

May 15, 2015

Submitted electronically via notice.comments@irs.counsel.treas.gov

CC:PA:LPD:PR (Notice 2015-16)

Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Request for Comments re: Notice 2015-16, Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage

Dear Secretary Lew and Commissioner Koskinen:

We are writing to express our deep concern regarding the very serious consequences the “40 Percent Excise Tax on High Cost Employer-Sponsored Health Coverage” will have on American workers and families. As imposed by the Affordable Care Act (ACA), this tax will jeopardize the health care coverage of more than 151 million Americans who rely on the employer-based health care system.¹ While we believe the excise tax should be repealed, we urge the Treasury Department and Internal Revenue Service (IRS) to exercise maximum regulatory flexibility to ensure that employers and workers are not penalized when crucial health benefits are provided.

The undersigned groups represent a diverse group of public sector and private sector employers, unions and other entities that support employer-sponsored health coverage. We join together to convey our shared message about the impact of the 40 percent tax.

Starting in 2018, the nondeductible 40 percent tax, established under Internal Revenue Code (IRC) section 4980I, applies to the cost of “applicable employer-sponsored coverage” in excess of certain thresholds (in 2018, \$10,200 for employee-only coverage and \$27,500 for family coverage). In 2019, the thresholds are linked to the Consumer Price Index (CPI) plus one percentage point; and in 2020 and beyond, the thresholds are indexed solely to the CPI. Historically, medical inflation has risen twice as fast as CPI, which will soon make this tax applicable even to plans with very high levels of employee cost-sharing.

¹ Kaiser Family Foundation, *State Health Facts: Health Insurance Coverage of the Total Population*, 2013.

In 2010, the tax was included in the ACA to address what was perceived at the time to be over-consumption of health care and to help finance other provisions of the law. It was initially thought that the tax would impact only a few select health plans². In reality, however, this tax will lead to a reduction in employer-sponsored coverage and an increase in employee cost sharing – the exact opposite of the goals of expanding coverage and lowering costs. This will negatively affect millions of working American families. For these reasons, the undersigned organizations are urging Congress to repeal this damaging tax.

We appreciate the opportunity to share our concerns with the Administration as you seek input on the implementation of IRC section 4980I related to (1) the definition of applicable coverage, (2) the determination of the cost of applicable coverage, and (3) the application of the annual statutory dollar limit to the cost of applicable coverage. We offer initial comments in each area and ask you to consider the overall implications of section 4980I on the employer health care system as you draft proposed regulations.

(1) Definition of Applicable Coverage

Adopting a broad definition of applicable coverage drives employers to eliminate coverage for benefits that provide valuable financial and health security for American families. Employers are caught between trying to balance the increased coverage requirements of the ACA and pressure to decrease coverage to stay under the limits of the 40 percent tax.

Adopting a broad definition also runs contrary to the intent of the ACA. For example, the ACA encouraged the adoption of wellness programs as a tool to decrease costs and improve the health of workers and their families. Taxing wellness benefits could discourage the use of wellness plans that provide important benefits to employees. The broad definition proposed in the notice could also implicate benefits that serve other workforce purposes such as Employee Assistance Plans (EAPs) and onsite medical clinics. While some EAPs provide a limited amount of health care along with other benefits, the primary purpose is to improve an employee's performance on the job – thus some EAPs are beyond the scope of 'excepted benefits' and should also be excluded from the definition of applicable coverage. Similarly, onsite medical clinics serve many purposes including work place safety, improving the health of employees, reducing health plan costs, and decreasing time away from work. Taxing benefits

²Bradley Herring, Lisa Korning Lentz, Health Affairs, *Bending the Cost Curve*, November 1, 2009.

designed to improve the health of the workforce and mitigate health care costs is incongruous with the ACA.

(2) Determination of the Cost of Applicable Coverage

There are many factors beyond the generosity of the benefits that contribute to the cost of employer-sponsored health coverage. Moreover, many of these factors are outside the control of employers and employees such as geography, industry risk profile and workforce demographics. We strongly encourage the Administration to work to alleviate to the maximum extent possible the uneven and discriminatory impact of this tax.

