Notice 2015-16

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MORTGAGE BANKERS ASSOCIATION

May 15, 2015

CC: PA:LPD:PR (Notice 2015-16)
Room 5203
Internal Revenue Service
P.O. Box7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2015-16 Comments

To Whom It May Concern:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to provide comments regarding Notice 2015-16, Section 49801 – Excise Tax on High Cost Employer-Sponsored Health Coverage ("Excise Tax"). MBA applauds the Internal Revenue Service for inviting comment on the many significant implementation issues arising from Section 49801 well before its effective date.

MBA is an organization exempt from federal taxation as a business league under section 501(c)(6) of the Internal Revenue Code. MBA, which is located in Washington, DC, has over 2,200 members representing all facets of the real estate finance industry and a staff complement of 135. The MBA membership ranges from large businesses that operate nationwide to small, local lenders and service providers.

As an overarching matter, Section 49801 is very complex. The proposed processes suggested in the Notice reflect this complexity. Unfortunately, the proposed processes are likely to create an extreme administrative burden on employers and others who have responsibilities under Section 49801 as well as pose significant unintended negative consequences for employees. Exempt organizations, including both associations and charitable organizations, and their employees promise to be especially hard hit. Although the original Senate proposal for the "Cadillac tax" was projected to affect 19% of all large employers, we have seen reports that approximately 33% of employers will be affected by 2018 and 60% by 2022.

MBA believes the unintended effect of the Excise Tax will be for employers to curtail health insurance benefits to avoid the tax. To protect employees' access to affordable and comprehensive health care, MBA is providing the following comments:

- Section 49801 should limit the calculation of "Applicable Coverage" to the costs of the group medical coverage plus any employer contributions to Health Savings Accounts ("HSAs") or other similar accounts. Employee contributions (pre-tax or otherwise) to Flexible Spending Accounts ("FSAs") or HSAs, or other such accounts should be excluded from the Applicable Coverage calculation along with any HSA carry over amounts and any HSA" catch up" amounts for those over 55 years old. Employees should not be penalized for choosing to set aside part of their wages to cover their anticipated health care expenses. These contributions are often the only way that lower income employees can ensure that they have money to pay co-pays and deductibles

programs to avoid the Excise Tax, lower-income employees and their families will be disproportionally affected.

- MBA supports the IRS' proposal to exclude the cost of Employee Assistance Programs from the calculation of applicable costs. Dental and vision benefits also should be excluded. Employers will be less likely to offer these voluntary benefits if they must be included in the aggregate Applicable Coverage cost calculation. We also recommend that the 2% administrative fee, a fee that is often added to the medical premium for the calculation of the COBRA rate, be excluded from the calculation of applicable coverage.
- The administrative burden of Section 49801 can be significantly reduced by requiring: (i) an annual calculation of Applicable Coverage, (ii) annual remittance of the Excise Tax, and (iii) reduction of the constituent elements of Applicable Coverage. Because it is unusual for benefit costs to change monthly, we recommend that the cost calculation be performed only once per year after the end of the calendar year and that payment of the Excise Tax be required only once per year. Group medical costs may be calculated relatively easily, either by looking at the monthly invoice from the carrier for a fully insured plan or by calculating the COBRA rate for a self-insured plan. Limiting the elements required to calculate "Applicable Coverage" to those, plus any employer contributions to HSA or FSA and other comparable plans would significantly reduce the administrative burden on employers and help assure the accuracy of the calculations by simplifying them.
  Absent such an approach, the administrative burden will be severe. The burden will result in part from the fact that there is tremendous variability in an employer's cost of Applicable Coverage per employee due to the variation in employee benefit elections, and these aggregate costs would need to be calculated monthly, potentially involving several vendors. No one vendor would have access to all of the information and if no single vendor's program is responsible for triggering the Excise Tax, each might refuse to remit the tax. If vendors provide the information to employers and/or remit the tax, fees will be passed onto employers.
- In light of the foregoing, the IRS should also clarify the party that is responsible for the calculation, collection and remittance of the Excise Tax.
- The statutory dollar limit should be indexed to the increase in the annual cost of healthcare versus the cost-of-living adjustment. The cost of healthcare has been increasing greater that the overall cost of living for many years.
- The statutory limit should be adjusted for locations that have an average higher cost of medical care.
- The statutory limit should not apply to group medical plans which are equivalent to the platinum or gold level coverage offered on the applicable state or federal exchange. This safe harbor will help employers which can afford to do so to maintain better coverage for their employees and their families, and increase the attractiveness of these plans on the federal and state exchanges.
- We recommend that the IRS provide an age and gender adjustment to the statutory limit, we note that the Affordable Care Act permits the medical premiums for older workers to be up to three times higher than the youngest workers. Without an adjustment, an employer could be penalized for hiring and retaining older workers or workers whose premiums are higher due to their gender. This adjustment is even more critical for small employers, like many exempt organizations, which already pay higher small-group rates

for coverage. In addition, we recommend that the IRS investigate whether there is a simple way to apply such an adjustment given that such an adjustment would add to the complexity of the calculation.

In summary, we believe that there will be significant unintended consequences because of the complexity of this regulatory regime:

1. Increased compliance costs to employers. Many employers, especially small employers like many exempt organizations, do not have the internal resources to perform the calculations, and will have to retain consultants to do this work, and the vendors will likely increase their fees to employers to account for their increased costs to comply.

2. A reduction in benefits under group medical plans in order to contain costs (including increases in deductibles, co-pays, and out-of-pocket expenses), which will be detrimental to employees. Employers will not willingly pay, and some may be unable to pay, the Excise Tax. As employers seek to reduce costs to avoid the tax, it is reasonable to expect that lower cost and lower coverage plans will become the only plans offered to employees. This will cause employees and their families, including young families already burdened by student debt, to spend more of their scarce resources on co-pays and deductibles and disproportionately adversely affecting lower-earning employees.

3. Elimination of other benefit plans that are included in the calculation of the aggregate cost, which will be detrimental to employees. Dental care, vision care, Health FSAs, HSAs and AFLAC-type plans are voluntary benefits. Employers will be less likely to offer these voluntary benefits if they are included in the cost of Applicable Coverage calculation. Elimination of these benefits will force employees, particularly lower-earning employees, and their families to spend more of their scarce resources on needed care or to forego needed altogether.

4. An adverse effect on the ability of exempt organizations to hire and retain high quality employees since quality, affordable healthcare coverage has been one of the few ways that larger exempt organizations have been able to compete with the private sector for employees.

5. A significant decrease in the expected revenue that the Excise Tax is projected to generate. As noted above, employers will aggressively seek to limit their liability for the Excise Tax by reducing or eliminating benefits.

Thank you for the opportunity to comment.

Sincerely,

Phyllis K. Stesinger
Senior Vice President and General Counsel, Human Resources and Legal Affairs