Notice 2015-16

CAPITOL TAX PARTNERS

May 21, 2015

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

Submitted electronically to: Notice.comments@irscounsel.treas.gov

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

Dear Ladies and Gentlemen:

Capitol Tax Partners, LLP, on behalf of Delta Air Lines, Inc. (Delta) is responding to the request of the Internal Revenue Service ("IRS") and the Treasury Department ("Treasury") for comments on Notice 2015-16, covering topics related to the issuance of proposed regulations under new Internal Revenue Code ("Code") section 4980I regarding the excise tax on high cost employer-sponsored health coverage. This section was included in the Affordable Care Act ("ACA") and is effective for taxable years beginning after December 31, 2017.

Delta employs 60,000 employees in the United States who are eligible for a wide range of health plans and benefits for themselves and their dependents. In addition, nearly 30,000 pre-65 Delta retirees and their dependents are eligible for Delta health plan benefits. Delta is pleased to provide these comments on important issues raised in the Notice.

Pre-tax employee contributions to Health Savings Accounts (HSAs) should not be considered applicable coverage

Employer-based HSA plans are now an integral part of the health plan design landscape. As an adopter of a total replacement consumer driven health plan strategy, Delta is currently in its eighth year of providing a high-deductible plan with an employee pre-tax HSA. This plan design has been very successful – almost half of Delta's covered employees participate in one of these HSA-based options for 2015 and that number is expected to increase significantly in the coming years.

HSAs are frequently used in health plan design to attempt to bring down health care costs by getting employees more involved in their health care decisions. Pre-tax payroll deductions make saving in these accounts easy for employees and should be encouraged. There is already a limit in place under federal law on the amount of annual contributions allowed on a pre-tax basis.

Treasury and IRS should use their regulatory authority to create consistency of treatment under the excise tax for pre-tax and after-tax employee contributions to HSAs for purposes of the excise tax. The Notice makes it clear that future regulations will exclude after-tax contributions to HSAs from applicable coverage but will likely include pre-tax contributions in applicable coverage. This logic means that employees can make after-tax contributions to their HSAs, deduct them on their tax returns as an adjustment in computing their adjusted gross income, and put themselves in the same income tax position as they would be in if they made pre-tax contributions. However, many individuals who currently benefit from pre-tax contributions to these accounts may not understand, or be intimidated by, the complexity involved in that process and, as a result, forego the savings altogether. To treat pre-tax and post-tax contributions differently for purposes of the excise tax is unnecessary and undercuts a primary purpose of the ACA – to contain healthcare costs.

Furthermore, inclusion of pre-tax HSA contributions as applicable coverage distorts the cost of employer-provided coverage. A *bronze* or *silver* actuarial value high deductible health plan that is combined with the maximum annual HSA pre-tax contribution amount can exceed the excise tax threshold. This is especially the case where the cost of the major medical coverage is higher than average based on plan demographics, as in Delta's case (see discussion of this issue later in this letter). Again, this is not the intent of the excise tax provision that is aimed at "high cost" employer provided health coverage and further demonstrates that pre-tax HSA contributions should be excluded from the definition of applicable coverage.

Legally enforceable health benefits that arise prior to the excise tax's effective date should not be considered in the cost of applicable coverage

Many health benefits may not be changed due to legally enforceable obligations. For example, Delta has binding agreements regarding the plan designs that must be made available to certain retiree groups, such as court-approved settlement agreements entered into by Northwest and its retirees during its bankruptcy (which agreements Delta is obligated to continue as a result of our merger). The excise tax was intended to apply to situations where an employer has a high cost plan and is legally able to, but does not, make the changes needed to bring the plan below the thresholds. It is important that coverage that is legally locked down not count toward the cost of applicable coverage – otherwise, an employer is placed in a Hobson's choice – either pay the excise tax or suffer other legal consequences.