As currently proposed, the 40 percent tax could have a disproportionate effect on employers with greater numbers of older, disabled, or sicker workers. Not only is it more costly to provide coverage to these employees, but basing the tax on COBRA valuations (in the manner outlined in the notice) could disproportionately affect workers with greater health needs. Workers with significant health costs may disproportionately select higher actuarial value plans offered by an employer, which increases the cost of the COBRA valuation for such plans. Providing employers with the flexibility to permissively blend plans and populations to the greatest extent possible could help mitigate some of the impact this tax places on employee health benefits.

Additionally, the Notice states the tax is determined based on the plan in which an employee is enrolled. Consequently, the plans of workers that need a greater level of insurance—not because they are “over consuming” health care, but because they have genuine health needs—could be hit with the tax first. Taxing employers more for protecting employees with higher health care needs is wrong.

Health care costs also vary greatly by geography. A health plan offered in higher cost states, such as New York or Alaska, will be more expensive than the very same health plan offered in a lower cost state³. The geographic variation is outside the control of employers who are unable to affect the numerous contributing factors such as state benefit mandates, the availability of health care providers and other economic factors.

³National Conference of State Legislators Private Sector Premium Tables by state *accessed at* <http://www.ncsl.org/research/health/health-insurance-premiums.aspx#Private Sector Premium Tables By State> on May 11, 2015.

To prevent the discriminatory application of the 40 percent tax, we encourage the Administration to adopt a safe harbor to ensure that if employees are covered by a plan with an actuarial value of 90 percent or below, that plan would not trigger the tax. Given that the ACA created 'platinum' level plans with a 90 percent actuarial value, it would be disingenuous to impose an excise tax on a plan whose value does not exceed that level. We urge the Administration to adopt a safe harbor rule of parity that would protect employer-sponsored plans with a similar actuarial value. Creating a safe harbor for employees covered by a plan with an actuarial value of 90 percent or below could eliminate the discrimination currently facing employers in higher risk industries, high cost geographies and with higher-cost demographics.

(3) Application of Annual Dollar Limits

Neither employers – nor their employees and family members – want to see the value of health benefits drastically reduced to avoid triggering the 40 percent tax. Unfortunately, the statute's insufficient indexing, broad definition of applicable coverage and restricted treatment of coverage other than self-only coverage mean that over time, even very moderate health plans will be subject to the tax.

As a consequence, employers are being forced to cut vital benefits. These and other changes to plans are already being implemented to avoid or mitigate the tax when it takes effect in 2018.⁴ We encourage the Administration to adopt regulations that provide for the maximum level of flexibility in determining and applying the annual dollar limits, and in calculating and administering the 40 percent tax.

* * *

After reviewing Notice 2015-16, we remain concerned that the 40 percent tax on health benefits threatens the long-term viability of the employer-sponsored system. The ACA penalizes certain employers whose benefits do not meet a specified 'floor' (i.e., covering the "minimum value" of at least 60 percent of health benefit costs). This puts employers in an untenable position in that they are required to offer an unchanging 'floor' of minimum value, yet at the same time the 40 percent tax on employee health benefits creates an ever-lowering 'ceiling' attributable to the insufficient indexing of the thresholds. Ultimately the floor and the ceiling will collide, forcing employers to either pay the 40 percent tax or pay the employer mandate penalty if they can no longer offer employee health coverage. Neither is a good option for the 151 million Americans who receive their health coverage through the employer-based system.

We appreciate the opportunity to share our comments with the Administration in response to Notice 2015-16 and look forward to working together to address these concerns. We recognize the difficulty of addressing all of the issues raised by the tax and acknowledge that because the damage that will be created by the tax is rooted in the statutory language, it cannot be completely resolved through the regulatory process. Thus, to protect the availability of vital employer-sponsored health coverage, the 40 percent tax must be repealed.

In the meantime, however, as the Treasury Department and IRS proceed with implementing the tax, American workers and employers implore you to use your regulatory authority to mitigate the serious consequences by providing maximum flexibility to enable employers to continue offering employees and their families the health care benefits they like and want to keep.

Sincerely,

American Benefits Council
American Staffing Association
Associated General Contractors
California Schools Voluntary Employees Benefits Association
Cigna
College and University Professional Association for Human Resources
Eversource Energy
Food Marketing Institute
International Association of Fire Fighters (IAFF)
Laborers' International Union of North America (LIUNA)
MetLife
National Association of Counties
National Association of Health Underwriters
National Association of Professional Insurance Agents
National Retail Federation
Pfizer
Retail Industry Leaders Association
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