



October 1, 2015

CC:PA:LPD:PR (Notice 2015-52)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam,

Subject: Internal Revenue Service Notice 2015-52

Aon Hewitt appreciates the opportunity to provide comments to the Internal Revenue Service (IRS) pursuant to IRS Notice 2015-52 regarding the excise tax on high cost employer-sponsored health coverage (the “excise tax”) under Section 4980I of the Internal Revenue Code of 1986, as amended (the “Code”).

Under Notice 2015-52, the IRS requested comments on the implementation of various aspects of the excise tax that the IRS will address in future regulations. Aon Hewitt is providing comments on the specific topics in Notice 2015-52 and offering additional comments for the IRS’s consideration. This comment letter supplements Aon Hewitt’s earlier comment letter on the excise tax dated May 15, 2015, in response to IRS Notice 2015-16.

Who We Are

Aon (NYSE: AON) is the leading global provider of risk management, insurance and reinsurance brokerage, and human resource solutions and outsourcing services. We have 66,000 colleagues worldwide. Aon unites to empower results for companies in over 120 countries via innovative and effective risk and people solutions and through industry-leading global resources and technical expertise.

Aon Hewitt, a business unit of Aon, empowers organizations and individuals to secure a better future through innovative talent, retirement and health solutions. We advise, design and execute a wide range of solutions that enable companies to cultivate talent to drive organizational and personal performance and growth, navigate retirement risk while providing new levels of financial security, and redefine health solutions for greater choice, affordability and wellness. Aon Hewitt is the global leader in human resource solutions, with over 30,000 professionals in 90 countries serving more than 20,000 companies worldwide.

Policy Objectives

Aon Hewitt commends the Treasury and IRS for its initiative in reaching out to the employer community to obtain its feedback and input on the development of regulations to implement the excise tax. As of 2014, employer-sponsored group health plans, both fully insured and self-insured,

provided health care coverage for 55% of the pre-age 65 population in the United States. Thus, Aon Hewitt believes it is critical that the implementation of the excise tax be accomplished in a manner that encourages employers to continue to offer comprehensive health care coverage to employees, retirees, and their dependents.

Aon Hewitt's comments emphasize the need for administrative simplicity and the need to give employers the ability to project the cost of the excise tax in advance of the payment date. The excise tax will inevitably place a burden on employers who sponsor health care coverage. However, this burden can be alleviated to some extent by (1) ensuring that the task of implementing and administering the excise tax is not overly complex and expensive and (2) giving employers the ability to accurately project the excise tax. These policy considerations will give employers some control over the excise tax's impact while maintaining employer-sponsored health care coverage.

With that in mind, Aon Hewitt submits the following comments for your consideration:

Persons Liable for the Excise Tax

Regarding identifying the person liable for paying the excise tax on employer-sponsored health coverage that is neither fully insured nor health savings account (HSA) or medical savings account (MSA) contributions, Aon Hewitt recommends that the Treasury and IRS adopt the second approach described in Notice 2015-52. That approach would identify such person, defined under the statute as "the person that administers the benefits," as "the person that has the ultimate authority or responsibility under the plan or arrangement with respect to the administration of the plan benefits (including final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility."

For single-employer plans, the person with such "ultimate authority" is the employer or "plan sponsor," as defined by Section 3 of ERISA.¹ The employer/plan sponsor has ultimate authority for establishing, terminating, modifying, and administering the terms of an ERISA plan. In most instances, the plan sponsor will be readily identifiable, such as in the ERISA summary plan description, plan document, or IRS Form 5500. Similarly, non-ERISA plans, in most cases identify the employer/plan sponsor as the entity with ultimate authority for plan benefits administration. Even in situations where the employer/plan sponsor and the plan administrator are different entities, ERISA and other applicable laws provide that the employer/plan sponsor remains the entity with ultimate authority for the plan (including the selection of the plan administrator).

As such, the IRS should specify that, for purposes of liability for payment of the excise tax, the employer/plan sponsor—the entity with ultimate authority for administering the plan and for naming the plan administrator for single employer group health plans—shall be the entity liable for payment of the excise tax. This would provide an easily administrable approach to payment of the excise tax and,

¹ For multiemployer plans, the plan sponsor will still be the appropriate authority; however, instead of the plan sponsor being the employer, it will be, presumably, a joint board of trustees. It seems to follow that the plan sponsor is the appropriate party for multiemployer plans to pay the excise tax, since the plan sponsor often sets the design of the plan and would have the authority to make adjustments to modify the impact of the excise tax.

as discussed below, relieve the employer/plan sponsor of the expensive obligation to reimburse other entities for the cost of the excise tax and the associated income taxes on that reimbursement.

