

GROOM LAW GROUP

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May 15, 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:

We appreciate the opportunity to provide comments to Treasury and the Internal Revenue Service (the "IRS") on Notice 2015-16, Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage (the "Notice").

We represent a group of large self-insured employers and professional benefits administrators that together provide and administer health coverage to over two million Americans. As such, we will be heavily impacted by the administration and imposition of the excise tax on high cost employer-sponsored health coverage (the "excise tax").

We appreciate that the Notice is just the first step in the ongoing process of implementing the excise tax. We are commenting now, however, out of concern that future guidance will exacerbate the already profound impact of the excise tax and could have substantial and far reaching unanticipated adverse effects on the provision of health care to working Americans. We are particularly concerned about the impact the excise tax will have on high deductible health plans offered in conjunction with health savings accounts and other similar consumer driven health savings vehicles and believe that the availability of these arrangements is in jeopardy. We respectfully ask Treasury and the IRS to implement the excise tax, to the extent possible, in such as manner as to alleviate any avoidable adverse impacts on consumers.

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We urge Treasury to provide permanent relief, as requested below. However, to the extent that Treasury and the IRS are unable to provide the full scope of requested relief, at a minimum, Treasury and the IRS should use their regulatory authority to grant transition relief or temporary limited enforcement. Treasury and the IRS could, for example, delay enforcement of the excise tax entirely, base the determination of the excise tax on the lowest cost affordable minimum value plan made available to an employee during a reasonable transition period (e.g., first three years in which the excise tax is effective), or provide safe harbors based on clear and easily ascertainable factors.

Our comments are as follows.

1. HSAs

Issue:

The Notice states that Treasury and the IRS anticipate future proposed regulations providing that (1) employer contributions to HSAs, including salary reduction contributions, are included in applicable coverage, and (2) employee after-tax contributions to HSAs are excluded from applicable coverage.

Comment:

In order to encourage employers to continue offering high deductible health plans and accompanying HSAs, we request that Treasury and the IRS exclude employer contributions to HSAs, including employee salary reduction contributions, from the definition of applicable coverage. At a minimum, Treasury and the IRS should exclude employee pre-tax salary reduction contributions to HSAs, even if employer contributions are counted.

HSAs increase consumers' awareness of the cost of health care and cause individuals to be more careful about spending health care dollars – goals that are very much in keeping with the policy behind the excise tax. Including employee and employer contributions for purposes of the excise tax will provide a disincentive to employers wishing to offer high deductible health plans.

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In addition, HSAs are unique vehicles that permit account holders to exercise control over how the funds are used. HSA funds can be saved for future use rather than spent on current medical expenses and can even be used for non-healthcare related items if needed (subject to additional tax). These features provide strong incentives for account owners to maximize annual contributions and to save and invest those amounts for future medical expense needs, which are laudable goals.

If employer and employee contributions to HSAs are included in the definition of applicable coverage, HSAs combined with high deductible health plans will be likely to cause the dollar limits imposed by § 4980I to be reached whereas health plans with smaller deductibles and richer benefits will not. This perverse result is inconsistent with the purpose of the excise tax, which is to discourage overly generous health plans that do not impose appropriate levels of cost-sharing.

There is also a statutory argument for excluding employer contributions to most HSAs from the excise tax. The definition of “applicable employer-sponsored coverage” under § 4980I(d) includes coverage under any group health plan made available to the employee by an employer which is excludable from the employee’s gross income under § 106. It is not clear, however, that Congress understood that this reference would sweep in salary reduction contributions made through a cafeteria plan under § 125 because of the IRS’s somewhat obscure position that salary reduction contributions made through a cafeteria plan are “employer contributions.” We believe that Treasury could interpret the reference to § 106 in § 4980I(d) to mean § 106(a), pertaining to health insurance premiums, and not § 106(d), pertaining to HSA employer contributions, including salary reduction contributions. At a minimum, it would seem that Treasury and the IRS could interpret the definition of applicable employer-sponsored coverage to exclude employee pre-tax salary reduction contributions to HSAs, even if employer contributions are counted.

In this regard, we note that HSA contributions made on an after-tax basis and then deducted under § 223 are clearly not included in the statutory definition of applicable coverage. Including pre-tax employee contributions but excluding contributions made on an after-tax basis and then deducted is an artificial distinction that increases complexity and further discourages the use of HSAs.

The ultimate effect of any rule that includes HSAs in the definition of applicable coverage will be that employers will stop offering employer and employee contributions to HSAs to compliment high deductible health plans to employees – an outcome that runs

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counter to the very purpose of the excise tax.

