

Notice 2015-16

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ELECTRONICALLY SUBMITTED

Notice.comments@irs.counsel.treas.gov

May 14, 2015

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

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

Ladies and Gentlemen:

This comment letter is submitted on behalf of a group of financial services companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, "Fidelity"). In addition to being a benefits plan sponsor itself, Fidelity is a leading provider of employee benefit plan services, offering those services to other plan sponsors in support of a variety of benefit plans and programs. Fidelity also offers Health Savings Accounts ("HSAs") to its own employees and to the employees of plan sponsors who elect to make HSAs available.

We appreciate the approach to rule-making being taken by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") with the publication of Notice 2015-16. Thank you for communicating the preliminary thinking about the excise tax on high cost employer-sponsored health coverage and providing an opportunity to comment on the issues even before a proposed rule is issued. Given the significance and high-profile nature of this tax, we believe that a thorough vetting of the issues is warranted.

Although there are many issues addressed in Notice 2015-16, we have limited our comments in this letter to the treatment of HSAs. The Affordable Care Act ("ACA") dictates that employer contributions to HSAs be included in the taxable base for the 40% excise tax, and IRS and Treasury have indicated that employee pre-tax contributions made via payroll deduction should be treated the same way. We do not believe that it is appropriate to do so.

The statutory language may be reasonably read to exclude HSAs from the taxable base for the excise tax. At a minimum, employee contributions, regardless of whether such contributions are made on a pre-tax or post-tax basis, should be excluded.

ACA provides for the excise tax to be applied to “applicable employer-sponsored coverage;” however, HSAs do not meet the definition of “applicable employer-sponsored coverage.” Section 4980I(d)(1)(A) reads as follows:

“(d) APPLICABLE EMPLOYER-SPONSORED COVERAGE; COST.—For purposes of this section—
“(1) APPLICABLE EMPLOYER-SPONSORED COVERAGE.—
“(A) IN GENERAL.—The term ‘applicable employer-sponsored coverage’ means, with respect to any employee, coverage under any group health plan made available to the employee by an employer which is excludable from the employee’s gross income under section 106, or would be so excludable if it were employer-provided coverage (within the meaning of such section 106).

The statutory language defines the taxable base for the excise tax as “...coverage ***under any group health plan*** [emphasis added] ...” that is either (a) “...excludable from ... income under section 106, or [(b)] would be so excludable if it were employer-provided coverage...” But HSAs ***are not group health plans***: rather, HSAs are individual trust accounts.¹ The subsequent references to exclusion under section 106 are irrelevant with respect to HSAs because the first part of the definition is not satisfied.

Section 4980I(d)(2) outlines how the cost of applicable employer-sponsored coverage should be determined. Subsection (A) gives us the general rule and points to section 4980B(f)(4), the section that provides guidance for the development of COBRA rates. We note, however, that HSAs are not included in the calculation of COBRA rates because HSAs are not health plans and therefore are not offered as a COBRA benefit. Subsections (B) and (C) of section 4980I(d)(2) then address arrangements that may not be widely understood to be included in the definition of applicable employer-sponsored coverage (as in the case of subsection (B) which covers health FSAs), and arrangements that are clearly not included in the definition (as in the case of subsection (C) which covers Archer MSAs and HSAs) but were chosen to be added in to the taxable base for the excise tax to some degree.

Health FSAs, of course, are group health plans, and FSAs are offered as a COBRA benefit. Thus, FSAs are applicable employer-sponsored coverage. The statutory language of subsection (B) specifies that the cost of coverage for FSAs equals “...the amount of employer contributions under any salary reduction election...plus [any other amounts reimbursed under the arrangement which would have been funded by the employer].” Subsection (C), however, does not mention salary reduction contributions whatsoever: subsection (C) provides that, with respect to HSAs, “...the cost of coverage shall be equal to the amount of employer contributions under the arrangement.” Both FSAs and HSAs may be funded with salary reduction employee contributions and true employer contributions. ACA’s specific reference to salary reduction for

¹ IRC §223(d); §5000(b)(1)

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FSAs, but not for HSAs, indicates an intent to treat employee contribution salary reductions differently under the different arrangements for purposes of the excise tax – that is, to include salary reduction employee contributions for FSAs, but not for HSAs. The differing language supports this interpretation.

If salary reduction employee contributions to HSAs are included in the taxable base for the excise tax, it will result not only in additional taxes on employers but also in additional taxes on workers.

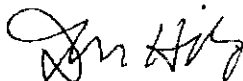
Pursuant to IRC Section 223, individuals may take a tax deduction for contributions they make on a post-tax basis to an HSA. However, the tax benefit obtained via the deduction is inferior to a pre-tax payroll deduction contribution because: (a) it is more burdensome for an individual to have to file for a deduction than to have the contribution deducted from pay; (b) the tax benefit is delayed; and (c) the payroll taxes that the employee pays cannot be deducted. If employers are made subject to the excise tax for salary reduction employee contributions, employers will stop facilitating salary reduction contributions for employees. This will result in more than inconvenience for employees: it will increase their taxes (payroll taxes).

It is inconsistent with the Affordable Care Act goal of improving health care affordability to discourage the use of HSAs.

The 40% excise tax on “any excess benefit” was intended to discourage employers from offering overly-rich benefit plans. High Deductible Health Plans (“HDHPs”) are not typically regarded as rich plans, and the premiums are more affordable. Although the lower premiums make the purchase of insurance more affordable, the high deductibles make many individuals worry about the affordability of the health care that the plan provides. HSAs are coupled with HDHPs (HSAs can only be offered in conjunction with HDHPs) to help make *using* a HDHP more affordable for the individual. HSAs will become more important to health care affordability as employers move toward HDHPs in order to keep their plans from triggering the excise tax. If the objective is to advance affordability, then the use of HDHPs and HSAs should not be discouraged.

Thank you for the opportunity to comment. We would be pleased to discuss these comments and to provide any additional information that you may find helpful.

Sincerely,



Denise Hilger
Senior Vice President & Deputy General Counsel