Proposing a regulation that imposes excise tax liability on the employer/plan sponsor will avoid the need for the employer/plan sponsor to reimburse a third party administrator (TPA) for the TPA's excise tax liability and for the TPA's liability for the additional income tax liability on the excise tax reimbursement. Imposing excise tax liability on the employer/plan sponsor will be much less costly for the employer/plan sponsor than paying an expensive and onerous tax indemnification.

Cost of Applicable Coverage

Determination Period

Aon Hewitt recommends that the Treasury and IRS give the employer/plan sponsor² the ability to determine the cost of applicable coverage for a self-insured group health plan under Section 4980I(d)(2) of the Code in advance of the determination period.

This approach would permit the employer/plan sponsor to determine the amount of the excise tax prospectively, as is done under COBRA. Section 4980I(d)(2) of the Code specifically states that the cost of applicable employer-sponsored coverage shall be determined under rules similar to the COBRA rules of Section 4980B(f)(4). For a self-insured group health plan, the COBRA cost of applicable coverage is determined before the plan year begins by projecting premium equivalent contributions sufficient to cover incurred claims and fixed expenses. Under this method, the projected premium equivalent contributions include claims run-out but not experience rating adjustments. No true-up is done after the year ends to reflect actual costs.

The determination of the cost of coverage for excise tax purposes should be permitted under this method for the following reasons:

- This method will provide more time for budget planning;
- This method is similar to the method used for setting fully-insured premiums;
- The amount of the excise tax will be ready for submission to the Treasury and IRS very close to the end of the plan year, without the need to wait for run-out data; and
- The approach can be applied consistently to both fully-insured and self-insured group health plans.

Aon Hewitt suggests that the employer/plan sponsor be given the option to re-calculate the cost of coverage using actual claims data. If an employer/plan sponsor believes that its cost-control initiatives, including wellness programs, have reduced expected costs during the plan year, an employer should be given the option to re-calculate based on actual claims data.

² If the Treasury and IRS determine that the coverage provider is not the employer/plan sponsor, the employer/plan sponsor should still have the authority to elect the appropriate method for determining the cost of coverage with respect to a self-insured benefit package, since the employer/plan sponsor will still be the party who is ultimately responsible for paying the excise tax.

Allocation of Contributions to HSAs, FSAs, and HRAs

Overview

Aon Hewitt supports the Treasury and the IRS's approach of allocating contributions to account-based plans on a pro-rata basis over the time period to which the contribution relates (generally, the plan year), regardless of when contributions are actually made.

Cost of Applicable Coverage Under FSAs Without Employer Flex Credits

Aon Hewitt suggests that, with respect to a health flexible spending account (FSA) that does not offer employer flex credits, the employer/sponsor be permitted to determine the cost of coverage solely by reference to the amount actually contributed by an employee for the relevant plan year. The primary benefit of this approach is administrative simplicity, as employers could easily determine through their payroll functions exactly how much a particular individual actually contributes to a health FSA via payroll deductions. Further, employers who can reasonably assume that most of their employees will remain employed for the duration of the plan year will be able to reasonably estimate the impact of the tax before the beginning of the taxable year, by simply reviewing the population's health FSA salary reduction elections. Under this approach, an employer could potentially limit the amount that employees can contribute for the year and ultimately reduce the amount of the excise tax without eliminating the health FSA.

The same approach of considering the amount actually contributed should apply regardless of whether the employee remained employed through the year, or terminated employment and ceased contributions midyear, even if the employee actually received reimbursements in excess of the salary contribution. For example, for the 2018 calendar year, an employee elects a pretax contribution of \$1,200. The employee terminates on March 31 after contributing just \$300, but incurs and requests reimbursement for \$1,000 in expenses prior to terminating. The coverage provider would report only \$300 towards the cost of coverage. The \$300 amount represents the cost of coverage for the employee and is easily and immediately identifiable by the employer's payroll function. Conversely, if employers are required to determine cost of coverage based on claims reimbursed, the cost of coverage for a health FSA in any given year will be undeterminable until well into the subsequent year, due to extended run-out periods and open claims and appeals windows.

Aon Hewitt also suggests that the Treasury and IRS permit an employer/plan sponsor to add up all contributions for employees enrolled in a particular account-based arrangement and then divide by 12 to determine the average monthly cost of coverage under an account-based arrangement.

For example, assume the account-based arrangement is a health FSA and the employee is enrolled in a medical plan but does not contribute to the health FSA. In this example, the employer/plan sponsor would include a "\$0" contribution for that employee for purposes of determining the population average, and then use this population average for calculating the excise tax associated with this individual. We believe that this will simplify administration and expedite the ability to determine the cost of coverage for excise tax purposes. Alternatively, an employer could take the contributions designated for the year by the employee and then divide by 12 to determine the cost of coverage for a month.

