

Notice 2015-16

MAY 13 2015

EXTENDICARE

Health Services, Inc.

May 13, 2015

The Honorable John Koskinen
Commissioner
Internal Revenue Service
CC:PA:LPD:PR (Notice 2015-16)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted via E-Mail to: Notice.comments@irs.counsel.treas.gov

RE: Notice 2015-16, Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage

Dear Commissioner Koskinen:

Extendicare Health Services, Inc. is writing in response to Notice 2015-16, the Request for Information on **Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage**, issued by the U.S. Department of Treasury (Treasury) and Internal Revenue Service (IRS) on February 23, 2015. We operate a large self-insured plan, and have been closely following the Cadillac tax issues and how it could impact us in the future.

We appreciate the opportunity to offer our comments on Notice 2015-16, which fall into three main issue areas: types of coverage affected by the tax, how to value that affected coverage, and adjustments to the dollar thresholds. It is our hope that these comments will serve to prompt further fruitful dialogue between employers and Treasury and IRS in these important issue areas.

Issue: Types of Coverage Affected by the Tax

- **Recommendation:** Treasury and IRS should exclude employer-sponsored wellness programs from the types of coverage affected by the tax.

Neither Internal Revenue Code Section 4980I nor Notice 2015-16 addresses whether employer-sponsored wellness programs are to be included in calculating the high cost plan excise tax. We recommend that Treasury and the IRS not include employer-sponsored wellness programs as "applicable employer-sponsored coverage" for purposes of the high cost plan excise tax.

Wellness programs are not a type of “coverage” providing benefits for medical services, as are health insurance and self-funded health benefits. Rather, wellness programs provide incentives (some monetary, some not) to encourage employees to start and maintain good health habits. Wellness programs are a tool used by employers to engage their employees in improving their health, and to provide incentives for making an effort. Changing behavior is critical to reducing health care costs. The more employers support corporate wellness programs and encourage their employees’ good health habits, the more likely employers are to see their investment in wellness directly lowering overall health care costs. If wellness programs reduce the cost of health care, this is consistent with the stated intent of the excise tax, which is to lower the overall costs of coverage. Employers should not be penalized by imposing an excise tax on wellness programs designed to foster better employee health and hence reduce the overall cost of health benefits.

Further, the Affordable Care Act (ACA) provides increased incentives for employers to include in their employee wellness programs, clearly indicating that Congress desired employers to expand the use of wellness programs to assist employees in creating and maintaining good health habits. Including wellness programs as “applicable employer-sponsored coverage” subject to the excise tax may cause employers to decrease use of these valuable programs, contrary to the policy reason behind the ACA wellness program changes.

- **Recommendation:** Treasury and IRS should exclude on-site medical clinics altogether from the high cost plan excise tax; to include them would be to unfairly penalize employers for using the clinics as one method of reducing employee medical costs.

Notice 2015-16 indicates that one of the types of coverage included in the definition of “applicable coverage” is “coverage for on-site medical clinics” [citing Section 4980I(d)(1)(B)(i)]. Treasury and IRS are considering excluding only those on-site medical clinics that offer *de minimis* services. We recommend excluding on-site medical clinics altogether from the purview of Section 4980I.

The stated purpose of the excise tax is to drive down the cost of comprehensive health coverage. Services provided by on-site medical clinics that qualify as excepted benefits are limited in scope; they do not replace major medical care, but do provide valuable services to employees. On-site medical clinics may also serve to lower costs associated with more comprehensive health benefits coverage by offering medical services that prevent minor issues from developing into full blown medical problems, while also limiting the time an employee must spend away from work to receive minor medical care. According to a 2012 survey from benefits firm Towers Watson, one of the most important reasons employers gave to establish on-site medical clinics is to reduce medical costs.¹ Employers should not be penalized for using on-site medical clinics as cost containment tools by making them subject to the high cost plan excise tax.

¹ Towers Watson, *2012 Onsite Health Center Survey Report*, found at: <http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2012/07/Onsite-Health-Center-Survey-2012> (last accessed May 11, 2015).

Issue: Approaches to Valuing Affected Coverage

- **Recommendation:** The cost of applicable coverage should be determined based upon the lowest cost option available to employees, rather than on the coverage employees are enrolled in.

Notice 2015-16 invites comments on potential alternatives to determining the cost of applicable coverage, consistent with statutory requirements. When read as a whole, Section 4980I appears to permit the cost of coverage determination to be based on coverage "made available" to employees. [See Section 4980I(b)(1).] In order to preserve the wide range of employee health benefits currently made available to different categories of employees, we recommend that Treasury and the IRS adopt an *interpretation* that allows the cost of applicable coverage to be determined based upon the lowest cost option available to employees, rather than on the coverage employees are actually enrolled in.

We note that focusing on the plan option made available to employees is permitted by Treasury and IRS in determining applicable large employer compliance with the Section 4980H employer shared responsibility requirements. In other words, under Section 4980H applicable large employers are in compliance with employer shared responsibility if they offer at least one plan to employees that constitutes minimum value – but the employee does not need to have chosen that minimum value plan option.

If Treasury and the IRS are unable to provide permanent relief as requested here, they should use their authority to provide transition relief, or temporary limited enforcement, by indicating the tax is based on the lowest cost plan made available to employees. For example, Treasury and the IRS could delay enforcement of the excise tax for the first several years that the tax is effective and base the determination of the tax on the lowest cost plan made available to employees, or provide safe harbors based on metal levels or other objective and easily ascertainable factors.