The Notice states that Treasury and IRS are contemplating not taking into account amounts made available for use prior to 2018 in health reimbursement accounts (HRAs). We strongly agree with that approach, but would broaden it to include all amounts funded prior to the excise tax effective date in any account or trust which would permit such prefunding. These plan design and financial decisions were made by employers potentially years before the excise tax was passed or effective.

Job-based mandatory employee health expenses are business expenses, not healthcare benefits, and should not be considered applicable coverage

Many employers are in heavily regulated industries where the law requires employees in certain job functions (such as airline pilots) to undergo frequent health care exams or testing to make certain that the employee is fit for duty. This does not fall into the realm of healthcare benefits the excise tax is designed to regulate. [1]

Typically, employers may pay or reimburse the cost of these medical expenses as a business expense, not unlike reimbursement for employee meals or safety equipment. These business expenses may be labeled as "healthcare" expenses but there is no justification for treating them differently from other types of job related expenses that are not within the realm of the excise tax.

Moreover, such employee exams or testing required by health and safety regulations should not be treated as part of COBRA costs for applicable coverage for purposes of the excise tax as such costs are only required of *active* employees covered by the applicable regulation. The Notice, in quoting Code section 4980B(f)(4), defines cost "with respect to any period of continuation coverage of qualified beneficiaries, the cost to the plan for such period of the coverage for similarly situated beneficiaries." Such language we do not believe contemplated health care expenses that can ONLY be incurred if such beneficiary is an active employee. Since COBRA and COBRA costs generally are focused upon coverage after a qualifying event has occurred, health care expenses such as those described above are inappropriate to be treated as COBRA costs for purposes of computing an excise tax under Code section 4980I. For purposes of an excise tax on high cost plans, it makes no sense to include such business expenses in the cost of "health care benefits" as these are not elective but are incurred to comply with Federal regulations focused on individual and public safety issues while carrying out active employees' duties.

Age and Gender Adjustments

The Notice requests comments regarding adjustments to the threshold amounts for age and gender if "the age and gender characteristics of an employer's workforce are different from those of the national workforce."[2] This is an important matter for Delta: the average Delta health plan participant is 49 years old.

There are likely several methods or safe harbors which employers should be able to choose from that would best match their particular fact pattern. We encourage guidance that provides employers flexibility in choosing the appropriate method for their workforce.

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[1] While Code section 4980I provides an increase in the threshold amounts for certain high-risk industries, it is not a substitute for the exclusion of such health testing from applicable coverage as many highly regulated employers will not be treated as part of a high-risk industry or even if they are, their workforce will include many employees who do not meet the definition of who is considered high-risk but still are required to have such testing

[2] Code section 4980I(b)(3)(C)(III)

One method that would approximate age and gender adjustments is a method used for the risk adjustment program created by section 1343 of the Affordable Care Act. The program determines impacted marketplace and small health plan's actuarial risk based on enrollees' individual risk scores. Plans with lower risk scores then transfer funds to plans with higher risk scores. States are required to have a risk adjustment program and if they do not, HHS will operate a program on their behalf.

HHS issued final rules on their risk adjustment model on March 11, 2013.[3] The proposed risk adjustment model predicts plan liability for an enrollee based upon that person's age, sex, and diagnoses (risk factors) to produce a risk score. Diagnoses are grouped and assigned a numeric value that represents the relative expenditures a plan is likely to incur for an enrollee. All enrollees' risk scores are then averaged across the plan to arrive at a plan's average risk score. Adjustments are made to the score including geographic cost variation (which for purposes of the excise tax could be included or excluded.) Fund transfers are based upon each plan's risk score compared to the average premium cost for plans in a state.

For self-insured plans, this model or a similar model could be used to determine how much the threshold amounts should be adjusted to take into account a plan's age and gender risks. We understand some large third party administrators already provide such a model for their customers to evaluate their plans' risk profile. For example, based upon a calculation similar to the HHS model, Delta has a 30% higher risk score (1.3) than the national average (1.0). This means that Delta's health plans are expected to incur **30%** more in costs than the national average. Under this proposed adjustment method, Delta would be permitted to increase the respective thresholds for its plans by 30%.[4] This provides a manner to calculate age and gender adjustments that exists in current law for a similar purpose. While the actual HHS model may not fit exactly for these purposes, we think it should be considered as one of many safe harbors for these adjustments. Because these risk scores are currently being calculated by HHS and third party administrators, what this approach may lack in precision for purposes of the excise tax, it makes up for in ease of administration.