Cost of Applicable Coverage Under FSAs With Employer Flex Credits

With respect to employer flex credits, Aon Hewitt suggests permitting the employer/plan sponsor to determine excise tax liability for an account-based arrangement by using the total amount of employer flex credits allocated to an employee's account for the year, rather than the amount of claims actually reimbursed. For example, if the employer allocates employer flex credits of \$500 to the employee's account, the cost of coverage will be \$500, regardless of the amount of reimbursements. Again, this approach will simplify administration and assist employers in projecting the impact of the excise tax before the taxable period.

Age and Gender Adjustment

Aon Hewitt supports the methodology for age and gender adjustment in Section VI of IRS Notice 2015-52 and anticipates that it will produce stable, unbiased results across the majority of employer-sponsored group health plans. Aon Hewitt agrees that Table A-8a and the Current Population Survey is an appropriate source of data for the age and gender characteristics of the national workforce for purposes of the excise tax. Aon Hewitt suggests that Table A-8a be reformatted to provide workforce counts in five-year increments rather than 10-year increments, consistent with the way the data from the FEHBP BCBS standard option is being aggregated. Aon Hewitt also suggests that the Treasury and IRS release preliminary versions of the cost data and workforce counts before 2017, based on 2015 experience, to allow employers and industry representatives to become familiar with the methodology and understand the implications for their populations.

Snapshot Date

To determine the age and gender characteristics of a particular employer's population, Aon Hewitt suggests that the employer be permitted flexibility in selecting the snapshot date. While in many cases the first day of the plan year will be reasonable, Aon Hewitt believes the ideal approach would be to allow an employer the option to designate a snapshot date up to 12 months prior to, or up to 12 months after, the start of the taxable plan year. This timeframe recognizes the need for some employers to determine the excise tax before the first day of the new plan year for budgeting and open enrollment purposes, as well as the need to adjust for significant business changes that occur during the taxable year.

Developing the Age and Gender Adjustment for an Employer's Population

With respect to determining the age and gender characteristics of a particular employer's population (i.e., all employees of the individual's employer), Aon Hewitt suggests that the term "employee" be defined as an employee, regardless of full-time or part-time status, as defined in Section 4980I(d)(3) of the Code, including current employees, former employees, surviving spouses, or other primary insured individual. IRS Notice 2015-52 indicates that the determination of average cost for FEHBP coverage be determined by aggregating all claims expenses of the FEHBP standard option and dividing the total by the number of coverage units, where each employee policyholder would be a coverage unit. As mentioned in Aon Hewitt's prior comment letter and based on the statutory language, Aon Hewitt suggests including retirees for this purpose to avoid penalizing employers who continue to provide coverage to retirees.

Aon Hewitt also suggests that the adjustment by employer focus, at the employer's/plan sponsor's election, on the age and gender characteristics of all employees enrolled in the applicable group health plan or benefit package, to the extent that the excise tax is determined by benefit package, rather than all employees of the individual's employer. While Section 4980I(b)(3)(C)(iii)(II)(aa) provides for pricing "for the age and gender characteristics of all employees of the individual's employer," the Treasury and IRS should consider interpreting such language in the context of the excise tax, which is based on coverage under the applicable group health plan or benefit package.

Notice of Calculation of Applicable Share of Excess Benefit

The notice requirement on the employer further supports the need to define "coverage provider" to include the plan sponsor for self-insured group health plan options. To the extent that a calculation error occurs that affects the cost of applicable coverage, the Treasury and IRS should consider a threshold (for example, 5%) before all coverage providers must adjust the excise tax and resubmit. Alternatively, if a resubmission is required, the employer/plan sponsor should be permitted to submit the adjustment.

Coordination Between the Excise Tax and the Employer Shared Responsibility Payment

Notice 2015-52 specifically requests comments regarding coordination between the excise tax under Section 4980I of the Code and assessable payments under the employer shared responsibility provisions of Section 4980H of the Code. Under Section 4980H of the Code, an employer that fails to offer a minimum essential coverage medical plan that provides minimum value (i.e., covers at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan) will be at risk of an employer shared responsibility payment.

Aon Hewitt requests a safe harbor that would exempt an employer from the excise tax to the extent that the employer offers a medical plan that provides minimum value (more precisely, a plan that covers at least 60% and no more than 65% of the total allowed cost of benefits that are expected to be incurred under the plan), regardless of whether the cost of coverage of this plan exceeds the thresholds under Section 4980I. Further, this minimum value medical plan would be disregarded when determining whether the employer's other employer-sponsored coverage exceeds the thresholds triggering the excise tax.

Closing

Aon Hewitt applauds the efforts of the IRS to create workable, flexible rules that encourage the design, establishment, and operation of employer-provided group health plans that help employees, retirees, and dependents pay for their health care expenses and reduce the cost and burden of those expenses on individuals, government, employers, and society. Aon Hewitt believes that the above recommendations will facilitate those objectives and help achieve the goal of affordable health care for all Americans.



Thank you for your consideration.

Sincerely,

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