

Notice 2015-16

MAY 19 2015



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

FOR: Department of Treasury and Internal Revenue Service

FROM: Office of Personnel Management

SUBJECT: Comments regarding Notice 2015-16: Section 4980I — Excise Tax on High Cost Employer-Sponsored Health Coverage

Date: May 14, 2015

Thank you for the opportunity to comment on the Internal Revenue Service's (IRS) notice for the excise tax on High Cost Employer-Sponsored Health Coverage (Notice 2015-16). The Office of Personnel Management (OPM) administers the Federal Employees Health Benefits (FEHB) Program. The FEHB is a \$47 billion health insurance program covering more than 8.2 million federal employees, retirees and their dependents as well as employees of tribal organizations. To administer the program, OPM contracts with 97 health insurance carriers which offer 257 plan options.

FEHB is one of the premier benefits the government uses to recruit individuals to the Federal workforce. As currently described in Notice 2015-16, and without relief, the administration of the excise tax will most likely require a reduction in FEHB benefits and elimination of other benefit programs. This will impact the lives of current enrollees and will affect the ability of agencies to recruit and retain a world class workforce.

Below we detail issues that raise concern for us and the FEHB program.

I. Medicare and Annuitants

Section 4980I allows a special adjustment for retirees from age 55 until they are eligible for Medicare but it remains silent on any adjustment for Medicare eligible retirees who do not enroll in Medicare. Most private sponsored health programs require participants to enroll in Medicare Parts A and B when they become eligible at age 65. The FEHB Program does not have statutory authority to require Medicare enrollment. Most FEHB annuitants who become eligible for Medicare have Part A since it is required to receive their Social Security benefit and is available at no cost to the enrollee. Far less opt into the optional Part B program where a premium is charged. In these cases FEHB, not Medicare, is the primary payer. Other employers who are able to require Medicare Part B can avoid these costs.

We strongly recommend IRS allow employers who are unable to require Medicare participation to exclude claims that would otherwise be paid by Medicare from the cost of

applicable coverage for retirees that are eligible for, but not enrolled in Medicare. These costs for other employers that provide retiree health coverage would be paid by the Medicare program which is not subject to the tax.

II. Employer and Plan as it relates to FEHB

(a) *Employer.* OPM administers the FEHB program and is responsible for contracting with each participating health insurance carrier (“carrier”). OPM annually negotiates benefits and rates as well as other contract terms with each carrier. Each federal agency, sub-agency, or tribal employer is responsible for enrolling their eligible employees into the FEHB program. The payroll offices associated with each particular agency withhold the employee’s share of the premiums from their salary. (OPM is responsible for withholding an annuitant’s contribution from their pension.) These withholdings are deposited into the OPM Health Fund (“the fund”) along with the agency’s contribution towards health insurance premiums. OPM then arranges for premium amounts to be paid from the fund to participating insurance carriers.

As we understand it, the employer is responsible for calculating the tax and the insurance carrier is responsible for paying the tax if the cost of coverage is over the threshold. OPM intends to serve as the employer in administering this provision on behalf of Federal agencies. OPM is the agency responsible for establishing premiums with participating carriers and thus is the only agency in the position to make the proper calculations for the excise tax. This is consistent with the federal government approach to the employer shared responsibility provisions of the ACA. OPM defined the Applicable Large Employer (ALE) on behalf of the federal government and is facilitating compliance with the reporting requirements under Internal Revenue Code (IRC) section 6055 and 6056.

(b) *Plan.* There are 257 different plan options, each with a unique set of benefits, within FEHB. Employees, annuitants and their dependents may participate in any of the plan options available in their geographic area regardless of what government agency they work for with limited exceptions. OPM intends to view the entire program (all plan options) on an aggregate basis when determining the cost of applicable coverage and all appropriate adjustments. OPM believes it would be administratively burdensome and unfeasible to determine the proper excise tax liability if it were to be calculated on an option by option basis. Additionally, we view the entire program as the employer sponsored plan as any enrollee can enroll in any plan option available in their geographic area in any given plan year.

III. Calculating the cost of applicable coverage

IRS Notice 2015-16 proposes the use of the COBRA premiums for determining the cost of applicable coverage, which is the average cost of providing coverage for those covered under the plan that are similarly situated.

FEHB premiums are the basis for our Temporary Continuation of Coverage (TCC) rates, which is the FEHB equivalent of COBRA. The TCC rates are comprised of the total FEHB premiums plus a 2% loading factor. The 2% administrative load is used to pay the USDA's National Finance Center to administer TCC contracts. We believe it is not the right method for us to use to calculate the cost of applicable coverage for the FEHB. TCC is utilized by a very small number of individuals. While there are over 8.2 million covered lives in the FEHB, there are fewer than 20,000 in the TCC program subject to the additional 2% load.

Consistent with viewing the FEHB program as the employer sponsored plan, OPM intends to use the program wide weighted average premium to determine the cost of applicable coverage.

