WageWorks

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Submitted Electronically via Email: Notice.comments@irscounsel.treas.gov

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

RE: Notice 2015-52

To Whom It May Concern:

WageWorks, Inc. ("WageWorks") appreciates the Department of Treasury ("Treasury") and the Internal Revenue Service ("Service") issuing Notice 2015-52, which—similar to Notice 2015-16—is intended to provide advance guidance to employers, insurers, and other stakeholders on potential approaches to implementing the Excise Tax on High-Cost Employer-Sponsored Health Coverage under new Internal Revenue Code §4980I (hereinafter referred to as "Excise Tax" or "Tax"). We also appreciate the opportunity to provide our comments on the suggested approaches outlined in Notice 2015-52 in advance of the issuance of proposed regulations.

WageWorks is a leading national provider of benefit administration services to employers, including consumer-directed health care accounts. Our company, the more than 45,000 employers we serve, and the 4 million employees they cover through tax-advantaged accounts are concerned about the impending Excise Tax, and the impact the Tax will have on employer-sponsored health coverage generally, and account-based health plans specifically.

A. Third-Party Administrators of Plan Benefits Should Not Be the Entity Responsible for Paying the Excise Tax

The Patient Protection and Affordable Care Act ("ACA") added Internal Revenue Code §4980I, imposing a 40 percent excise tax on employer-sponsored health coverage that exceeds $10,200 for individuals and $27,500 for families for tax years beginning on or after December 31, 2017. According to the statute, the Excise Tax liability is payable by an insurance company (in the case of fully-insured benefits) and the employer (if, for example, certain contributions to a health savings account ("HSA") are made). Code §4980I(c)(2)(C) also provides that the Excise Tax liability shall be imposed on the entity that "administers the plan benefits." In this latter case, Notice 2015-52 indicates that Treasury and the Service are considering two approaches for determining who is the entity that "administers the plan benefits" for purposes of imposing the Excise Tax liability on that entity.

Under the first approach, the Excise Tax liability would be imposed on the entity "responsible for performing the day-to-day plan administration functions, such as receiving and processing claims for benefits, responding to inquiries, or providing a technology platform for benefits information." The Notice explains that Treasury and the Service anticipate that this entity would be the third-party administrator ("TPA") of the plan benefits, except

in rare circumstances where an employer performs these administrative functions on its own (or the employer owns the TPA performing these functions).

Under the second approach, the entity liable for paying the Excise Tax would be the entity "that has the ultimate authority or responsibility under the arrangement with respect to the administration of the plan benefits (including final decisions on administrative matters), as well as authority or responsibility over eligibility determinations, claims administration, and arrangements with service providers (including the authority to terminate service provider contracts)." Here, it would appear that the employer would be responsible for paying the Excise Tax.

As stated above, WageWorks is a leading national provider of tax-preferred benefit services to employers, including consumer-directed health care arrangements. As a provider of these consumer-directed health plans, WageWorks administers HSAs, but the company also administers Health Flexible Spending Arrangements ("Health FSAs") and Health Reimbursement Arrangements ("HRAs"). If Treasury and the Service adopted the first approach described in Notice 2015-52, it would appear that WageWorks would be considered a TPA of Health FSAs and/or HRAs, and therefore, responsible for paying a portion of the Excise Tax liability in cases where it is triggered by an employer client. If this first approach is adopted, significant administrative burdens and complex contract negotiations would result for WageWorks, as well as other companies that administer Health FSAs and HRAs. In addition, WageWorks' employer clients would – in the end – pay amounts associated with the Excise Tax that far exceed the statutory 40 percent tax rate applicable to an excess benefit.

1. Employers Would Pay More Than the Statutory 40 Percent Tax Rate

As is customary in a TPA service agreement with an employer client, any resulting tax liability is passed through by the TPA to the client. This means that if the Excise Tax liability is imposed on the TPA, the TPA will respond by simply passing the Tax liability through to its employer client. Importantly, because the Excise Tax liability is non-deductible, the Tax liability will effectively be higher than the 40 percent tax rate applied to the excess benefit. This means that the total amounts that would be passed through to the employer could be higher than if the employer paid the Excise Tax liability directly (depending upon the marginal tax rate for the TPA and the employer).

