# IRS Seeks More Input on the Cadillac Tax

This ALERT will provide a high level overview of what looks likely to be a very complicated process if the Notices are any indication.

## Background

The Cadillac tax under the Affordable Care Act applies to taxable years beginning after December 31, 2017. It imposes a 40 per cent nondeductible excise tax on employer-sponsored health coverage that exceeds a certain threshold. The IRS is asking plan sponsors for more input on the Cadillac tax.

Questions include what benefits are taxable, how the tax is calculated, who pays the tax and when. Based on the preliminary guidance, the process of determining the Cadillac tax could be onerous.

Notice 2015-16 issued on February 23, 2015 discussed the benefits included and excluded in applicable coverage, calculation of the cost of the applicable coverage as well as age and gender adjustments to the dollar limits and adjustments for high risk professions (e.g., law enforcement). The Notice also mentioned that the IRS anticipated issuing another Notice before any proposed regulations are published.

Notice 2015-52 was issued on July 30, 2015. This latest Notice supplements Notice 2015-16 by addressing additional issues such as who is liable for the excise tax, employer aggregation, payment of the tax as well further discussion regarding calculating the cost of applicable coverage.

Comments may be submitted until October 1, 2015. The IRS intends to issue proposed regulations after considering comments on both Notices. The proposed regulations will also provide a comment period. Since the comment period ends October 1, 2015, chances are we may not see proposed regulations this year. If we do it will be late in the year.

## A quick summary of key issues

### *Who is liable for the excise tax?*

The coverage provider is liable for the excise tax. The coverage provider is the insurance company in the case of an insured plan, the employer in the case of an HSA or an Archer MSA and "the person that administers the plan benefits" for all other applicable coverage, presumably the TPA in the case of self-insured health plans not administered in-house.

*Note: The employer is expected to calculate the amount of the excess benefit subject to the excise tax and notify the coverage provider and the IRS of the excess benefit. The calculation is based on the "taxable period" meaning the calendar year. The coverage provider pays the tax.*

### *What is considered applicable benefit coverage?*

Applicable coverage includes:

- Group health plans
- Health FSAs
- Archer MSAs
- HSAs

- Government plans
- On site medical clinics providing more than de minimis medical services
- Retiree coverage
- Multiemployer plans
- Certain other coverages

*What are the basics of calculating the cost of applicable coverage?*

The cost of applicable coverage includes employer and employee contributions and is calculated using rules similar to the COBRA rules for determining premium. The determination for the cost of coverage and the excise tax is made monthly. It is calculated separately for self-only and other than self-only coverage.

The cost of a health FSA is equal to the sum of the salary reduction, employer flex contributions and any reimbursement amounts in excess of the salary reduction contributions. The cost of coverage for HSAs and Archer MSAs includes employer contributions to HSAs and Archer.

Both Notices provide more detail regarding determining the cost of applicable coverage.

*What adjustments to the dollar limits are available?*

Additional amounts can be added to the dollar limit for

- retirees who have attained age 55 and are not entitled to enroll in Medicare.
- high risk professions (e.g., law enforcement, certain electricians, fire personnel, certain medical professionals)
- age and gender characteristics of a particular workforce that differs from the national workforce. Plan sponsors are required to determine the age and gender of their workforce at a snapshot date, e.g., the first day of the plan year. The results are compared to an annual table published by the Department of Labor Bureau of Labor Statistics. The IRS anticipates that it will develop tables to help determining the age and gender adjustment.

*Really now, how is this going to work?*

The how and when of paying the tax is unknown at the present time. The IRS realizes that both insured and self-insured plans may not know the applicable cost for a taxable year until sometime after the end of the calendar year. Likewise, the timing of the age and gender adjustment is up in the air, should it be at the beginning of the taxable year or some other time?

The calculations will require aspirin for you are bound to suffer headaches. The employer must determine if the cost of applicable coverage exceeds the dollar limit. ACA imposes a 40 per cent nondeductible excise tax on the excess of the aggregate cost of applicable coverage for the month over the applicable dollar limit for the month (1/12th of the annual limit of $10,200 for self-only coverage and $27,500 for other than self-only coverage). These limits will be updated for 2018 by a “health cost adjustment percentage” and a cost of living adjustment for taxable years after 2018.

The employer notifies the IRS and the coverage provider and the coverage provider pays the tax. If the employer reimburses the coverage provider for the excise tax, the amount reimbursed is considered taxable income to the coverage provider!

The employer will also have to allocate any excess for plans that use multiple providers, e.g, medical is provided by one coverage provider, prescription by another.

Other issues to be addressed include how to reflect claims during any run out period as well premium discounts for experience rated plans.

## Bottom line for plan sponsors

Execution of this particular ACA provision will be very involved and very complicated if the initial guidance is any indication. This ALERT is just the tip of the iceberg as it relates to the issues with implementing the Cadillac tax. However, it appears that despite rumblings of opposition to the Cadillac Tax, the IRS is proceeding full speed ahead. Therefore, it is important that plan sponsors talk to their advisors regarding the potential impact of the excise tax.

Take advantage of the comment period, you just might be able to shape the ultimate form of the proposed regulations.

Note: all links are active as of the date of issuance of this ErisaALERT.

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