

**EMPLOYERS COUNCIL
ON FLEXIBLE COMPENSATION**1444 I Street NW, Suite 700 • Washington, DC 20005 • www.ecfc.org • 202-659-4300 Main • 202-216-9646 Fax

October 1, 2015

CC:PA:LPD:PR (Notice 2015-52)

Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 2044

Re: Comments on IRS Notice 2015-52

Dear Sir or Madam:

This letter is submitted on behalf of the Employers Council on Flexible Compensation ("ECFC") with respect to the issues addressed by the Department of the Treasury and the Internal Revenue Service (collectively, the "Agencies") in IRS Notice 2015-52 (the "Notice") concerning the excise tax under Section 4980I of the Internal Revenue Code (the "Excise Tax") which was added to the Internal Revenue Code by the Affordable Care Act (the "ACA").

ECFC is a membership organization dedicated to maintaining and expanding private employee benefit programs with a particular interest in arrangements that provide employees with a choice among employer-sponsored benefits (so-called consumer-directed benefit arrangements). ECFC's members include employers who sponsor employee benefit plans, including flexible spending arrangements ("FSAs"), health reimbursement arrangements ("HRAs") and health savings accounts ("HSAs"), as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans. ECFC member companies assist in the administration of cafeteria plan and health benefits for over 33 million employees.

HRAs, FSAs and HSAs are important benefit plans that help stretch benefit dollars and increase employee spendable income. Unlike traditional "one-size fits all" plans, HRAs, FSAs, and HSAs promote efficient choices by empowering employees to direct their dollars to the *benefits most meaningful* to them. In addition, as employers move toward higher deductible health plans or plans that increase the amount of cost sharing borne by employees¹, HRAs, FSAs, and HSAs will provide a much-needed means for employees to finance these additional costs in a tax-efficient manner.

¹ National Business Group on Health, "Large Employers' 2015 Health Benefit Design Survey," August 13, 2014. According to this survey, 42 percent of employers are increasing employee cost-sharing and 57 percent of employers are implementing or expanding account-based consumer-directed arrangements.

Overall Concern about the Impact of the Excise Tax on Consumer-Directed Benefit Arrangements

ECFC members continue to be concerned that, based on the regulatory posture expressed in IRS Notices 2015-16 and 2015-52, employers will stop offering consumer-directed benefit arrangements as these arrangements may result in the employer's health benefit coverage to exceed the statutory limit and subject the coverage to the excise tax. As stated in ECFC's comment letter regarding IRS Notice 2015-16, we believe that Agencies should use their broad interpretative authority to provide a means for employers to continue to offer these plans.

According to a recent Kaiser Family Foundation study², in 2018, the first year of the Excise Tax, about 16 percent of the employers offering health benefits would have at least one plan that would exceed the threshold triggering the tax. The percentage would increase in subsequent years: the study estimates that in 2023, after the Excise Tax has been in place for 5 years, 22 percent of employers would be subject to the tax and 36 percent would be subject to the tax after being in place for 10 years in 2028. The study also shows that employers who include an FSA in their benefits package are much more likely to be subject to the excise; 26 percent would be subject to the tax in 2018, 30 percent in 2023 and 42 percent in 2028. As a result of the increased likelihood of being subject to the Excise Tax if an FSA is offered, the study points out that employers are examining ways to modify their health benefit plans to reduce costs to avoid triggering the Excise Tax. The study states that reducing or eliminating HRAs, FSAs, and HSAs would be widely adopted as an option for employers seeking to avoid the imposition of the tax. This is also what our membership has noted in discussions with employers about whether they will be subject to the tax.

As we noted in our previous comment letter, the Agencies should address issues of significance to consumer-directed health plans in future guidance. The issues of concern are as follows:

- i. In IRS Notice 2015-16, the Agencies indicated they were considering whether they should use their regulatory authority to exempt limited scope vision and/or dental coverage that is self-funded by the employer from the Excise Tax since Code §49801 excludes from such coverage "under a separate policy, certificate or contract of insurance." ECFC requests that the Agencies clearly confirm that a similar exemption should apply from the Excise Tax for HSA-compatible "limited purpose" FSAs or HRAs.
- ii. Salary reduction contributions to an HSA should not be considered employer-provided coverage unless the HSA is a group health plan. A reasonable interpretation of the statute would support this conclusion since the Excise Tax is only to be imposed on employer sponsored coverage and the simple fact that a contribution to an HSA is made on a pre-tax basis does not mean that the HSA itself should be considered a group health plan. Our previous letter describes this analysis in greater detail.
- iii. Employer contributions to FSAs and HRAs made in conjunction with a wellness program should not be included in the Excise Tax. The Excise Tax was intended to assist in the