Treasury and the Service have indicated that any amounts passed through to the employer would be taxable income to the TPA. In this case, the TPA would likely respond by "grossing up" the passed through amounts to cover the additional tax liability. This practice would, again, effectively increase the total Excise Tax liability that would be passed through, resulting in the employer paying a greater amount than the statutory 40 percent tax rate on the excess benefit. Congress never intended for this perverse result when developing the Excise Tax provision. However, this perverse result can be eliminated by imposing the Excise Tax liability on the employer directly.

2. Employers Would Be Required to Apportion the Excise Tax Liability Among Multiple TPAs, Which Would Add Administrative Burdens and Strain Contractual Relations

According to the statute, an employer is required to determine—on an employee-by-employee basis—(1) the different types of health coverage for a particular employee, (2) the aggregate cost of that coverage, and (3) the amount, if any, that exceeds the Excise Tax's dollar thresholds for the year. If this calculation shows that there is an excess benefit subject to the Excise Tax, the employer is then required to (1) determine the amount of the Tax on the excess benefit and (2) apportion—on a pro rata basis—the Tax liability among the entities that are "administering" one or more of the plan benefits. The employer must notify each of these entities of the amount of the Excise Tax owed, and the employer must report the amount of the Tax payable by each entity—and also the employer, if applicable—to the IRS.

Most, if not all, of WageWorks' employer clients contract with a number of TPAs to administer the various benefits offered under their plans. If an employer is required to apportion the Excise Tax liability among the TPAs "administering" the various plan benefits, the employer would be required to make multiple calculations for each employee and for its many TPAs. Then, the employer would be required to notify each particular TPA of the portion of the tax liability the TPA must pay to the Service. Requiring the employer to determine the portion of the Excise Tax liability allocable to these multiple TPAs would be time consuming and difficult to calculate. In addition, the burden of notifying each of the TPAs of the Excise Tax liability owed—along with the burden of sending a separate notice to the IRS regarding the Tax liability for each TPA—would be significant.

A TPA, like WageWorks, would prudently perform its own audit to determine if the apportioned Excise Tax liability was calculated correctly. However, it is unlikely that WageWorks – and other TPAs – would have accurate and complete information needed to perform such an audit. If there were discrepancies in the apportioned Excise Tax liability amounts, WageWorks and the employer client would be required to reconcile their differences. Since there are no "audit" procedures set forth in Code §4980I, disagreements over responsibility for the Excise Tax liability could strain WageWorks' and other TPAs' relationships with employer clients, and possibly even frustrate future contract negotiations. These adverse effects could be avoided if Treasury and the Service decided to impose the Excise Tax liability directly on the employer.

3. WageWorks Cannot Control the Cost of the Applicable Health Coverage for a Given Year

WageWorks provides benefits administration of HSAs, Health FSAs, and HRAs for our employer clients. WageWorks does not typically engage in advising employers on the design of the types of health coverage that should be offered to their employees. Nor does WageWorks advise on the amount of tax-preferred contributions employees should make to a Health FSA or to an HSA through a Code §125 cafeteria plan, which may have the effect of pushing the overall cost of applicable coverage over the Excise Tax's dollar thresholds for the year. As a result, whether the Excise Tax is triggered by a particular employer client in a given year is outside of the control of WageWorks (and could very well be outside of the control of the employer in some cases). Yet, if Treasury and the Service impose the Excise Tax liability on the TPA, WageWorks would be required pay a tax the company never had a hand in triggering. This unfair result is magnified if and when multiple employer

clients trigger the Excise Tax in a given year. To avoid this inequitable result, Treasury and the Service should consider the second suggested approach, and impose the Excise Tax liability directly on the employer.

B. The Proposed Allocation Rule for Account-Based Plans Is Reasonable

WageWorks supports the approach Treasury and the Service suggest with respect to how contributions to account-based plans should be allocated for purposes of determining the cost of applicable coverage for the year. For example, Treasury and the Service suggest that contributions made to, among others, an HSA, a Health FSA, and an HRA should be allocated on a pro-rata basis over the period to which the contributions relate, regardless of the timing of the contributions during the period.

