



Buzzi Unicem USA, 100 Brodhead Road, Suite 230, Bethlehem, Pennsylvania 18017-8989

CC:PA:LPD:PR (Notice 2015-16)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044  
[Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov)

VIA Email and U.S. Mail

May 14, 2015

Dear Ms. Levin:

Buzzi Unicem USA Inc. is writing in response to Notice 2015-16 of the Internal Revenue Service ("IRS") requesting comments on the potential need for additional regulatory guidance regarding the excise tax on high cost employer-sponsored health coverage under § 4980I of the Revenue Code ("Code").<sup>1</sup>

This IRS Notice suggests that it is unclear to the IRS at this time whether further regulatory action is appropriate regarding the application of the excise tax since the definitions of key terms are not included within the jurisdiction of the IRS or Treasury. Buzzi Unicem USA Inc. is writing to request that if any new regulations are promulgated by the IRS or Treasury, those regulations should not contradict long-held statutory and regulatory understandings that employees at its member's cement plants, as well as at related aggregate and sand mining operations, are engaged in "mining" under the regulatory jurisdiction of the Mine Safety & Health Administration ("MSHA") and should therefore be included in the definition of "high-risk occupations" under the terms of § 4980I(f)(3) of the Code, allowing higher thresholds for the application of excise tax on employer sponsored health coverage, assuming other applicable conditions are met.

#### **I. Background**

Headquartered in Bethlehem, Pennsylvania, Buzzi Unicem USA is one of the leading cement manufacturing companies in the US. The company's seven cement plants have a

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<sup>1</sup> Buzzi Unicem USA Inc. further supports the comments being submitted by the Portland Cement Association ("PCA"), the trade association for the cement manufacturing industry in the United States, and, to the extent that those comments are consistent with those stated here, further adopts those comments as PCA's own.



production capacity of approximately 8 million metric tons. The company's cement manufacturing locations are as follows: Cape Girardeau, MO; Chattanooga, TN; Festus, MO; Greencastle, IN; Maryneal, TX; Pryor, OK and Stockertown, PA.

The company operates 30 cement terminals across the US to distribute the cement into 21 states. Buzzi Unicem USA, with over 1,300 valued employees, supplies cement and masonry cement to over 3,800 ready-mix concrete, highway and airport paving firms, concrete block companies and concrete product firms.

Buzzi Unicem USA, which stems from the merger, early in 2004, of RC Cement (Buzzi Unicem SpA) and Lone Star Industries (Dyckerhoff) serves the Midwest, Southwest, Northeast and Southeast sections of the country.

According to the Notice, Section 4980I was added to the Code by § 9001 of PPACA, as amended by § 10901 of PPACA, and as further amended by § 1401 of HCERA.<sup>2</sup> Section 4980I is effective for taxable years beginning after December 31, 2017. Section 4980I(a) imposes a 40% excise tax on any "excess benefit" provided to an employee, and § 4980I(b) provides that an excess benefit is the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month. Section 4980I(b)(3)(C) specifies per-employee baseline dollar limits for 2018 (\$10,200 per employee for self-only coverage and \$27,500 per employee for other-than self-only coverage), but further provides for various adjustments to increase the applicable dollar limits in certain circumstances. Of particular concern to Buzzi Unicem USA Inc., Section 4980I(f)(3) provides for an adjustment to the baseline dollar limits for 2018 for those plans in which a majority of employees covered by the plan are "engaged in a high-risk profession," and specifically includes those engaged in the construction, mining, agriculture (not including food processing), forestry, and fishing industries. Such term also includes an employee who is retired from a high-risk profession described in the preceding sentence, if such employee satisfied the requirements of such sentence for a period of not less than 20 years during the employee's employment.

The Treasury and IRS have requested comments on how an employer determines whether the majority of employees covered by a plan are engaged in a high-risk profession and what the term "plan" means in that context, and how an employer determines that a retired employee was engaged in a high-risk profession for at least 20 years. Comments were also requested on whether further guidance on the definition of "employees engaged in a high risk profession" would be beneficial, taking into consideration that various categories set forth in § 4980I(f)(3) are determined by laws not under the jurisdiction of Treasury or IRS. Buzzi Unicem USA Inc. will address each of these requests below.

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<sup>2</sup> The "Affordable Care Act" refers to the Patient Protection and Affordable Care Act (enacted March 23, 2010, Pub. L. No. 111-148) (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010 (enacted March 30, 2010, Pub. L. No. 111-152) (HCERA), and as further amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (enacted April 15, 2011, Pub. L. No. 112-10).

