Notice 2015-16

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Submitted electronically via email to 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: IRS Notice 2015-16

Dear Sir or Madam:

The Brink's Company ("Brink's") appreciates the opportunity to submit comments in response to IRS Notice 2015-16, issued by the Department of Treasury ("Treasury") and the Internal Revenue Service (the "IRS"), which is intended to initiate and inform the process of developing regulatory guidance regarding the excise tax on high cost employer-sponsored health coverage under Section 4980I of the Internal Revenue Code (the "Code"). In particular, this letter responds to the invitation set forth in IRS Notice 2015-16 to comment on the definition of applicable employer-sponsored coverage ("applicable coverage") and the determination of the cost of applicable coverage under Section 4980I.

Brink's is a global leader in security-related services for banks, retailers and a variety of other commercial and governmental customers. Brink's was in the same corporate family with Pittston Coal Company. The Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") requires Brink's to make minimum annual contributions, at levels determined by Federal statute, toward the cost of health coverage provided to eligible retired coal mining employees and their dependents on behalf of certain of its affiliates. We encourage Treasury and the IRS to incorporate the recommendations below into any proposed rule or other future guidance under Section 4980I.

Executive Summary

Section 4980I was added to the Code by Section 9001 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148, 124 Stat. 119) (as amended, the "ACA"). Section 4980I imposes a 40% excise tax on any "excess benefit" provided to an employee, equal to the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month. As such, employers seeking to avoid imposition of the excise tax must adopt benefit designs that conform to the dollar limitations set by Section 4980I.

Section 4980I's dollar limitations are in direct conflict with the Coal Act, codified at Sections 9701-9722 of the Code, which requires that employers subject to the Coal Act make annual contributions toward the cost of health coverage for certain retired miners and their dependents which far exceed the dollar limitations set by Section 4980I. Implicit in the design of Section 4980I is a presumption that an employer who wishes to avoid imposition of the excise tax is free to adopt benefit designs which conform to the dollar limitations set by Section 4980I. However, employers subject to the Coal Act cannot modify their benefit programs to avoid imposition of the excise tax without simultaneously violating the Coal Act.

This result, which was not contemplated by Congress when Section 4980I was enacted, makes it impossible for such employers to comply with both laws without being subject to the excise tax. We urge Treasury and the IRS to address the conflict between Section 4980I and the Coal Act in the regulations under §4980I by creating a valuation safe harbor with respect to the coverage mandated by the Coal Act for purposes of the determination of the cost of applicable coverage under Section 4980I, which takes into consideration value of the coverage mandated by the Coal Act.

Coverage Required By the Coal Act

Congress passed the Coal Act in 1992 to ensure the continued provision of health care benefits to retired coal miners who worked under collective bargaining agreements that promised such benefits. The Coal Act provides that the health benefits (and, in some cases, the death benefits) provided to retirees who were age and service eligible as of February 1, 1993, and who actually retired by September 30, 1994, are guaranteed under Section 9711 of the Code. The Coal Act requires responsible employers to provide and pay these benefits for life.

Section 9704 of the Code requires employers that are or were signatories to collective bargaining agreements with the United Mine Workers of America ("UMWA") to make annual premium payments to the UMWA Combined Benefit Fund. Established by Section 9702 of the Code, the Combined Benefit Fund assumed responsibility of payments for medical expenses of retired miners and their dependents who were eligible for health care coverage under private multiemployer plans previously established by such collective bargaining agreements. Pursuant to Section 9706 of the Code, the Social Security Administration is responsible, in part, for calculating annual premiums to be paid by each such employer to the Combined Benefit Fund with respect to each beneficiary assigned to such employer. The annual premium required to be paid to the Combined Benefit Fund by Section 9704 of the Code includes a "health benefit premium" which is computed by multiplying the number of beneficiaries assigned to such employer by the year's "per beneficiary" premium, which is set by the Commissioner of Social Security and based on the Combined Benefit Fund's health benefit expenses for the prior year, adjusted for changes in the Consumer Price Index.

The Coal Act imposes similar coverage requirements on employers who were signatories to the 1988 National Bituminous Coal Wage Agreement and thus provided health care coverage through their individual employer plans to qualifying retirees (and their dependents) in Section 9711: such employers are required to continue to provide coverage that is substantially the same as the coverage which was provided by such plans as of January 1, 1992, to such individuals for their lives. Finally, the Coal Act created the 1992 UMWA Benefit Plan to provide health benefits to retirees not receiving benefits from either the Combined Benefit Fund or individual employer plans; in general, under Section 9712 of the Code employers who were signatories to coal wage agreements but who are not required to contribute to the Combined Benefit Fund or to maintain individual employer plans must pay annual premiums to the 1992 UMWA Benefit Plan that are substantially similar to those required to be made to the Combined Benefit Fund. Although under certain limited circumstances employers subject to Section 9711 are permitted to adopt cost containment and managed care programs in order to make the cost of continuing its retiree health coverage indefinitely more tolerable, the level of benefits required to be provided under such coverage is fixed by law.

In addition to being subject to civil enforcement under Section 4301 of the Employee Retirement Income Security Act of 1974 ("ERISA") for claims arising from obligations under the Coal Act, employers who are required to pay annual premiums to the Combined Benefit Fund are subject to a penalty under Section 9707 of the Code on any failure to pay any premium required to be paid with respect to any eligible beneficiary, of up to $100 per day.

Conflict of Section 4980I with the Coal Act

As stated above, Section 4980I imposes a 40% excise tax on any "excess benefit" provided to an employee equal to the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month.