2. FSAs

Issue:

The Notice states that Treasury and the IRS anticipate future proposed regulations providing that both salary reduction and employer flex contributions to health FSAs will be included in determining the cost of applicable coverage.

Comment:

We request that Treasury and the IRS exclude salary reduction and employer flex contributions to FSAs from the definition of applicable coverage. Like HSAs, FSAs increase consumers' awareness of their health spending and since amounts in an FSA can be rolled over from year to year, participants have an incentive to spend their funds wisely. The Congressionally mandated cap on FSA contributions ensures that were such contributions excluded from the definition of applicable coverage, FSAs would not create an end-run around the excise tax by allowing employees to spend unlimited amounts of tax free dollars on health care.

With passage of the ACA and enactment of § 125(i), Congress signaled its approval of FSAs that conform to a statutory limit of \$2,500 (as indexed for inflation). If, however, FSAs are included in the definition of applicable coverage for purposes of the excise tax, the effort involved in valuing the cost of each individual FSA, in addition to the complications inherent in determining the value of an FSA in light of the uniform coverage rule, would make the cost of administration prohibitive. If FSAs are included in applicable coverage, we expect that most employers will simply stop offering FSAs altogether. This result would be in stark contrast to Congressional intent.

3. On-Site Medical Clinics

Issue:

Section 4980I(d)(1)(B)(i) excludes from the definition of applicable coverage each of the excepted benefits listed in § 9832(c)(1) other than the § 9832(c)(1)(G) exception for on-

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site medical clinics. Accordingly, coverage provided through on-site medical clinics is generally counted as applicable coverage.

Comment:

We support Treasury and the IRS's intention, as expressed in the Notice, to exclude from applicable coverage on-site medical clinics that offer de minimis medical care to employees. We request, however, that Treasury and the IRS adopt a broader rule and exclude all on-site medical clinics that meet the regulatory definition of an excepted benefit.

Clinics are a cost effective way for employers to deliver a wide range of services, including preventive benefits. From a health policy perspective, clinics should be encouraged. Employees with access to an on-site clinic are more likely to seek preventive care such as screenings for obesity and hypertension on a regular basis because they do not need to take off time from work to do so. In addition, these employees are also more likely to seek treatment at an early point in an illness, helping to prevent minor medical issues from developing into more serious problems. Finally, for employees struggling with chronic conditions like diabetes, clinics provide a convenient place to receive necessary tests and treatments.

Requiring clinics to be included in the calculation of the excise tax will, at best, be an administratively cumbersome exercise, and at worst, will serve as a disincentive to employers to offer clinics. Fortunately, a straightforward solution exists. Treasury and the IRS could take the position that clinics will be excluded from the excise tax if such clinics satisfy the excepted benefit regulations. Currently, the HIPAA Portability regulations simply provide that "coverage for on-site medical clinics" are excepted benefits. Treas. Reg. § 54.9831-1(c)(2)(viii). This is likely because, notwithstanding the valuable role that on-site clinics play in maintaining the employees' health, services provided by on-site medical clinics are necessarily limited in scope and in no way replace major medical care. Should the agencies ever feel that clinics have evolved to a point that they are providing major medical care, the existing excepted benefit regulations could be amended and the excise tax would apply to any clinics that fail to satisfy the revised definition.

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4. HRAs for Active Employees

Issue:

The Notice states that guidance will be needed on how to determine the cost of HRA coverage since Treasury and the IRS anticipate that HRAs will be applicable coverage. The Notice further observes that basing the cost of coverage on amounts that are available in an HRA may overvalue the HRA since all contributions might not be spent in a given year. Treasury and the IRS are, therefore, considering a rule that would permit an employer to determine the cost of coverage by adding together all claims and administrative expenses attributable to HRAs for a particular period and dividing that sum by the number of employees covered for that period. Several other approaches are also described in the Notice.

The Notice discusses potential problems associated with taxing the value of an HRA that will either be used to purchase coverage that will also be subject to the excise tax (double counting) or that can only be used to purchase benefits that would not otherwise be subject to the excise tax because the benefits do not constitute applicable coverage.

Comment:

As discussed in the Notice, determining the cost of an HRA is difficult due to risks of overvaluing and double counting.

We support the approach described in the Notice that would permit employers to determine the cost of coverage under an HRA by adding together all claims and administrative expenses attributable to the HRA for a particular period and dividing that sum by the number of employees covered for that period. We encourage Treasury and the IRS to adopt the other approaches outlined in the Notice as well, and to permit employers to choose between approaches.

While making available multiple methods for determining the cost of applicable coverage under an HRA runs the risk of increasing administrative complexity, it also increases the chances of valuing HRAs fairly and thus not discouraging their use. Allowing employers a choice between multiple methods would maximize flexibility and would avoid unnecessary overvaluing of HRA coverage, double counting HRA amounts, and other similarly inequitable outcomes.