**II. MSHA jurisdiction and regulation should be used for determining whether an employee is or was engaged in "mining" under Section 49801(f)(3) of the PPACA.**

MSHA provides comprehensive specialized regulation of "mines" and "mining" in the United States, based upon a long-standing legislative interest in the risks of mining activity. MSHA is an agency of the U.S. Department of Labor specifically charged with regulating the safety in all mining operations in the United States. Congress passed the first legislation regulating mine safety in territorial mines in 1891 and since then the agency's jurisdiction has expanded. The mission of the modern MSHA is now to administer the provisions of the Federal Mine Safety and Health Act of 1977, and to "enforce compliance with mandatory safety and health standards for all mines and mining operations as a means to eliminate fatal accidents; to reduce the frequency and severity of nonfatal accidents; to minimize health hazards; and to promote improved safety and health conditions in the Nation's mines."<sup>3</sup> MSHA carries out the mandates of the Mine Act at all mining and mineral processing operations in the United States, regardless of size, number of employees, commodity mined, or method of extraction.

Given this broad jurisdiction, the result is a carefully considered legislative and regulatory definition of "mining" and "mine" that can and should be used by IRS and Treasury to interpret "mining" under Section 49801(f)(3) of the Code. Specifically, Section 4 of the Mine Safety and Health Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The term "coal or other mine" is defined in Section 3 of the Act, 30 U.S.C. § 802. Specifically, Section 3(h)(1) defines it as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment. 30 U.S.C. § 802(h)(1)

As applied to Buzzi Unicem USA Inc. this definition means MSHA jurisdiction exists at all aggregate, limestone and sand mining operations. Further, MSHA also has jurisdiction over cement plant operations based upon the Mine Act and agreements between MSHA and

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<sup>3</sup> <http://www.msha.gov/faq/faqhome.htm>

OSHA. Specifically, pursuant to Section 3(h)(1)(C) of the Mine Act, an agreement between MSHA and the Occupational Safety and Health Administration (OSHA) allocates responsibility between the two agencies for various types of operations involving the mining and milling of minerals. See 44 Fed. Reg. 22,827 (Apr. 17, 1979), amended by 48 Fed. Reg. 7,521 (Feb. 22, 1983). Paragraph B.6.a. of that agreement provides: "[p]ursuant to the authority in Section 3(h)(1) [of the Mine Act] to determine what constitutes mineral milling considering convenience of administration, . . . **MSHA jurisdiction includes . . . cement plants.**" 44 Fed. Reg. at 22,828. (Emphasis added) Therefore, cement plants in the United States, including quarries, kilns and all related on-site operations, have been defined to be engaged in "mining" by the most relevant applicable laws and regulations. In light of this legislative and regulatory history defining "mining" operations for the very purpose of providing safety regulation for what Congress has deemed a high risk occupation by passage of the Mine Act, Buzzi Unicem USA Inc. believes that the IRS and Treasury should not propose or ultimately adopt any regulations that could potentially disturb these settled interpretations. Indeed, this legislative and regulatory history is a very solid basis for determining the meaning of the term "mining" under 49801(f)(3) of the PPACA.

In fact, MSHA regulates all employees located in a cement plant location based upon this MOU that has been published in the Federal Register, including those employees who work in offices at the plant site location. MSHA has authority over working conditions in all operating locations, including office buildings on cement plants and aggregate, sand and limestone mining sites. For example, Part 46 of the Mine Act (Surface Mining) requires Site Specific Hazard Awareness training for all employees at MSHA regulated facilities, including office and staff employees and lab and scientific workers. In part, this is because of the equipment and other hazards that exist for all employees on site given the nature of the activity occurring, even for those employees not actively mining in quarries. In short, cement plants, as well as its other aggregate, limestone and sand mining operations, are regulated under MSHA's definition of "mine" and "mining," and therefore should be included in the definition of the term "mining" under 49801(f)(3) of the PPACA. These definitions of mines and mining are a bright-line jurisdictional definition that has been upheld by courts and is the basis for a significant regulatory oversight for the cement and mining industry by a specialized regulatory agency, and this categorical distinction should be retained by any regulations issued by the IRS and Treasury.