One alternative could be for Treasury and the IRS to implement a safe harbor for large group plans meeting minimum value, and *small group plans* meeting a certain actuarial value. In order to avoid imposition of penalties under Section 4980H, applicable large employers are required to offer health plans that are affordable and meet minimum value, but the required minimum value plan offering could exceed the threshold for the excise tax. Similarly, small employers not subject to Section 4980H can choose from plans with at least a 60% actuarial value – plans which in some geographies could subject the employer to the high cost plan excise tax. If Treasury and the IRS does not establish minimum value and actuarial value safe harbors, the excise tax will be unfairly imposed upon employers complying with the employer shared responsibility and other Affordable Care Act employer requirements.

- **Recommendation:** Treasury and IRS should take a broader approach to determining which types of coverage are "similarly situated" for purposes of determining their cost.

According to Section 4980I, the cost of applicable employer-sponsored coverage is to be determined under rules similar to the rules of Section 4980B(f)(4), the COBRA rules. With consideration for the numerous and customized plan offerings of many employers, we recommend that the IRS use its regulatory authority to adopt a rule that would provide employers with broad discretion in determining how best to aggregate their plans and/or benefit packages. Since there is no firm definition of "similarly situated" in Section 4980B(f)(4) or in Section 4980I, we believe the IRS has the authority to define "similarly situated beneficiaries" quite broadly.

If the IRS does not define "similarly situated" in the broadest sense possible, then valid employee choices based on lifestyle, family need, and medical need will eventually be removed. The very granular aggregation approach suggested in Notice 2015-16 would have the logical result of forcing most employers to retreat to a single, very high out-of-pocket plan design in order to avoid the excise tax – a result that would deprive employees of a broad range of choices in benefit plans. Finally, a broad aggregation definition would also ease administrative burden on employers in calculating the tax.

- **Recommendation: Treasury and IRS should modify their interpretation of "employer contributions" to include only those HSA contributions made by the employer, but not employee contributions to HSAs through pre-tax payroll deductions or otherwise.**

The IRS' proposed interpretation in Notice 2015-16 of Section 4980I(d)(2)(C) will influence employers' ability to continue to support employees' option to responsibly and conveniently set aside pre-tax funds to cover their out-of-pocket health care costs. This proposed interpretation indicates that "employer contributions" includes funds employees contribute to their HSAs via payroll deduction.

Should this interpretation stand, employers that are successfully utilizing health care consumerism and high-deductible health plans as a key strategy in managing health benefit costs would need to eliminate or severely limit the employee HSA contribution option in order to avoid paying a 40% excise tax on these employee payroll contributions. This leads to two potential outcomes, which seem inconsistent with the overall purpose of the ACA and related legislation. Either:

- Employees will contribute to their HSAs on their own using after-tax money and will take the deduction when they file their federal income taxes. This appears to have the same net effect from a federal income tax perspective but creates an unnecessary administrative burden on the employee; or
- Employees will not contribute to their HSAs on their own. As a result, employees may find that they do not have sufficient funds readily available when they are faced with an unanticipated health care expense. As a result, employees and their family members may be forced to delay or forego treatment.

Exempting all employee HSA contributions from the high cost plan excise tax will enable employers to continue to facilitate employee contributions to HSAs via pretax payroll deduction and support better employee health care consumerism.

Issue: Adjustments to the Dollar Thresholds

- **Recommendation:** Treasury and IRS should simplify the multiple, complex adjustments to valuing applicable coverage.

In order for employers to calculate their Section 4980I liability, they will have to make up to seven (7) separate adjustments to the threshold amounts set forth in the Affordable Care Act. Treasury and IRS should take steps to simplify and perhaps combine these adjustments to ease employers' administrative burden in calculating the applicable excise tax. It is not unusual for Treasury and IRS to take steps to simplify employer burdens; one recent example is the combined reporting in Sections 6055 and 6056.

While these adjustments greatly add to the complexity of the Section 4980I tax calculation, one critical type of adjustment is missing – an adjustment for geographic location. It is well-documented that health benefit costs vary by geography; typically costs are higher in the Northeast region of the U.S., for example. Because the COBRA rules specifically allow geographic variation in cost, Treasury and IRS should permit a geographic adjustment in Section 4980I as well.

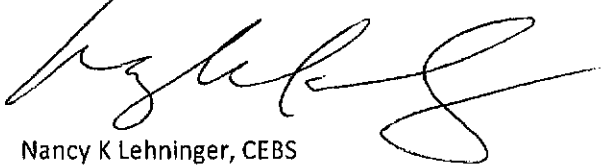
- **Recommendation:** Rather than using CPI-U as the standard for inflationary adjustment in 2019 and subsequent years, Treasury and IRS should by regulation establish a set percentage as the estimated inflation applicable in and after 2019. The CPI-U factor for 2019 will be issued too late for plan sponsors and issuers to take it into consideration in finalizing plan terms.

Employers plan for benefit offerings a considerable period of time in advance of the beginning of any plan year, and thus have a need to be aware of and take into consideration any inflationary adjustments in the high cost excise tax well in advance. However, the Consumer Price Index-Urban (CPI-U) will be issued far too late for employers to include it in their benefits planning.

In order that group health plan sponsors may adequately plan their upcoming benefit offerings, we recommend that the IRS establish a set number for the cost-of-living adjustment (COLA) at least 18 months ahead of the applicable calendar year. We suggest that the IRS may want to use 2% as the COLA target to provide sufficient notice and certainty to employers planning for future employee benefit offerings.

As stated above, we believe that Treasury and the IRS should consider the practical implications of their preliminary interpretations of Section 4980I in Notice 2015-16 and alter their interpretations accordingly. Should you have questions about these comments, please contact [name of responsible person] at [phone] or [email].

Sincerely,

A handwritten signature in black ink, appearing to read 'Nancy K Lehninger', with a long horizontal flourish extending to the right.

Nancy K Lehninger, CEBS
Senior Director of Benefits