WageWorks believes this is a logical approach, considering the statute indicates that the cost of applicable coverage shall be determined on a monthly basis, yet Treasury and the Service anticipate that the Excise Tax liability would be determined on a calendar year basis (and determined as soon as possible after the end of that year). For this suggestion to work in practice, an employer would simply aggregate the cost of applicable coverage during each month in the applicable calendar year to ultimately determine whether the aggregate cost of applicable coverage exceeds the Excise Tax's dollar thresholds for that year. In other words, this monthly allocation rule smooths out how an employer should calculate the amount of any Excise Tax liability that may be owed at the end of the calendar year.

C. The Proposed "Safe Harbor" to Avoid Double Counting Health FSA Carry-Over Amounts Is Reasonable

WageWorks is also supportive of the "safe harbor" Treasury and the Service suggest which would allow an employer (1) to take into account the full amount of an employee's salary reduction contributions made during an applicable calendar year and (2) to disregard any unused amounts carried over when determining the cost of applicable coverage in the second year. This would avoid any double-counting that would result if Code §4980I(d)(2)(B) was implemented as written. This approach should simplify how an employer would calculate the Excise Tax liability for a given applicable calendar year.

It appears that this approach can be administered due to the manner in which some Health FSA administrators (like WageWorks) account for (1) salary reduction contributions made in a given year and (2) any amounts carried over from one year to the next. Specifically, this separate accounting would allow an employer to know the exact dollar amount that is carried over from the prior year, thereby allowing the employer to appropriately disregard these amounts when determining the cost of applicable coverage in the following year.

It appears that this "safe harbor" is only available in cases where no employer contributions are made to an employee's Health FSA. However, in cases where non-elective flex credits are made, Treasury and the Service seem to suggest a modified "safe harbor" where it appears that an employer can count (1) the amount of the employee's salary reduction contributions to the Health FSA plus (2) the amount of the non-elective flex credits allocated to the Health FSA for the year, up to the maximum FSA dollar limitation under Code §125(i). In other words, it appears that an employer is not required to take into account non-elective flex credits that exceed the

Code §125(i) maximum (1) in the year in which the non-elective flex credits are made, and also (2) the following year (so as to ensure there is no double-counting of flex credits that may be carried over). While it appears that this approach may work due to separate accounting of (1) the amounts of salary reduction contributions and (2) the non-elective flex credits made in a given year, additional clarification of this proposed approach would be helpful.

D. Treasury and the Service Should Reduce Administrative Burdens and Recognize Employee Salary Reduction Contributions to a Health FSA as Something Other Than "Employer Contributions"

WageWorks understands that Treasury and the Service may feel compelled to count employee salary reduction contributions to a Health FSA toward the Excise Tax due to Code §4980I's statutory language. But, in interest of reducing administrative burdens on employers that have historically offered Health FSAs, and in recognition of the clear fact that employee contributions to a Health FSA are in reality "employee money" (as opposed to the legal fiction where these contributions are re-characterized as "employer contributions" for tax purposes only), Treasury and the Service should consider developing a rule where these employee Health FSA contributions are not taken into account when an employer determines the cost of applicable coverage for the year (i.e., Treasury and the Service should recognize employee Health FSA contributions as wages earned by the employee, and not in fact, employer-provided benefits).

As stated, the allocation rule for account-based plans and the "safe harbor" to avoid double-counting carry over amounts, which are intended to minimize some of the administrative burdens associated with determining the cost of applicable coverage, are logical approaches. However, these proposed rules possess their own administrative burdens that can be avoided by treating employee salary reduction contributions to a Health FSA as "employee contributions" (and *not* "employer contributions") for purposes of the Excise Tax. For example, while Health FSA administrators (like WageWorks) may be able to separately account for certain contributions under these account-based plans, employers that choose to administer their own arrangements or employers that contract with TPAs that do not provide these accounting functions, may find it next to impossible to adequately and accurately track Health FSA contributions over the course of an applicable calendar year. To eliminate this burden, in addition to simplifying the determination of whether the Excise Tax is triggered in a particular year, these employers may discontinue their Health FSA altogether.[1] A result Congress never intended, and a result that Treasury and the Service should want to avoid in the wake of ever-increasing deductibles and out-of-pocket costs among employer-sponsored plans.[2]

In addition, under the proposed allocation rule, administrative burdens could arise when an employee terminates employment during the course of the year after receiving Health FSA reimbursements that far

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[1] *See* Kaiser Family Foundation, *How Many Employers Could Be Affected By the Cadillac Plan Tax?* (Aug. 25, 2015), where Larry Levitt, Senior Vice President of the Kaiser Family Foundation suggested that, "in the next few years, when some employers will be subject to the [Excise] Tax, I would expect some employers to drop Health FSAs."