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5. Retiree Only HRAs

Issue:

In addition to the issues noted in Section 4, above, the Notice also discusses potential problems associated with taxing the value of an HRA that will either be used to purchase coverage that will also be subject to the excise tax (double counting) or that can only be used to purchase benefits that would not otherwise be subject to the excise tax because the benefits do not constitute applicable coverage.

Comment:

We request that Treasury and the IRS exempt retiree only HRAs to the extent that amounts in the retiree only HRA can be used solely to pay for premiums for other coverage. In such instances, it is highly likely that the HRA amount would either be double taxed because the coverage purchased was already subject to the excise tax, or should not have been taxed at all because it is used to purchase coverage that is not itself subject to the excise tax.

We also request that Treasury and the IRS provide a “grandfather” rule excluding from the excise tax entirely all amounts available under a retiree HRA if the beneficiary would be retired and the amount that would be available in the HRA was set prior to December 31, 2017.

6. COBRA Rules

Issue:

The cost of applicable coverage must be determined under rules “similar” to the rules for calculating COBRA applicable premiums.

Comment:

We request that Treasury and the IRS develop clear guidance regarding the excise tax, in as timely a manner as possible, and we encourage Treasury and the IRS to maintain maximum similarity between rules under the excise tax and rules under COBRA.

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The ACA has already added tremendous expense and increased the administrative burdens on employers offering health coverage to their employees. In order to achieve the excise tax's goal of lowering the cost of health coverage, it is imperative that future rules be as straightforward and uniform as possible so as to decrease the already substantial and costly administrative burden on employers, plan sponsors, and plan administrators.

7. Person that Administers the Plan

Issue:

Section 49801(c)(1) and (2) specifies that in the case of applicable coverage that is not insured and is not an HSA or Archer MSA "the person that administers the plan" is the entity that shall pay the excise tax. Neither the statute nor the Notice define which entity is "the person that administers the plan."

Comment:

Future guidance should make clear that health insurance issuers providing administrative services are not "the person that administers the plan" and thus cannot be liable for the excise tax. Treasury and the IRS should define the person that administers the plan in a way that most easily fits with current plan filing and reporting requirements under ERISA and the Internal Revenue Code and should therefore look to the ERISA plan administrator.

8. Benefits Provided to Comply with Federal and State Law

Issue:

In the Notice, Treasury and the IRS invite comments on whether any alternative approaches to determining the cost of applicable coverage would be consistent with the statutory requirements and would be useful.

Comment:

Treasury and the IRS should exercise their regulatory authority to ensure that plans can

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simultaneously comply with applicable ACA requirements (as well as requirements mandated by other Federal and state employment and employee benefit laws) and avoid incurring the excise tax. For example, employers may soon be in a position where they will be unable to offer minimum value coverage, as required by the employer shared responsibility provisions, without also incurring the excise tax. Similarly, state laws may require employers to offer certain medical procedures or tests to specific groups of employees. For example, sleep apnea programs are often required to be offered to various categories of employees by applicable safety laws and should not be considered benefits that are subject to the excise tax. Subjecting employers to the excise tax due to requirements of general applicability imposed by other laws would be deeply unjust for taxpayers simply trying to comply with the law.

9. Safe Harbors for Determining the Cost of Coverage

Issue:

In the Notice, Treasury and the IRS invite comments on whether any alternative approaches to determining the cost of applicable coverage would be consistent with the statutory requirements and would be useful.

Comment:

Treasury and the IRS should exercise their regulatory authority to calculate the excise tax in reference to the lowest cost plan that is both affordable and offers minimum value that an individual is eligible to enroll in (that is, the lowest cost plan “made available” to an individual), rather than looking at the coverage the individual actually enrolls in (the approach apparently contemplated in the Notice).

Any requirement to determine the cost of coverage on an employee by employee basis will create great administrative complexity at great cost to all parties involved. Treasury and the IRS could reduce both the complexity and the cost of the provision by creating safe harbors that allow issuers to determine the cost of coverage based on clear and easily ascertainable standards. The statutory language in § 4980I, when read as a whole, appears to permit Treasury and the IRS to look at the cost of coverage made available to employees rather than looking at coverage in which an employee is actually enrolled. We appreciate the opportunity to provide comments on the Notice and look forward to continuing to work with Treasury and the IRS as they issue guidance on implementing

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the excise tax. Please contact us with any questions or if we can provide and further information.

Sincerely,

A handwritten signature in black ink that reads "Christine L Keller". The signature is written in a cursive, flowing style.

Christine K. Keller