MINNESOTA Management & Budget

May 15, 2015

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

Submitted electronically to notice.comments@irscounsel.treas.gov

To Whom It May Concern:

Thank you for the opportunity to provide comments in response to your recent regulatory guidance, Notice 2015-16, regarding the excise tax on high cost employer sponsored coverage. I am writing on behalf of the Minnesota State Employee Group Insurance Program (SEGIP).

SEGIP includes approximately 120,000 employees, retirees, and dependents. Our program includes a self-insured medical plan, a stand-alone self-insured dental plan, and other optional coverages including a health FSA, HRA, life insurance, disability insurance and long-term care insurance. We also provide a variety of innovative wellness programs that seek to ensure and improve the ongoing health of our members. SEGIP is a governmental plan that is not subject to ERISA.

Our comments on the guidance fall into two categories. The first category relates to treatment of FSAs and HRAs, and the second category relates specifically to governmental plans.

FSA/HRA Issues

Distinction between self-only and "other than self-only coverage."

An employee may have self-only medical coverage and yet use an FSA or HRA to reimburse expenses for eligible dependents. For example, an employee may have self-only medical coverage but also elect an FSA on behalf of family members who have medical coverage through another source. If counted as self-only coverage, the FSA for this employee could trigger the excise tax in a way that is not consistent with the intent of the law to tax excessively generous employer health insurance.

To address this problem, we recommend that the IRS consider an approach for FSAs that is similar to the potential approach for HRAs that is described on pages 21-22 of Notice 2015-16. Such an approach would pro-rate the self-only and other than self-only limits to account for the fact that the employee has a mix of self-only and other than self-only coverages. It is impossible to know in advance which employees

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will use their FSAs or HRAs for other than self-only purposes and it is also not practical to calculate employee by employee reimbursements for self vs family members on a monthly basis for purposes of the excise tax (in part, because employees may wait until after the end of the year to submit their expenses for reimbursement).

For administrative simplicity, therefore, we suggest establishing a "safe harbor" approach that would allow employers to use historical data to establish a proportion of FSA reimbursements to employees with self-only medical coverage that are used to pay for the expenses of other family members. For example, if in 2017 employees with self-only medical coverage expended, on average, 40 percent of their FSA accounts to pay for qualified expenses of other family members, the employer could be allowed to count only 60 percent of FSA contributions of employees with self-only medical coverage toward the excise tax threshold in 2018.

Treatment of FSA contributions that are rolled over between years.

Employers that offer health FSAs may allow employees to carry over up to $500 at the end of a plan year to reimburse qualified medical expenses incurred in the next plan year. The ability to carry over funds from one plan year to the next did not exist at the time the Affordable Care Act was enacted.

The notice addresses similar issues related to carryover of HRA funds beginning on page 18. We agree with the suggested approach of only counting amounts newly available to employees for purposes of the excise tax, and suggest that the IRS also clarify for FSAs that all contributions are counted toward the excise tax in the year that the funds were contributed, and that amounts carried over from year to year will not be counted toward the excise tax in both years.

Treatment of HRA and FSA reimbursements for vision and dental expenses.

On page 19 of the notice, the IRS requests comments on how the cost of an HRA should be determined if employees can use it both for coverage that is and for coverage that is not applicable coverage. Because vision and dental coverage do not constitute applicable coverage under the law, we believe that reimbursements from HRAs and FSAs for these expenses should be excluded from calculations of the cost of coverage for purposes of the excise tax. The proportion of expenses from these accounts that goes toward coverage that is not "applicable coverage" is *likely quite significant* – for example, initial calculations for the State of Minnesota's FSA plan indicate that at least 35 percent of reimbursements from the plan are for vision or dental expenses that are not covered benefits under the State's health insurance. For simplicity of administration, we suggest that employers be allowed to calculate a historical proportion of reimbursed expenses that are for "not applicable" coverage and use this proportion for purposes of calculating the tax. For example, if 35% of FSA-reimbursed expenses in 2017 were for not applicable coverage, an employer would be able to exclude 35% of employee FSA contributions from calculation of the cost of coverage for purposes of the excise tax in 2018.

Treatment of HRAs that are provided as wellness incentives.

The State of Minnesota has been a leader in developing innovative wellness programs. One example is our diabetes medication therapy management program in which eligible employees meet with a

pharmacist to improve adherence to their medication plan. Employees meeting certain goals earn an HRA contribution to help cover the cost of diabetes related medical supplies. The clear purpose of this program, and the HRA, is to improve the health of our membership thereby holding down our health care costs. Including these types of HRAs in the definition of applicable coverage may have the unintended effect of discouraging those programs and ending the development of programs that improve health and reduce health care spending.

Governmental Plan Issues

Clarification of the term "plan administrator" for governmental plans and other plans not subject to ERISA.

As noted above, SEGIP is a governmental plan that is not subject to ERISA. For non-ERISA plans, the term "plan administrator" is ambiguous. We request clarification that for self-insured plans that are not subject to ERISA, including governmental plans and multiemployer plans, the term "plan administrator" as used in §4980I means the employer. This clarification would allow for the easiest calculation and administration of tax liabilities under §4980I.

Clarification of whether the excise tax applies to Health Care Savings Plans (HCSP).

Minnesota Statutes, Chapter 352.98 authorizes the Health Care Saving Plan (HCSP), which is a government trust to which employees contribute for future health care costs following termination from employment. Contributions to the plan are exempt from income tax and FICA tax as an integral part of the State as provided under the Internal Revenue Code, IRS Revenue Ruling 87–2, and other relevant guidance. Participation in the HCSP is available to public employers in Minnesota. All employees in each participating group must participate in the plan; in other words, an employee within a participating group may not opt out of the program.

Contributions to the HCSP may be made through the following sources: 1) mandated employee salary reduction contributions, including the amount contributed; 2) severance pay generally consisting of unused vacation and/or sick leave at the time the employee terminates employment; and 3) employer contributions. Most participating groups do not include an employer contribution.

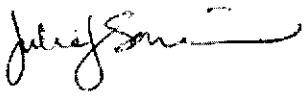
Participant access to HCSP funds is limited to: 1) upon retirement; 2) termination of employment at any age; or 3) receipt of a disability benefits from a Minnesota public pension plan. Employees do not have access to the funds when they are deposited into the HCSP and may not have access for many years.

26 U.S. Code section 105(j) was written, at least in part, for this specific HCSP. This provision specifically describes the HCSP a "medical trust" and does not define it as a "medical plan." This is true despite its inclusion under Section 105, which is entitled "Amounts received under accident and health plans." The section specifically does not define the HCSP as a medical plan, and thus we believe it does not constitute applicable coverage for purposes of §4980I. Further support for this argument comes from the fact that the Minnesota State Retirement System administers the HCSP and it is considered a retirement plan. Minnesota Management and Budget (MMB) manages all insurance benefits for both

active and former state employees, including retirees. MMB has no control over the HCSP. Had the State intended the HCSP to be a health plan it would have been placed under the control of MMB.

Thank you for your consideration of these comments. If you have any questions, you may contact me at 651 259-3732 or via email at julie.sonier@state.mn.us.

Sincerely,



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