[2] *See* Kaiser Family Foundation, *2015 Employer Health Benefits Survey* (Sept. 22, 2015), where the survey found that the average deductible under an employer-sponsored health plan increased six times faster than wages since 2010.

exceed the amount of salary reduction contributions that were made prior to the employee's termination date. Should the employer only count the salary reduction contributions that were made during the months in which the employee was employed? Or, would the employer count the entire reimbursements when determining the cost of applicable coverage for the year? This issue, along with the burden of accounting for contributions on a monthly basis, could be avoided by developing a rule that would not require an employer to take into account employee Health FSA contributions when determining the cost of applicable coverage for the year.

Furthermore, in the case of the "safe harbor" to prevent double-counting, it is likely that a number of employers (especially small- and mid-sized employers) offering a Health FSA will not have the systems in place to properly account for carry over amounts, which could lead to an employer erroneously triggering the Excise Tax for the year simply because Health FSA reimbursements were counted (1) in the year in which the contributions were made, as well as (2) in the following year. Again, the probability of this occurring can be eliminated if employee Health FSA contributions are not taken into account for purposes of determining the cost of applicable coverage for the year.

E. Employee Contributions to an HSA Made Through a Code §125 Cafeteria Plan May Reasonably Be Excluded From the Calculation of the Excise Tax

As discussed in our comment letter on Notice 2015-16, the term "applicable employer-sponsored coverage" means, "coverage under any *group health plan* made available to [an] employee by an employer which is excludable from the employee's gross income under [Code] §106." It is well-accepted that an HSA is *not* a "group health plan." For example, formal guidance relating to HSAs issued to date has never indicated that an HSA would be considered a "group health plan." In addition, the preamble of Interim Final Regulations implementing the ACA's annual limit restriction provision specifically states that "HSAs generally are not considered group health plans because the amounts available under the plans are available for both medical and non-medical expenses." As a result, because an HSA is not considered a "group health plan," an HSA should *not* be considered "applicable employer-sponsored coverage" for purposes of the Excise Tax.

In addition, although employee contributions may be made to an HSA through a Code §125 cafeteria plan, the Service has never indicated that Code §125 cafeteria plan itself is a "group health plan." Therefore, it is reasonable to conclude that a Code §125 plan – which is not considered a "group health plan" – would similarly not be considered "applicable employer-sponsored coverage" for purposes of the Excise Tax. This would especially be true in cases where the 125 plan is simply facilitating contributions to an arrangement that itself is not a "group health plan" (e.g., an HSA). As a result, we believe the Treasury and the Service have the authority to interpret the term "applicable employer-sponsored coverage" as not including employee contributions to an HSA made through a Code §125 plan, thus permitting this arrangement to fall outside of the purview of the Excise Tax.

Actual contributions coming directly from the employer, however, may be distinguished from employee HSA contributions made through a Code §125 plan, and therefore, these "employer contributions" may still be included in the "cost" of "applicable employer-sponsored coverage," thereby allowing the Treasury and Service

to fulfill your duties in implementing the statute as written. Treasury and the Service made a similar distinction when implementing the "minimum value" rules, where Treasury and the Service explicitly provided that employer contributions for the current year to an HSA *may* be counted toward satisfying the "minimum value" test, while it does not appear that employee HSA contributions made through a Code §125 plan are to be counted for these purposes.

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Once again, we appreciate the opportunity to provide comments on Notice 2015-52, and we look forward to reviewing future guidance and regulations regarding the implementation of the Excise Tax. Should you have any questions about our comments, please do not hesitate to contact Jody Dietel, Chief Compliance Officer, at (650) 577-6372 or Jody.Dietel@wageworks.com.

Sincerely,

Jody L. Dietel, ACFCI, CAS
Chief Compliance Officer
WageWorks, Inc.