IV. FSA Contributions

(a) *FSA Questions*. Currently there are over 300,000 federal employees enrolled in the Flexible Spending Account program ("FSAFEDS"). FSAFEDS allows eligible employees to contribute anywhere from \$100 to \$2,550 a year to cover out of pocket expenses for their medical care. Starting in 2015, enrollees may carry over up to \$500 of unused benefits into their 2016 FSA account. Any balance above \$500 that is not used in 2015 will be considered forfeited. We understand that under the Affordable Care Act ("ACA"), contributions to Health FSAs count towards the applicable cost of coverage. We request the IRS clarify whether it is the contribution to the FSA or the amount used in a given year that is included toward the cost of applicable coverage. If the amounts that are used are to be counted towards the cost, we request the IRS clarify how amounts rolled over from one year to the next should be accounted for. Similarly, OPM requests clarification on how forfeited funds should be accounted for in determining the cost of coverage. OPM recommends that for FSA calculations, the IRS use the amount contributed for calculation of the excise tax since keeping track of individual amounts paid, rollover, and forfeited amounts would be an extreme administrative burden.

(b) *Limited Expense FSA*. Because the FSA is counted towards the applicable cost of coverage, there will likely be changes required by OPM to limit or eliminate the Health Care FSA program. This will have a significant impact on the hundreds of thousands of federal employees who use this benefit. Because the law explicitly exempts the costs of Dental and Vision care from the excise tax, we recommend that a limited FSA program that only covers Dental and Vision and other exempted benefits under the law be excluded in the calculation for the total cost of applicable coverage.

V. Age and Gender Adjustment

Section 4980I(b)(3)(C)(iii) provides that the amounts of the dollar limits for an employer may be increased by an age and gender adjustment if the age and gender characteristics of an employer's workforce are different from those of the national workforce. While OPM has the average age of enrollees for those enrolled in the FEHB, we do not have access to data that

would allow us to determine the age and gender of employees in all federal agencies. As requested in Notice 2015-16, we recommend a safe harbor that would allow the age and gender adjustment to be based on current enrollees in the employer sponsored plan, rather than the employer's entire workforce.

OPM administers a combined risk pool for FEHB including both active and retired employees. Therefore, the average age of the FEHB population tends to be higher than that of the private sector employer sponsored plans. This causes the average costs for FEHB to increase and differ from the national workforce. OPM intends to adjust the threshold for FEHB using the age and gender adjustment.

VI. Taxes and Fees

OPM agrees with the IRS that costs attributed to the excise tax should be excluded from the cost of applicable coverage. OPM interprets this exclusion to include the additional income tax liabilities incurred as a result of the non-deductible excise tax being reimbursed through premiums since it is a cost incurred as a result of the excise tax.

Additionally, OPM recommends that taxes and fees, such as, Premium Taxes, State or Federal Income Tax, ACA taxes and fees, Community Benefits Expenditures, Regulatory authority licenses and fees, also be excluded from the cost of applicable coverage since these costs are unrelated to the claims costs, network agreements, etc.

VII. Employee Assistance Programs and On-site Health Clinics

(a) Employer Assistance Programs. We agree employee assistance programs (EAPs) that meet the criteria identified in recently issued regulations should be listed as an excepted benefit and excluded from applicable coverage for purposes of Section 4980I.

(b) On-site medical clinic. Under Section 4980I(d)(1)(B)(i), coverage provided through an on-site medical clinic generally is applicable coverage. We recommend that the IRS exclude Federal on-site medical clinics from the calculation of the excise tax. On-site medical clinics located in Federal agencies are often referred to as Occupational Health Clinics or Health Units. Most health units do not provide significant benefits in the nature of medical care in that the 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. The health care is available only to current employees, and employees are not charged for the use of the facility. The level of service a Health Unit provides is dependent on the nature of the sponsoring Agency's mission and the position/employment requirements at that agency. Agency Health Units are not designed nor intended to replace primary care medical facilities. Some health units are completely contracted, some are staffed by agency personnel, and others are hybrid. For example, OPM's on-site health clinic is a hybrid, with the allergy clinic services provided through a contract with Federal Occupational Health (FOH) and the on-site nurse as an agency

employee. FOH is a service unit organization within the Department of Health and Human Services' Program Support Center. Some agencies share employee health services with other agencies. For example, in a building or location with multiple agencies, one program may be developed to provide health services to agency employees and managed through interagency agreements or consortia. There is no association between an agency Health Unit and FEHB insurance carriers.

It would become an extreme burden for OPM to keep track of all health facilities in every federal agency that offer more than *de minimis* care to its employees. We would have to locate all medical clinics worldwide, estimate their patient pool, calculate the benefit amount for each individual clinic, and apply that amount to the calculation. We also would like IRS to consider that while some parent agencies do not have on-site health clinics, their sub-agencies or field offices may have an on-site health clinic to meet that sub-agency's mission. If the IRS chooses not to exclude this benefit in the calculation, we would like IRS to give guidance about how to calculate the benefit.

VIII. HSA

The FEHB is unique in its administration of health savings accounts (HSA) in that , the HSA contributions are built into the total premium and the carrier makes the contribution into the health savings account. The HSA contribution is a premium pass-through and a portion of the total premium cost. Since HSA accounts are not administered by the employer in any capacity, OPM intends to include the HSA contribution as a portion of the cost of applicable coverage for purposes of the excise tax calculation.

IX. Conclusion

We request that above stated issues and suggested solutions be considered during the drafting of the regulation. We also request that the recommended adjustments be used logically and fairly to minimize the cost plus administrative burden imposed upon Federal Agencies to comply with the law. Thank you for your consideration of these comments.