

Notice 2015-16

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Edison Electric
Institute

Mary Miller
Chief Administrative Officer

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@irs.counsel.treas.gov

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

Dear Ladies and Gentlemen:

The Edison Electric Institute (EEI) is responding to the request of the Internal Revenue Service ("IRS") for comments on Notice 2015-16, covering topics related to the issuance of proposed regulations under 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.

The Edison Electric Institute (EEI) is the association of U.S. investor-owned electric utilities, international affiliates and industry associates worldwide. Our industry directly employs more than 500,000 workers and EEI's investor-owned electric utility members serve nearly 70% of America's industries, businesses and consumers.

The electric power sector is a \$910-billion industry and is the most capital-intensive industry in the United States representing approximately 2% of our nation's real gross domestic product. It is projected to spend approximately \$90 billion a year, on average, for major transmission, distribution and smart grid upgrades; cybersecurity measures; new, cleaner generating capacity; and environmental and energy-efficiency improvements. Our industry provides reliable, affordable, and sustainable electricity that powers the economy and enhances the lives of all Americans.

Many of the challenges the electric utility industry faces in the implementation of the excise tax on high cost employer-sponsored health coverage are unique. From the high-risk categorization of much of our workforce to the onsite medical clinics some of our members provide to their employees, we believe there are numerous issues that without the proper implementation could heavily impact our industry. With that in mind, we are pleased with the opportunity to provide you the below comments on issues raised in the Notice 2015-16.

High-risk professions

The Notice requests comments regarding how an employer determines who is or was employed in a high-risk profession and how to determine whether a “plan” includes a majority of such beneficiaries. Code section 4980I(b)(3)(C)(iv) provides that an additional amount is added to the dollar limits for an individual “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 telecommunication lines” as well as “engage in construction” of electrical substations and other facilities used to generate or distribute power. These highlighted groups comprise a significant portion of the workforce of EEI member companies. EEI seeks ease of administration and flexibility for purposes of identifying these employees and the plans that cover them.

EEI believes that a fairly easy and accurate methodology to determine whether a current or past employee falls into one of these high-risk profession categories, is to rely on the North American Industry Classification System (NAICS). NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system. The NAICS industry codes define establishments based on the activities in which they are primarily engaged. The IRS currently uses NAICS information on the Form 1040 and related schedules.¹

EEI believes that employees whose primary work duties are within NAICS 237100 (Utility System Construction)² or NAICS 221000 (Utilities) will encompass [nearly] all of the current and former workers who have been involved in the construction, installation or repair of electrical or gas lines. However, because NAICS refers to an employer and activities by an employer, the definition for high risk professionals could then be narrowed by use of the Standard of Occupational Classifications (SOCs) to cover the specific occupation and job duties listed in Code section 4980I. SOC groups 47-0000 (Construction Occupations) and 49-000 (Installation, Maintenance, and Repair Occupations) should then cover high-risk professionals in the NAICS categories for Utilities and Utility System Construction.

EEI believes that the use of these standard classifications from the Department of Labor should be used as a safe harbor for employers to determine who is and who is not a high-risk professional. A safe harbor will provide employers with some level of certainty when

¹ IRS Manual 1.13.4 Form 1040 NAICS Coding.

² This industry group comprises establishments primarily engaged in the construction of distribution lines and related buildings and structures for utilities (i.e., water, sewer, petroleum, gas, power, and communication). All structures (including buildings) that are integral parts of utility systems are included in this industry group.

calculating the number of high-risk employees in their plans.

EEL believes the definition of a “plan” for purposes of the excise tax should be broadly and flexibly construed for purposes of determining whether the plan includes a majority of such workers. The law’s clear intent is to permit higher threshold amounts for health plans with high-risk enrollees, and should be implemented to fit different employer fact patterns. Below are two examples displaying what we believe is the need for flexibility in the determination of what constitutes a “plan” that encompasses a majority of those in the high-risk professions.

Example 1 - - An EEL member utility may offer six health plans (with various single and family options of coverage) with one plan having 80% of its enrollees in a high-risk profession, four plans each with 30% of enrollees who are high risk, and one plan with only 5% of enrollees deemed to be high risk.

In this example, a narrow definition of a plan may only permit one health plan of the six plans available to employees to qualify for the increased threshold amount - - even though five of the available plans have at least 30% of their enrollees in a high-risk profession. One solution for this fact pattern is to allow employers to define “a plan” as an aggregation of all health plans in which a significant number of enrollees (at least 20%) are high-risk professionals. Thus, under this example, the utility could aggregate the five plans with significant high-risk enrollees and determine whether a majority of all enrollees in these combined five plans are high-risk professionals. This would allow the utility to be able to have an increased threshold for five of the six plans available.

