

National Grocers Association

May 15, 2015

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

Room 5203

Internal Revenue Service

P.O. Box 7604, Ben Franklin Station

Washington, DC 20044

Re: Comments on Excise Tax on High Cost Employer-Sponsored Health Coverage (IRS Notice 2015-16)

Ladies and Gentlemen:

The National Grocers Association (“NGA”) values the opportunity to comment on the Internal Revenue Service’s (“IRS’s”) Notice 2015-16 (the “Notice”) regarding the Excise Tax on High Cost Employer-Sponsored Health Coverage (the “Cadillac Tax”).

NGA is the national trade association representing the retail and wholesale grocers that comprise the independent channel of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. Some independents are publicly traded, but with controlling shares held by the family and others are employee owned. Independents are the true “entrepreneurs” of the grocery industry and dedicated to their customers, associates, and communities. The independent supermarket channel is accountable for close to 1% of the nation’s overall economy and is responsible for generating \$131 billion in sales, 944,000 jobs, \$30 billion in wages, and \$27 billion in taxes.

Regardless of size or composition of workforce, NGA members are committed to the welfare of their employees and, as a result, the vast majority of members currently offer health benefit packages to their full-time employees. While the plans offered by NGA members provide a valuable health benefit designed to meet the specific health needs of their workforces, they are certainly not the benefit-rich “Cadillac plans” that the law intended to curtail.

Like other employers, NGA members have witnessed their health care costs dramatically increase in recent years. This increase is due more to changes in the law, the populations NGA members provide benefits to, and the size of the groups covered rather than an increase in the richness of the benefits offered. Because of the services included in the definition of applicable coverage and the indexing of the thresholds, if not changed, the Cadillac Tax will likely apply to all employer plans over time.

NGA is concerned that the eventual application of the Cadillac Tax to all of its members will force its members to drop programs designed to promote workforce health, reduce the richness of the benefits offered (hindering access to necessary treatments), and eventually drop coverage altogether. From an employer perspective, it is very difficult to justify a non-deductible expense that is projected to increase every year that provides no additional benefits to employees. To address these concerns, NGA asks the IRS to exercise its interpretive authority and:

- Narrowly define applicable coverage¹ to exclude on-site medical clinics and telehealth services provided to treat injuries and illnesses presented by employees;
- Exclude wellness programs and employee assistance programs (“EAPs”) from the definition of applicable coverage;
- Exclude employee contributions to HSAs and certain other accounts from the definition of applicable coverage; and
- Allow adjustments to the annual dollar limits for high-turnover professions.

A. On-Site Medical Clinics and the Provision of Care via Telehealth

Many NGA members view on-site medical clinics and telehealth services as a high-value method of providing convenient access to care for employees. This access reduces absenteeism, increases productivity, and helps lower long-term health care costs by empowering workers to detect and treat conditions before they develop into more serious illnesses.

The purpose of the Cadillac Tax is to discourage plans with excessively rich benefits and rein in unnecessary health care spending. NGA believes that the current Cadillac Tax framework discourages certain programs and services – such as on-site medical clinics and telehealth – that are wholly consistent with the Cadillac Tax. Such programs are intended to curtail medical costs while improving employees’ health and productivity.

The Notice proposes a potential approach that would exclude from the definition of applicable coverage certain on-site medical clinics that provide only *de minimis* medical care. NGA supports this proposal but also urges the IRS to exclude from the definition any treatment provided by an on-site medical clinic for a health condition presented by a worker. Along these same lines, NGA believes that services provided to employees via telehealth to treat workers should also be excluded from the definition of applicable coverage. Under the approach described in the Notice, only on-site clinics that provide certain *de minimis* services would be excluded from the definition of applicable coverage.²

¹ Applicable coverage is defined as coverage under any group health plan made available to the employee by an employer which is excludable from the employee’s gross income or would be excludable if it were employer-provided coverage. Internal Revenue Code § 4980I(d)(1)(A).

² Under COBRA, *de minimis* services primarily consist of first aid. The Notice solicits comments on what rules should apply to clinics that provide certain other services, such as immunizations, injections of antigens, provision of aspirin and other nonprescription pain relievers, and treatment of injuries caused by accidents at work.

Regulations promulgated under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) provide rules for determining whether an on-site clinic would constitute a group health plan: “The provision of health care at a facility that is located on the premises of an employer or employee organization does not constitute a group health plan if – (1) The health care consists primarily of first aid that is provided during the employer’s working hours for treatment of a health condition, illness, or injury that occurs during those working hours; (2) The health care is available only to current employees; and (3) Employees are not charged for the use of the facility.”³

NGA believes that these conditions are too restrictive when applied to the Cadillac Tax. On-site medical clinics and the on-site provision of care via telehealth are not at all representative of the rich benefits that the Cadillac Tax is meant to target, even when such services go beyond first aid. Discouraging such programs, which attempt to lower long-term health care costs, is not consistent with the goals of the Cadillac Tax.

