from the Federal Age Curve. The average age for both the employer population and the national workforce would be calculated to one decimal place, and interpolation would be used to calculate the corresponding age factors, if the average age is not a whole number.

An example of the proposed safe harbor calculation for the 2018 plan year is as follows:

- For the plan year 2018, the average age for the national workforce is 41.7 based on the BLS.
- For the plan year 2018, the average age of Example Company X is 43.2.
- Based on the Federal Age Curve, age factors are as follows:

AGE	FACTOR
41	1.302
42	1.325
43	1.357
44	1.397

- The age factor for the national workforce (41.7) would be calculated as $(1.302 * 0.3) + (1.325 * 0.7) = 1.318$.
- The age factor for Example Company X (43.2) would be calculated as $(1.357 * 0.8) + (1.397 * 0.2) = 1.365$.
- The adjustment factor would be calculated as $1.365 / 1.318 = 1.036$, and the 2018 dollar limit thresholds for Example Company X would be multiplied by the adjustment factor of 1.036 when determining any excise tax liability that applies.

This methodology would allow for a simple, transparent, and equitable calculation for all employers and would not require an extensive and costly actuarial analysis.

In conclusion, we appreciate that the Department of Treasury and the IRS recognize the potentially significant costs that the excise tax creates for employers who are offering the coverage and benefits required by the Affordable Care Act and tailored to our workforce. We respectfully submit these comments and proposed approaches and look forward to providing additional details as the regulatory process proceeds. Should officials at the Department and IRS need any further information from Boeing on this important issue, please do not hesitate to contact us.

Sincerely,

Anthony M. Parasida
Senior Vice President, Human Resources and Administration

Cc: Timothy Keating, Senior Vice President, Government Operations
Stacey Dion, Vice President, Corporate Public Policy
Pamela French, Vice President, Compensation and Benefits