Although Section 4980I was designated as a revenue-raising provision in the ACA, legislative history suggests that the excise tax imposed by Section 4980I was not intended to be unavoidable by all or by certain employers. Instead, it appears that Congress believed that no employer was required to offer health insurance coverage under Federal law, and that as a result, imposing an excise tax on high cost employer-sponsored coverage would have the double benefit of not only raising revenue to offset other provisions of the ACA, but of encouraging employers to bring the costs of their benefit offerings below the dollar limitations of the excise tax provision, in order to bring down the cost of health care in the United States. For example, the Report of the Senate Finance Committee to S. 1796, "America's Healthy Future Act of 2009," an early version of the ACA in which the excise tax provision initially appeared, states that "[c]urrently, there is no Federal requirement that employers offer health insurance coverage to employees or their families."[1] Additional comments to S. 1796 submitted by Senators Kerry, Rockefeller IV, Schumer, Stabenow, and Menendez indicate that the excise tax provision was designed to act as a restraint on health

[1] S. Rept. 111-89, October 19, 2009, available online at https://www.congress.gov/congressional-report/111th-congress/senate-report/89/1.

care spending, but was not intended to punish employers with cost considerations outside their control, such as inflation, retirees and high risk professionals:

> "We agree with the view of many economists that there needs to be restraint on health care spending. The high cost insurance excise tax will help bend the cost curve, but it needs to strike the right balance so that in future years it will not affect the health care plans of hard working American families....[the changes supported by Chairman Baucus to the prior version of S. 1796] substantially improve the distribution of the proposal. The threshold for the excise tax will be indexed to the Consumer Price Index plus one percentage point. In addition, the threshold is increased for retirees over age 55 and for plans covering high risk professionals by $1,850 for individual plans and $5,000 for family plans. *However, we remain concerned the thresholds are too low and will impact plans that are not overly generous and that in 2019 far too many plans will be impacted by the excise tax*."[2] (*emphasis added*)

This legislative history suggests that although Congress failed to consider the impact of Section 4980I's excise tax on coverage mandated by the Coal Act, Congress did not intend for the excise tax to apply to the coverage mandated by the Coal Act: in fact, Congress made a deliberate point to lessen the chance that the excise tax would apply to coverage provided to the two groups with traditionally higher health coverage costs to whom coverage under the Coal Act applies—retirees and employees in high-risk professions—by specifically increasing the threshold at which the excise tax would apply. It seems inconceivable that Congress would have intended to put employers subject to the Coal Act in the unenviable position of having to choose between a "rock"--violating the Coal Act and incurring a $100/day penalty for failing to pay the premiums required thereunder, and a "hard place"--complying with the Coal Act and incurring a 40% excise tax under Section 4980I for doing so.

Recommendations

Section 4980I imposes a 40% excise tax on the excess, if any of the aggregate cost of the applicable coverage of an employee for a month over the applicable dollar limit for the month. Section 4980I(d)(2)(A) further provides in relevant part that the "cost of applicable coverage" is to be determined under rules "similar to the rules of section 4980B(f)(4)." IRS Notice 2015-16 indicates that Treasury and the IRS are considering using their authority to prescribe various approaches in determining the cost of applicable coverage, including requesting public comment on alternative valuation approaches.

Section 4980I(b)(3) provides two baseline per-employee dollar limits for 2018, but also provides that various adjustments will apply to increase these amounts. Two of the adjustments specifically contemplated in the Act increase these amounts for the two groups with traditionally higher health coverage costs to whom coverage under the Coal Act applies: for "qualified retirees" under Section 4980I(b)(3)(C)(iv), and for individuals in high-risk

[2] *Id.*

professions, under Section 4980I(b)(3)(C)(iv). By increasing the dollar limit applicable to coverage for such groups, Congress clearly intended to decrease the chance that any portion of such coverage would be subject to the excise tax.

In light of the inherent conflict between the mandates of the Coal Act and the dollar limitations set by Section 4980I, and given the clear Congressional intent to lessen the potential that the excise tax would apply to coverage provided to traditionally higher-cost populations such as retirees and high-risk professions such as miners, we recommend that the regulations under Section 4980I create a valuation safe harbor with respect to the coverage mandated by the Coal Act for purposes of determining the cost of applicable coverage. This valuation safe harbor could be created by clarifying that the cost of applicable coverage will not take into account the cost of such coverage which is attributable to the coverage required to be provided pursuant to the Coal Act. Creating such a valuation safe harbor with respect to coverage mandated by the Coal Act would put employers subject to the Coal Act in the same position as employers who have the choice whether to provide coverage, and to design coverage as they see fit: an employer that provides only the coverage required by the Coal Act would not be subject to the excise tax; however, an employer that provided coverage in excess of such coverage requirements would lose the protection of the safe harbor and would be subject to excise tax on the cost of the excess coverage.

In Section 4980I(g), Congress gives the Secretary of the Treasury broad discretion to prescribe such regulations as are necessary to carry out Section 4980I. We believe that creating a valuation safe harbor pursuant to this authority would respect Congress's intention to use Section 4980I as a vehicle to decrease health insurance costs, without unfairly penalizing employers (such as Brink's) who are required by the Coal Act to provide a set minimum level of coverage to retired coal miners and their dependents.

In the event that Treasury and the IRS believes that it cannot establish such a safe harbor, we urge you to consider alternative approaches that prevent employers subject to the mandates of the Coal Act from being penalized by the §4980I excise tax for merely complying with those mandates. We appreciate the opportunity to respond to IRS Notice 2015-16, and are available to respond to any questions regarding our comments.

Sincerely,

McAlister C. Marshall, II
Vice President and General Counsel