Example 2 - - An EEL member utility offers two health plans (with various single and family options of coverage.) One health plan covers 55% of all employees and 90% of the plan’s enrollees are considered high-risk professionals. The other health plan covers 45% of all employees and has 30% of the plan’s enrollees are considered high-risk.

Under this example, a narrow definition could permit only one of the utility’s plans to have an increased threshold, while clearly the other plan would have significant costs arising from 30% of its enrollees in a high-risk profession. A better rule would provide an employer with the flexibility to combine plans with significant high-risk enrollees for purposes of determining which plans qualify for the higher threshold. In this example, both plans would be eligible for the higher threshold.

Finally, the Notice refers to identifying retirees who had worked in the high-risk profession for at least 20 years. This is an extremely difficult task, especially with respect to long-term retirees. Thus, a rule which permits employers to use one identification method for workers who retired before 2016, and another rule for employees who retire later seems appropriate. For those pre-2016 retirees, employers should be permitted to look at a retiree’s duties for his or her last five years of employment as a proxy for their historical performance. There is little or no opportunity for abuse for these retirees as ACA had not been implemented yet nor had the Notice been released. Another proxy for all retirees could be an employee’s salary history. If an employer had records to determine that an employee was paid a certain amount per hour and that rate of

pay corresponded with high-risk type duties, an employer could assume such employee's duties included high-risk activities for that year. Determining retirees' work history when such records were not required will be extremely burdensome on employers. Guidance should provide employers with maximum flexibility to match up employee records with the Notice requirements.

Mandated health care costs such as certain employee physicals or testing should not be considered applicable coverage

Many industries are heavily regulated by the Federal government to protect consumers and the public in general. Such regulations generally include mandated health care exams and other testing of employees to determine whether employees have medical conditions which could put the public or themselves at risk of injury while in the performance of their duties. Employers may pay or reimburse these costs as business expenses or as a part of a self-insured health plan. For the employer, these expenses are clearly business expenses and are easily distinguished from other mandated health benefits required for health policy reasons or provided for compensation reasons. The key difference is that these types of health expenses are mandated by law³ for safety concerns (for employees or for the general public who are consumers of the product or services provided by the employer),

The utility workforce is unique in that many of our employees must meet several regulated qualifications from a number of Federal agencies – such as the Nuclear Regulatory Commission, Department of Transportation, and the Occupational Safety and Health Administration – in order to perform their duties. These regulations cover a much broader category of employee than just high-risk professionals. Some of these rules require employees to be tested and then fitted for safety devices used in their jobs. Such testing could occur annually or even more often if necessary. Such testing expenses should not be treated the same as other employee health benefits, such as executive physicals or other preventative type expenses. These health care expenses are really business expenses incurred in order to comply with federal health and safety regulations for that employee's specific job and should not be considered as part of the costs of applicable coverage for purposes of the excise tax.

In addition, 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), states that COBRA costs are “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.” We do not believe such language contemplated health care expenses that can ONLY be incurred if such beneficiary is an active employee. COBRA and COBRA costs generally are focused upon health care coverage after a qualifying

³ 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 may 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.

event has occurred, but health care expenses such as those described above are inappropriate to be treated as COBRA applicable premiums for purposes of computing an excise tax under Code section 4980I as they are more appropriately classified as business expenses. 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.

On-site medical clinics should not be considered applicable coverage

Treasury and IRS should exercise their regulatory authority Code section 4980I(g) and exclude certain on-site medical clinics. The Notice recognizes that COBRA regulations provide that health care provided during employer’s working hours for treatment of a health condition or injury that occurs during those working hours do not constitute a group health plan. EEI supports this rule for purposes of the excise tax and such health care should not be considered applicable coverage. Moreover, on-site clinics enable opportunity for earlier medical intervention and care which leads to lower medical costs overall.

In addition, health care services related to health care testing or monitoring required by law for safety from injury during work hours should also not be applicable coverage. This would include, for example, testing for sleep apnea of truck drivers and then any follow-up treatment and/or devices for such a condition. Thus, the exclusion for on-site medical clinics should include testing, monitoring, and treatment of work related health conditions. Employees view such on-site medical clinics not as a health benefit, but more as a safety check for their work environment.

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.”⁴

Due to the demographics of our industry’s workforce, the issue of age and gender adjustments is of significant importance to EEI member companies. Over the next five years, an estimated 36% of the utility industry’s skilled workforce may need to be replaced due to retirement or attrition. By 2023, this percentage will increase to almost 50%. With such an aging workforce, adjusting threshold amounts based on age and gender will permit electric utilities to offer comparable plans as companies with younger employees.

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 to provide employers flexibility in choosing the appropriate method for their workforce.