Finally, whatever the safe harbors are for age and gender adjustments, such safe harbors must be dynamic enough to level the playing field within the workforce at large. For example, with the numbers of baby boomers set to retire from the workforce in the near future, employers from America's more traditional industries will be competing for the next generation of workers with newer startup companies and industries that have typically employed a much younger workforce. Without a dynamic adjustment for age and gender, those mature companies will be put at a competitive disadvantage in maintaining a talented workforce because the health benefits they are able to offer may be a fraction of what an employer with a younger workforce could offer due to the impact of the excise tax.

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[3] Rule is in Document Number 2013-04902 (78 FR 15409) and is effective on April 30, 2013.
[4] This is a simplified example that aggregates all plans and employee groups, and we realize such a risk score will likely apply on an individual plan basis.

Safe harbor alternatives for determining application of the excise tax

As is demonstrated in the section above, plan "cost" can escalate based on factors that are out of the control of the employer. Therefore, the Treasury and IRS should provide for a safe harbor approach whereby plans that are less than a given actuarial value are deemed not subject to the excise tax. This is a way to level the playing field among plans with different geographic and demographic factors that can heavily influence cost. Delta suggests a safe-harbor whereby a plan with an actuarial value of less than 90% would not be subject to the excise tax. This is also consistent with the goal of the ACA which is to make available to all Americans coverage of at least a minimum value at an affordable cost.

Self-insured dental plans and supplemental excepted benefits should not be applicable coverage

Treasury and IRS should exercise their regulatory authority under Code section 4980I(g) to exclude self-insured limited scope dental coverage from applicable coverage for purposes of the excise tax. Employees view this coverage similar to an insured plan and elect coverage separately from their medical coverage, thus making it tantamount to "a separate policy, certificate or contract of insurance" that is exempt under the statute from the cost of applicable coverage. Thus, from an enrollee viewpoint and policy standpoint, there is no difference between an insured dental plan and a self-insured dental plan. Neither should be considered applicable coverage.

Likewise, Tricare supplement coverage should not be applicable coverage. Delta offers this insured, employee-paid supplemental coverage because it employs a large number of military retirees eligible for Tricare. Under Section 4980I, Tricare coverage itself is not applicable coverage. Due to the same policy considerations, coverage supplemental to Tricare should likewise not be applicable coverage. Moreover, Notice 2015-16 states that Treasury and IRS will likely exempt other excepted benefits from the definition of applicable coverage. Tricare supplemental coverage meets the definition of an excepted benefit and as a result should be extended the same treatment. This is a very important matter to Delta and other employers with a strong policy of hiring U.S. veterans.

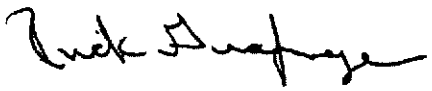
Effective date should be delayed to give employers time to implement plan design changes that may be necessary to avoid the excise tax

Plan design changes can take several years to implement as employers will need to better understand the final regulations to determine what type of plan design changes will be the least disruptive to employees and their families. In addition, employees need to be educated regarding how their current plan choices will be changed and what elections may best approximate their former coverage. If changes are significant, a plan may need to phase in necessary changes over several years to lessen the financial burden on employees. If final rules are not issued until the end of 2016 or 2017, a several year delay in the effective date may be needed depending on the flexibility provided for employers in the regulations.

Conclusion

We hope you find our comments helpful. We would like to make ourselves available to meet with you regarding our comments. Please contact Rick Grafmeyer, Capitol Tax Partners, LLP at (202) 408-6225 if you would like to discuss our comments or if we can be of further assistance.

Sincerely,



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