

May 7, 2015

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

Submitted Electronically: [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov)

Re: Notice 2015-16 (Section 4980I – Excise Tax on High Cost Employer Sponsored Health Coverage)

This letter is in response to Notice 2015-16 and the process for developing regulatory guidance in relation to the excise tax on high-cost, employer-sponsored coverage, sometimes referred to as the “Cadillac Tax,” as added by the Affordable Care Act (ACA) to the Internal Revenue Code in Section 4980I.

Our organization, Flexible Benefit Service Corporation (Flex), acts as a benefits administrator for thousands of employers and employees throughout the country, and we serve as a voice on their behalf when Code provisions have the potential for significant economic impact and change to the benefit plans that are offered by employers to employees.

Absent a repeal of the Cadillac Tax, we believe there are significant concerns and disadvantages in the type of plans that are expected to be included in the value of coverage, and the use of the COBRA applicable premium as the way to calculate the value of coverage.

#### **Applicable Coverage**

Notice 2015-16 reflects that the applicable plans in determining the value of coverage will include Health FSAs, Archer MSAs, HSAs and coverage for on-site medical clinics that provide more than de minimis medical care. Notice 2015-16 also indicates that future guidance is expected to include HRAs when determining the value of coverage, and there is potential that self-insured dental and vision plans may also be included.

Flex, with the support from many of our clients, is requesting an exclusion of the above mentioned plans in determining the value of coverage. We recognize there is a concern for unnecessary and increased utilization of medical services when a health plan, or a combination of multiple health plans, exposes an individual to low out-of-pocket expenses. However, the plans referenced in the preceding paragraph are part of the solution, not part of the problem.

Health FSAs, Archers MSAs, HSAs and HRAs are all plans that have a similar thing in common. Each of these plans can change employee spending behavior, thus reducing, and in some cases eliminating, unnecessary utilization of medical expenses. Furthermore, Archer MSAs and HSAs are required to be coupled with a qualified high deductible health plan, and while not required, HRAs are most commonly

integrated by employers with a plan that has high out-of-pocket expenses. In addition, employees who enroll in a Health FSA most commonly do so because they have anticipated out-of-pocket medical expenses, whether covered by the health plan or otherwise.

Health FSAs, Archer MSAs, HSAs and HRAs also allow tax-free distributions for qualified medical expenses. The tax advantages of these plans makes health care more affordable, especially to those employees who are in the lower and middle class. The inclusion of these plans in the value of coverage would likely cause many employers to change or eliminate their availability to employees in an effort to reduce the impact of the Cadillac Tax. Employees would subsequently be faced with greater out-of-pocket exposure.

In addition, there is an increasing concern for the cost of medical care in retirement. According to Fidelity Benefits Consulting, the average 65 year old couple retiring in 2014 will need \$220,000 (in today's dollars) to pay for medical expenses in retirement.<sup>1</sup> Archer MSAs, HSAs and HRAs all have rollover provisions that allow for people to save now for future medical expenses.

On-site medical clinics are also trying to accomplish a similar goal of the Cadillac Tax, which is to slow expenditures for medical care. On-site medical clinics provide employers and employees with a much more timely and affordable means of being treated for the more common, and often times less serious medical conditions. The inclusion of on-site medical clinics in the value of coverage may lead to a reduction in the number of these clinics, which will just force employees to seek more expensive and less timely medical care.

Lastly, Notice 2015-16 indicates there is potential to exclude self-funded dental and vision plans from the value of coverage. We recognize that stand-alone, fully insured dental and vision plans will usually be excluded from the value of coverage because they are issued under a separate policy from the major medical plan. We are asking the IRS to provide a similar exception for self-insured dental and vision plans so as not to discriminate against employers with this type of coverage. The inclusion of these plans in the value of coverage could create costly and unnecessary expenses to employers who would need to find an alternative way to issue this type of coverage under a separate policy.

### **COBRA Applicable Premium**

The value of coverage, as currently written in Section 4980I and reiterated in Notice 2015-16, indicates the COBRA applicable premium will generally be used as the way to calculate the value of coverage. From our experience, the COBRA applicable premium is not a good way to calculate the value of a plan because there are so many variables that impact the applicable premium outside of plan design.

For example, geographic location has a significant impact on the applicable premium. All other things equal, a health plan offered by an employer in New York City will have a substantially higher premium than an employer offering a similar plan in rural Alabama.

Demographics and utilization patterns also play a significant role in relation to the applicable premium. All other things equal, a plan with an older employee population will have a higher applicable premium

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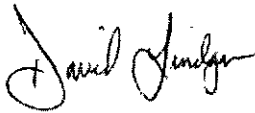
<sup>1</sup> Fidelity Benefits Consulting

because of statistically higher utilization patterns. Similarly, a plan that covers employees with a greater number of chronic illnesses will have a higher applicable premium.

As a result, we believe the use of the COBRA applicable premium is an inappropriate and incorrect way to determine the value of coverage. It will discriminate against employers in urban locations, as well as those employer plans with certain demographic types, such as a plan covering older employees or a plan covering employees with more chronic and serious medical conditions. We are asking the IRS to reconsider alternative methods in the calculation of the value of coverage.

Flex would like to thank you for taking our comments into consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "David Lindgren". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Lindgren".

David Lindgren  
Senior Manager, Compliance & Public Affairs  
Flexible Benefit Service Corporation