



Notice 2015-16

MAY 19 2015

May 15, 2015

Internal Revenue Service
1111 Constitution Avenue, NW
Room 5203
Washington, DC 20044
Notice.comments@irs.counsel.treas.gov

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

To the Office of Associate Chief Counsel:

Total Administrative Services Corporation (TASC) - based in Madison, Wisconsin - is the largest privately held third party administrator in the United States...providing employee benefit plans, including flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), and health savings accounts (HSAs) to approximately 60,000 private and public sector Clients across the United States. In business since 1975, we currently employ approximately 1,000 staff members across the country and have an annual revenue exceeding \$100 million.

TASC recognizes the enormity of the task before the Department of Labor, Internal Revenue Service, and Department of Health & Human Services in implementing the Patient Protection & Affordable Care Act (PPACA). This legislation charts new territory, necessitating the development of many new and extremely technical regulations. Subsequently, this Notice was intended to initiate the process of developing regulatory guidance regarding IRC § 4980I¹, which is scheduled to go into effect in 2018, and describes potential approaches to a number of issues which may be incorporated in future regulations. As a result, TASC would like to offer its preliminary analysis and urges the IRS to give thoughtful consideration to our request.

While the Excise Tax on High Cost Employer-Sponsored Health Coverage (or "Cadillac" Tax) is well intentioned, it completely misses the mark and therefore should be considered for Congressional repeal. It is TASC's opinion that this provision was intended to discourage/eliminate overuse of generous health benefits and services that drive up medical spending (i.e. plans with minimal to no deductible and/or out of pocket (OOP) expenses). However, as currently drafted, the tax will affect a disproportionate amount of Americans. Statistics show that the structure of the tax will eventually result in penalizing employers offering any health coverage (and this will ultimately be passed on to employees). This will have a huge negative impact on the middle class and a devastating snowball effect over time.

Many are already feeling the impact. A significant number of employers are considering cutting the amount subsidized for the health benefits of spouses/dependents, while even more have actually begun to scale back benefits and/or increase employee contributions. The unfortunate reality is that if employers fail to make changes to their current offerings, approximately one-

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third could be subject to the excise tax upon implementation in 2018; that number increases to nearly 60% within the first five years.ⁱⁱ

Generally speaking, the whole concept is flawed. Studies indicate that only about 4% of premium is attributed to plan design; the remaining factors include regional variation, utilization patterns, demographics, etc. A “Cadillac” premium doesn’t necessarily mean that you have the best plan, but yet the system is punitive towards the employer. One could argue that even with the medical loss ratio (MLR) included, there is nothing within PPACA that truly controls costs.

Absent a full repeal, this controversial measure should be delayed - and material modifications made - to ensure that only true “Cadillac” Plans are subject to the tax. In that vein, the comments below are intended to inform the IRS’s rulemaking process and position employers and their respective service providers to be able to position effectively/efficiently in order to meet the spirit and intent of the law.

Section II-C: Form W-2 Reporting of Applicable Coverage

- TASC accepts the fact that reporting can be accomplished by providing the applicable amount on Form(s) W-2/W-3; however, an alternative and possibly more appropriate reporting vehicle could be the new Form(s) 1094/1095 created out of IRC § 6055/6056. Additionally, we believe that all employers should report regardless of size...versus only those above 50 full-time employees (i.e. Applicable Large Employers).

Section III: Definition of Applicable Coverage

- Sec. 4980I(a) imposes a 40% excise tax is to be on any “excess benefit” provided to an employee.ⁱⁱⁱ Likewise, Sec. 4980I(d)(1)(A) speaks to “any group health plan, which is excludable from the employee’s gross income under IRC § 106.” When an employee has to bear the brunt of the expenses (for the employee and/or the employee’s family) it is TASC’s opinion that their contributions are outside the spirit and intent of the law. These amounts would include employee funded FSAs and/or HSAs where the employee chooses between cash or health benefits within the meaning of IRC § 125. Continuing to count these contributions will have the unintended consequences of causing employers to drop these account-based plans, unfairly depriving employees of this benefit.
- Conversely, TASC believes that employer funded HRAs, employer FSA contributions and employer HSA/MSA contributions are all important elements to this formula and clearly fit within the spirit and intent of the law.
- TASC agrees with excluding dental and vision whether they are provided via:
 - Dental and vision insurance;
 - Limited scope dental and vision funded and reimbursed thru a HRA; and



- Limited scope dental and vision funded and reimbursed through a FSA.
- Note: The design of the HSA does not allow for controls for the employer funded HSA contributions to be limited in scope.

Section IV: Determination of Cost of Applicable Coverage

- TASC agrees with use of the “Cobra Equivalent” for such things as self-funded health plans, HRAs, employer provided FSAs and employer provided HSAs. Special considerations:
 - HSA: 100% of contribution, given the fact that the HSA in its design creates 100% utilization.
 - FSA: Use the portion of the contribution that is utilized, which is the amount that is the net of the “use it or lose it” forfeited amount (i.e. the benefit received does not equal the contribution, or benefit total, due to the “use it or lose it” rules - as is the case with the HSA).
 - Assuming the excise tax remains in play, the IRS should eliminate the \$500 employer contribution (maximum) for excepted health FSAs.

Section V: Applicable Dollar Limit

- Private health care spending per enrollee is expected to grow by an average of 5.6 percent annually over the next decade, according to the Congressional Budget Office (CBO), while inflation will increase by 2 percent per year...meaning that the tax will ensnarl more companies over time. So while TASC agrees with adjusting the 2018 baseline using the “health cost adjustment percentage,” we believe that the index going forward should be a health cost of living (i.e. health cost adjustment percentage) vs. the general cost of living adjustment or CPI.
- Sec. 4980I(b)(3)(C)(iv) provides for adjustments for Plans primarily covering employees in specified high-risk professions.^{iv} If not already excluded, TASC believes that sole proprietors and/or one-employee employers (i.e. those not subject to ERISA) should be incorporated under the current “Agriculture” category. Alternatively, creating a separate mechanism for these entities would seem to accomplish the same outcome.
- We agree with age and gender adjustments on an employer group by employer group basis; creating a safe-harbor adjustment upward based on degrees, or deviation, above the mean.



TASC greatly appreciates the ability to submit this commentary in response to Notice 2015-16, and we would welcome the opportunity to discuss our initial recommendations further. Should you have any questions, please do not hesitate to contact me at (608) 316-2423 or via email jason.westphal@tasconline.com.

Sincerely,

A handwritten signature in black ink that reads "Jason J. Westphal".

Jason J. Westphal
TASC Governmental Affairs

ⁱ Sec. 4980I was added to the Code by §9001 of PPACA (as amended by §10901)

ⁱⁱ Source: Mercer. Additional preliminary analysis by Towers Watson shows that 48% of employers are likely to trigger the tax in 2018, and 82% could hit the threshold by 2023.

ⁱⁱⁱ Sec. 4980I(d)(3) provides that for this purpose the term "employee" includes a former employee, surviving spouse or other primary insured individual.

^{iv} Defined in § 4980I(f)(3) as law enforcement officers, fire fighters, emergency medical technicians, paramedics, first responders, longshoremen, and individuals engaged in construction, mining, agriculture, forestry and construction industries.