**III. Determinations of whether a "majority" of a plan's participants are engaged in high risk occupations should be based upon job site classifications rather than individualized employee reviews.**

As explained above, MSHA regulates cement plant operations not based upon the activities or job functions of certain individuals, but rather based upon the general activities at operating locations and their associated risks, such that the jurisdiction of MSHA in regard to "mines" and "mining" activities is generally based upon locations and not in regard to day-to-day activities of individual employees occurring at such locations. Following the logic and jurisdiction of the Mine Act, Buzzi Unicem USA Inc. believes that if new regulations are

proposed, the IRS and Treasury should look to whether a site is subject to the Mine Act for determining if participants in a health care plan are engaged in "mining" under 4980I(f)(3) of the Code. From a health care plan administrative standpoint, cement manufacturers are already well aware of those locations and employees who are subject to MSHA regulation based upon their job location and MSHA's required inspections and other active regulatory oversight, and it would be quite simple for cement manufacturers to determine if a majority of employees in their healthcare plan are located at such mining locations. Again, this approach is a clear and easily administered way to define "mining" activities, and it would respect existing laws and regulations.

Such a broad reading of "mining" not focused on day to day activities or job duties is also consistent with the language of §4980I of the Code. The Code provides relief in the dollar limits for employees where the health care plan for a majority of the employees are engaged in a "high-risk profession":

(iv) Exception for certain individuals. In the case of an individual who is a qualified retiree or who participates in a plan sponsored by an employer the majority of whose employees covered by the plan are engaged in a high-risk profession or employed to repair or install electrical or telecommunications lines

(I) the dollar amount in clause (i)(I) shall be increased by \$1,650, and

(II) the dollar amount in clause (i)(II) shall be increased by \$3,450

The Code, therefore, doesn't define "high-risk profession" by injury history of specific individuals or by reference to individuals engaging in specific high-risk activities, but instead more broadly to specific "industries" that Congress by this definition has determined should be included in the exception providing relief from the excise tax threshold. This language specifically includes those engaged in the

"construction, mining, agriculture (not including food processing), forestry, and fishing industries." (Emphasis added)

As to the case of "mining" industry, Congressional intent is consistent with the existence of MSHA as an agency broadly focused on regulating and promoting safety in the mining industry, not an agency regulating only specific miners and activities and not other miners and activities.

**IV. For those employers with retiree health care plans, the referenced 20 year period should be satisfied by time in service at a location regulated by MSHA.**

Buzzi Unicem USA Inc. provides retiree health coverage or subsidies to its retired employees based upon certain eligibility requirements. Although the statutory language would create some administrative difficulties, it is likely possible for cement manufacturers to track their retiree pool to determine whether the eligibility requirements are met based upon their location of service. If the IRS and Treasury decide to issue new regulations in



this area, particularly in regard to work in a mining operation, a fair way to structure this requirement would be time in service at a location regulated by MSHA, with as much flexibility as possible for employers to determine applicability based upon the statutory criteria.

**V. Additional regulation may be warranted for ready-mix concrete operations not regulated by MSHA.**

Buzzi Unicem USA Inc. also employs a number of ready-mix concrete plant employees and drivers, and those ready-mix concrete plant locations are not mines under the Mine Act, because unlike cement plants, they are not necessarily adjacent to quarrying operations. Where they are not adjacent to a quarry, ready-mix concrete plants are instead regulated by OSHA.

Ready-mix concrete plants are classified as "mineral product manufacturing," a subcategory under the manufacturing sector under the North American Industry Classification System ("NAICS") codes. Interestingly, "mineral product manufacturing" is not under the mining sector or the construction sector in the NAICS codes. Buzzi Unicem USA Inc. believes it would be a reasonable interpretation of the legislation, however, that "mineral product manufacturing" could be in the ambit of 49801(f)(3), which also includes the broad industry categories of "construction, mining, agriculture (not including food processing), forestry, and fishing industries." As such, additional regulatory action may be needed in regard to such operations to clarify that such operations are "mining" operations under 49801(f)(3) of the Code.

Above all, Buzzi Unicem USA Inc. believes that the IRS and Labor department should allow manufacturers like Buzzi Unicem USA Inc. enough flexibility as possible to meet the legislative intent of Congress to fairly apply the higher threshold for the excise tax to the mining operations of its member companies.

Sincerely,

A handwritten signature in black ink, reading 'Thomas P. Marnell'.

Thomas P. Marnell  
Senior Vice President, Human resources