² Kaiser Family Foundation Issue Brief, "How Many Employers could be Affected by the Cadillac Tax," August 2015.

reduction of overall health care spending and the use of employee wellness programs has the same intent – reduced utilization of health care. To count the financial incentives used in a wellness program as increased health care costs penalizes employers who are attempting to reduce health care spending. The Agencies should use their regulatory authority to help achieve this important policy result.

Persons Liable for the Excise Tax

The Notice sets out possible approaches that the Agencies *could take when determining* what persons will be liable for the Excise Tax. For coverage that is neither an insured group health plan nor coverage under an HSA or Archer HSA, the Excise Tax is imposed on the “person that administers the plan benefits.” The Agencies have outlined two approaches and have asked for comments on these two approaches. The first approach would be that the entity that provides day-to-day administrative services would be considered the person that administers the plan. The second approach is that the person that has ultimate authority or responsibility for the plan administration would be the person that administers the plan. The determination of who has that ultimate authority would be identifiable based on the terms of the plan document.

As an association whose members provide administrative services in the operation of various health plans, it is very important that the person to be liable for the Excise Tax be clearly determined. Consequently, we believe that the second approach outlined in the Notice (the entity with ultimate authority or responsibility for plan administration) is the preferred manner of determining the entity that should be responsible for the Excise Tax. In this way, all the parties that are involved with the plan – the employer sponsor and those entities that provide the services to run the plan – would be able to structure the arrangement in a manner that places the responsibility for the tax on one person. That structure would be identified in plan documents and other administrative materials (such as administrative services agreements). Principles of contract law would apply so that an amendment to an administrative services contract that identifies who is ultimately responsible for plan administration would control, even if the initial contract was silent on the issue. We believe that if this approach was taken, employers would want to be considered the person that is ultimately responsible for the plan’s administration. *If that was the case and the employer was liable for the Excise Tax*, many of the administrative complexities in excluding the amounts attributable to the Excise Tax from the cost of coverage will be lessened. In addition, we would ask that the Agencies confirm under this approach that the responsible entity is the “plan administrator” for purposes of ERISA.

Allocation of Contributions to FSAs, HRAs, and HSAs

We appreciate that the Agencies recognized the need to address how amounts in account-based plans, such as FSAs, HRAs and HSAs, would be counted in the month-by-month determination of whether an employer provided an excess benefit. The approach under consideration by the agencies whereby contributions to account-based plans would be allocated on a pro-rata basis over the period to which the contribution relates addresses the concern that ECFC raised in its comment letter regarding IRS Notice 2015-16. Also, the safe harbor approach taken with regard to FSAs with employer flex credits

Internal Revenue Service
Re: Comments on IRS Notice 2015-52
October 1, 2015
Page Four

provides a means of determining coverage provided without double counting of coverage in situations where amounts available in one year are carried over into the next year.

While the approaches being considered by the Agencies address the issues specific to account-based plans, they also require complex new administrative procedures that are not currently being provided under the administration of these plans. There will need to be time for these new administrative procedures to be settled and programed. Accordingly, the Agencies will need to provide final guidance on how these rules are to be implemented with appropriate lead time for plan administrators to develop and program the changes in systems necessary to comply with these rules. The Agencies should consider using its authority to delay the application of the Excise Tax to these account-based plans in order for the system changes to be made.

Conclusion

ECFC believes that consumer-directed benefit arrangements are an important component of the current employer-provided health system. We appreciate the direction that the Agencies have taken to recognize the unique nature of these benefits as they apply to the Excise Tax. We ask that look to the agencies your offices to take action to do more to preserve these important arrangements in light of the Excise Tax.

We appreciate the opportunity to comment on these critical issues. If additional information on any of these issues would be helpful, please feel free to contact me at (202)465-6397 or at wsweetnam@ecfc.org.

Sincerely,

A handwritten signature in black ink, reading "William F. Sweetnam, Jr." in a cursive script.

William F. Sweetnam, Jr.
ECFC Legislative and Technical Director