B. Wellness Programs and EAPs

In an effort to improve the health and well-being of employees, many NGA members offer a variety of wellness programs and EAPs.⁴ These programs provide valuable access to care and other services and ensure that employees are taking the appropriate steps to stay healthy and manage disease. These programs help employees prevent conditions from turning into chronic illnesses that are costly to treat.

NGA supports the IRS’s proposal to exclude excepted benefit EAPs from the definition of applicable coverage. In October 2014, the Departments of the Treasury, Labor, and Health and Human Services amended the excepted benefits rule so that certain EAPs would constitute excepted benefits.⁵ Specifically, for an EAP to constitute excepted benefits, the EAP must satisfy four requirements:

1. The EAP cannot provide significant benefits in the nature of medical care;
2. The EAP cannot be coordinated with benefits under another group health plan;
3. Employees cannot be required to make a contribution to participate; and
4. There can be no participant co-sharing under the EAP.

By definition, an excepted benefit EAP does not provide coverage for medical care that is coordinated through a group health plan and should not be considered applicable coverage since that definition is limited to group health plan coverage. Therefore, NGA is in favor of the IRS’s proposal to exclude such EAPs from the definition of applicable coverage.

³ 26 C.F.R. § 54.4980B-2.

⁴ For example, these EAPs may offer substance abuse counseling, financial services, or mental health services.

⁵ 79 Fed. Reg. 59130 (Oct. 1, 2014).

However, NGA also asks the IRS exclude wellness and disease management programs from the definition of applicable coverage. NGA believes that employers play an important role in fulfilling the goals of the Cadillac Tax by promoting efficient use of health care services. Wellness programs and EAPs are the vehicle that employers use to encourage employees to consume health care effectively. For example, wellness programs encourage employees to access primary care services to learn of their health risk factors and take steps to address them before they manifest into conditions that are expensive to treat. After employees are diagnosed with a condition, employer disease management programs provide care coordination and coaching services to assist employees with the proper management of the disease which improves health and contains cost.

Including wellness programs and disease management in the definition of applicable coverage will have a chilling effect on these programs which will increase health care spending. The goal of the Cadillac Tax is to promote responsible spending in health care and without these programs employers will not be able to provide employees with the information and tools necessary to do just that.

C. Employee Contributions to Health Savings Accounts (“HSAs”) and Other Tax-Favored Health Plans

NGA agrees with the IRS’ interpretation that employee after-tax contributions should not be included in the definition of applicable coverage. However, NGA also believes that employee pre-tax contributions and salary reductions to HSAs and Archer MSAs should be excluded from the definition of applicable coverage. NGA believes that such programs help curtail the cost of health care coverage for many individuals since these are their own funds. When an employee’s own money is in play, he or she has every incentive to spend this money on high-value items and services.

Including these contributions in the definition of applicable coverage may also encourage more employers to structure pre-tax contributions to HSAs and Archer MSAs as post-tax contributions. This would greatly reduce tax savings and discourage participation. Furthermore, for HSAs and Archer MSAs, the cost of applicable coverage “shall be equal to the amount of *employer* contributions under the arrangement.”⁶ Therefore, any *employee* contributions should not be included in the definition of applicable coverage based on a reasonable interpretation of the text.

D. Adjustments to the Applicable Dollar Limit for High-Turnover Populations

The independent supermarket industry and other industries have naturally high turnover in their workforces. This high turnover often leads to increased insurance costs that are in no way correlated to the generosity of benefits. Therefore, disproportionately targeting high-turnover populations is inconsistent with the goals of the Cadillac Tax.

⁶ Internal Revenue Code § 4980I(d)(2)(C) (emphasis added).

Two annual dollar limits have been set for 2018 – \$10,200 for self-only coverage and \$27,500 for other-than-self-only coverage.⁷ Adjustments are to be made to these figures for 2018 based on a “health cost adjustment percentage.” After 2018, changes will be based on changes in the cost of living. Other adjustments are made for certain age and gender characteristics, qualified retirees, and high-risk professions. NGA believes that the IRS should include high-turnover professions in the allowed adjustments to annual dollar limits. This would more closely align the goals of the Cadillac Tax with its potential impact on NGA members and employers in other industries where there is high turnover in the employee population.

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NGA greatly appreciates the IRS’s consideration of its comments. Please contact Maggie Lyons at mlyons@nationalgrocers.org or 703-516-0700 with questions about any of the comments raised in the letter.

Sincerely,

Greg Ferrara

Vice President, Public Affairs

National Grocers Association (NGA)

⁷ Internal Revenue Code § 4980I(b)(3).