

Notice 2015-16

MAY 19 2015



May 15, 2015

Submitted Via Email: Notice.comments@irscounsel.treas.gov

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

Dear Ms. Levin:

The HR Policy Association (“HR Policy” or the “Association”) welcomes the opportunity to provide comments to the Internal Revenue Service (IRS) regarding its Notice 2015-16, Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage, issued on February 23, 2015.¹ Section 4980I, which was added to the IRS Code by the Affordable Care Act (ACA), applies to taxable years beginning after December 31, 2017. Under the provision, if the aggregate value of employer-sponsored coverage provided to an employee exceeds a statutory dollar limit, the excess is subject to a 40 percent excise tax. Notice 2015-16 describes some potential regulatory approaches the IRS could take to implement the excise tax and invited comments on those approaches.

The HR Policy Association is the lead organization representing chief human resource officers of over 360 of the largest corporations doing business in the United States. The member companies, all of whom are large employers, provide health care coverage to over 21 million employees and dependents, and collectively spend more than \$76 billion annually on health care in the U.S. Many HR Policy Association member companies will be directly impacted by the excise tax.

The Association’s member companies have a long standing commitment to improve the quality and affordability of health care, and they offer employees a host of innovative health benefits such as onsite medical clinics, wellness programs, and direct contracting with Centers of Excellence that are lowering overall health care costs. The ACA’s excise tax may undermine the ability of employers to continue such innovation and more than likely the higher costs, and those that are associated with the excise tax, will ultimately be borne by employees and their families.

¹ Available at: <http://www.irs.gov/pub/irs-drop/n-15-16.pdf>.

Policymakers should recognize the cost of employer-provided care is increasing for a variety of reasons beyond the control of employers and employees, including the aging workforce, new medical technologies and drug therapies as well as new taxes, fees and benefit requirements imposed by the ACA. To avoid the inevitability of “Chevrolet” benefit plans eventually being taxed as “Cadillacs,” and to remove the potential negative impact that the tax will have on employer sponsored health benefits, we urge the IRS to enable employers to have the maximum flexibility possible in determining “applicable coverage,” the cost of applicable coverage, and allowable adjustments to excise tax dollar limit thresholds.

The Association’s detailed comments and reasoning are more fully described below.

Determining Applicable Coverage

Employers should have the maximum flexibility possible in determining applicable coverage in order to minimize the unintended consequences of the excise tax. Any costs associated with improving health, as opposed to direct medical costs, should be excluded from the calculation of applicable coverage for purposes of the excise tax. For example, wellness programs and on-site clinics are designed to improve health and reduce health care spending and should be completely excluded from the tax. Similarly, employee assistance programs should be excluded from the excise tax.

Mandated preventive care services covered under Section 2713 of the Affordable Care Act (ACA) should also be excluded from the tax. It makes absolutely no sense for the federal government to require employers to provide access to an ever expanding list of preventive care items and services at no in-network cost to participants, and then tax the cost of those benefits as being “excessive.” Health care benefits cannot be both required and excessive at the same time.

Any costs arising from efforts to innovate with the health care delivery system to improve value should be excluded from the excise tax. Programs such as direct contracting with providers, utilizing accountable care organizations, patient-centered medical homes, Centers of Excellence, and bundled and capitation payment initiatives are designed to reduce excessive health care spending and improve health outcomes, and should not be discouraged by taxing them at 40 percent. The Association strongly urges the IRS to exclude the costs of programs aimed at innovation in health care delivery from the calculation of applicable coverage.

Similarly, high-deductible health plans coupled with health savings accounts are an increasingly important health care strategy for incentivizing employees to become more informed and better consumers of health care, and to reduce the tests and treatments that scientific and professional organizations have consistently determined to have no health benefit or to be outright harmful. Employee contributions to health savings accounts, flexible spending accounts, and health reimbursement accounts should be excluded from the excise tax. Inclusion of these accounts into the calculation of applicable coverage will have the unintended

consequence of incentivizing employers to discontinue these types of accounts and only penalize employees and their families in the end.

Further, any benefit that is treated as an “excepted benefit,” including self-insured vision and dental coverage and employee assistance programs, should be excluded from the excise tax. The Association urges the IRS to exclude all benefits that are considered excepted benefits, regardless of the type, from calculations for purposes of the excise tax.

Cost of Applicable Coverage

Section 4980I requires rules “similar” to those in § 4980B(f)(4), but does not require use of the rules in § 4980B(f)(4) to calculate the aggregate cost of applicable coverage.² This language clearly gives the IRS significant flexibility around what rules apply in determining the cost of applicable employer-sponsored coverage. Each employer should have flexibility to determine the cost of applicable coverage in a way that fits the needs of the company and its health benefit offerings.

Importantly, employers often offer a number of plans or plan options to their employees, and companies should have the flexibility to use the lowest cost plan that is *offered* to employees for purposes of calculating the cost of applicable coverage. Employers should not be taxed because one or more of their employees chooses a higher value plan that better meets their needs. Moreover, taxing higher value plans would be harmful to employees and their dependents with acute and chronic health conditions. Therefore, the Association strongly urges the IRS to provide employers with the maximum flexibility for determining the cost of applicable employer-sponsored coverage.

Furthermore, because of the way the excise tax is indexed for inflation, at some point the value of employer-sponsored health plans with a 70 percent actuarial value will be subject to the tax through no fault of the company or its employees. In fact, the ACA’s various benefit mandates ensure this will happen sooner rather than later. To avoid the “Cadillac” tax in the future, employers will have to reduce the non-mandated benefits they offer and lower the actuarial value of their plans to the ACA’s mandated 60 percent actuarial value, at which point they will either have to pay excise tax or one of the ACA’s shared responsibility penalties. Congress never intended for the average employer-sponsored health plan to be subject to the excise tax. Therefore, the Association strongly urges the IRS to implement a “safe harbor” for any plan that is at or below an actuarial value of 80 percent.³

² 26 U.S.C. 4980I(d)(2)(A).

³ It should be noted that individual health care plans that are sold on the ACA’s public exchanges are not subject to the excise tax even if they are platinum level plans with actuarial values of 90 percent or more.

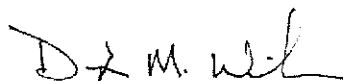
Adjustments to the Excise Tax Thresholds

According to a recent Milliman report, “although the excise tax is often referred to as a tax on overgenerous health benefits, it is likely to be a tax based on factors other than benefit level and beyond the control of health plan members.”⁴ The “unexpected consequences of the tax, therefore, include imposing a tax on moderate-benefit plans based primarily on geography, age, and gender...”⁵ Therefore, the Association strongly urges the IRS to enable employers to have the maximum flexibility possible to make demographic adjustments to excise tax dollar limit thresholds, including some type of “safe harbor” for age adjustments.

* * *

HR Policy appreciates the deliberate and collaborative process the IRS has signaled for the implementation of regulations surrounding § 4980I, and we look forward to working with you in the future. If the Association can be of further assistance, please contact Mark Wilson at 202-315-5575 or mwilson@hrpolicy.org.

Sincerely,

A handwritten signature in black ink, appearing to read "D. M. Wilson", written over a horizontal line.

Mark Wilson
Vice President, Health & Employment Policy
HR Policy Association

⁴ Robert H. Dobson and Stuart D. Rachlin, “What does the ACA excise tax on high-cost plans actually tax?” Milliman, December 9, 2014.

⁵ *Id.*