⁴ 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 a plan's actuarial risk based on enrollees' individual risk scores. Plans with lower risk scores will then transfer funds to plans with higher risk scores. States are required to have a risk adjustment program and, if they do not, the Department of Health and Human Services (HHS) will operate a program on their behalf. HHS issued final rules on their risk adjustment model on March 11, 2013.⁵ 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 depending on whether it is material or not to the risk score.) Fund transfers are made 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 determine how to set premiums for their self-insured plans.

An example demonstrates how to calculate age and gender adjustments for the excise tax using this risk score method that exists in current law for a similar purpose.

Example - - An EEI member utility has an aging skilled workforce. Most of this skilled workforce is provided health care benefits in a single plan covering unionized workers. Utility also has two other health plans covering all other employees. The skilled workforce plan has a risk score of 1.25, meaning that plan is likely to incur 25% more in costs than the national average. The other two plans have a risk score of 1.0. Under this example, the skilled workforce plan would be permitted to increase its threshold for the skilled workforce plan by 25% while the other two plans would receive no further adjustment to the thresholds.

A method similar to the actual HHS model should be considered as one of many safe harbors for these adjustments. This safe harbor would significantly ease administration because HHS and third party administrators are currently calculating these risk scores.

Finally, whatever the safe harbors are for age and gender adjustments, such safe harbors must be dynamic enough to level the playing field between types of companies. For example, employers from more mature industries like electric utilities, who have an aging skilled workforce, are competing for new engineering or skilled college graduates who can also choose to work for startup companies with a much younger workforce. Without a dynamic adjustment for age and gender, those mature companies will be unable to compete for talented young workers because

⁵ Rule is in Document Number 2013-04902 (78 FR 15409) and is effective on April 30, 2013.

the health benefits they could offer will be a fraction of what an employer with a young workforce could offer due to the impact of the excise tax.

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. HSAs are frequently used in health plan design to attempt to bring down health care costs by involving employees more in their health care decisions. Pre-tax HSAs through payroll deductions make saving in these accounts easy for employees and should be encouraged.

Treasury and IRS should use their regulatory authority to create consistency of treatment under the excise tax for pre-tax and after-tax 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 tax position as they would be in if they made pre-tax contributions. However, many employees are intimidated by the tax system and will reduce or decline participation if they are required to deal with the tax complexity of post-tax HSA contributions. This will diminish the value of these accounts to employees and undermines encouraging employees to save for health care expenses. We believe pre-tax and post-tax contributions to HSAs should be treated the same.

Regulations should be clear that employers can pass the excise tax along to enrollees in plans which exceed the thresholds

Nothing in the law prohibits employers from passing along an excise tax to enrollees in a plan that exceeds the threshold. In fact, this is clearly contemplated by Code section 4980I(d)(2)(A) by providing that cost of coverage shall not include taxes attributable to this section. For example, employers that want to modify their plan design to avoid the excise tax but cannot reach agreement to do so with employees may want to pass the excise tax along to enrollees in such plan which then exceeds the thresholds. The ability to either pay the tax or pass it along to enrollees is an important element to the balancing that employers must perform in designing their health plans.

The effective date should be extended for plans covered by collective bargaining agreements entered into prior to 2018

The excise tax should apply to employers who had the opportunity to modify their plans, but chose to not change their plan design to bring their health costs below the thresholds. In the utility industry, collective bargaining agreements can cover a term of two to six years and EEI members have existing agreements that do not expire until after 2018. Collective bargaining agreements are legal documents that can only be changed during their term for very specific

reasons. An employer should not be subject to the excise tax on a plan subject to a prior existing collective bargaining agreement until such agreement can be renegotiated.

In addition, retiree medical is frequently a subject of collective bargaining. Such costs should be excludible from applicable coverage if covered by a collective bargaining agreement that has not been the subject of new bargaining post-2017. Regulations should give employers as much leeway to offer retiree medical as possible.

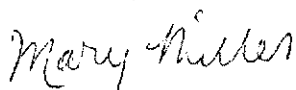
The effective date should be delayed to give employers time to implement plan design changes that may be necessary to avoid the excise tax

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 they should make to best approximate their former coverage. If changes are significant, a plan may need several years to implement the necessary changes 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 again would like to thank you for the opportunity to provide comments about the unique challenges our industry faces with the implementation of the excise tax. We hope you find our comments helpful and we welcome the opportunity to discuss them with you. In the meantime, if you have any questions or comments, please contact myself at (202) 508-5232 or Rick Grafmeyer at Capitol Tax Partners, LLP at (202) 408-6225.

Sincerely,

A handwritten signature in cursive script that reads "Mary Miller".

Mary Miller
Chief Administrative Officer
Edison Electric Institute