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Additional Guidance Issued on the Cadillac Tax

The IRS has issued additional guidance on the 40% excise tax on high-cost employer-sponsored health coverage (commonly referred to as the “Cadillac Tax”). [Notice 2015-52](#) is a supplement to [Notice 2015-16](#) issued earlier this year. Many of the issues addressed in the new Notice explore proposed approaches to key issues relevant to calculating and paying the tax. The IRS will accept comments on the items addressed in Notice 2015-52 until October 1, 2015. It is expected that proposed regulations will be drafted based on comments received from both Notices and subsequently, final regulations on the Cadillac Tax will be issued after the Department of Treasury and the IRS (the “agencies”) consider comments from the proposed regulations.

General Background

Beginning in 2018 a non-deductible excise tax of 40% will be assessed on the excess amount of the aggregate cost of “applicable employer-sponsored coverage.” Generally, the excess amounts to which the tax will apply are \$10,200 and \$27,500 for individual coverage and “other-than-individual coverage,” respectively. Please see our [Update](#) for more information on the Cadillac Tax and the previously issued guidance.

Notice 2015-52

Notice 2015-52 is “intended to continue the process of developing regulatory guidance regarding the excise tax on high cost employer-sponsored health coverage...” The Notice addresses several topics related to calculating and paying the Cadillac Tax and addresses further issues regarding the cost of applicable coverage that were not addressed in Notice 2015-16. Topics include:

Identifying the party liable for paying the tax – Under current guidance, the employer is responsible for calculating the Cadillac Tax due and the “coverage provider” is responsible for paying the tax on its applicable share of the excess benefit. Generally the guidance provides that a coverage provider is the insurer for a fully-insured arrangement, the employer for account-based arrangements such as an FSA, HRA, or HSA, and “the person that administers the plan” for all other applicable self-insured coverage. The term “the person that administers the plan” is not clearly defined, as the statute indicates that “the person that administers the plan” may be, but is not always, the employer under a self-insured arrangement. The agencies are considering two approaches in identifying “the person that administers the plan”. Recognizing that the “person” in most cases will be an entity, under the first approach, the entity responsible for the plan’s day to day administrative functions, such as claims processing and responding to participant inquiries will be the party responsible for paying the tax. For self-insured employers, this would typically be a

third-party administrator (TPA). Under the second approach, the agencies are considering naming “the person that administers the plan” as the entity that is ultimately responsible for the plan, regardless of whether that entity routinely exercises their authority or responsibility. This would likely mean the plan sponsor or the employer would be identified as “the person that administers the plan” and hence responsible for the Cadillac Tax payment.

The agencies are seeking comments on both approaches, specifically requesting comments on the administrative functions that would fall under the first approach and whether both approaches would provide a clear determination of the “person that administers the plan”.

Employer Aggregation – Under the Cadillac Tax, all employers that are part of the same controlled group based on IRS controlled group rules are treated as a single employer. The agencies seek comments on whether these rules will prove to be problematic in the following areas:

- identifying the employees taken into account for the age and gender adjustments
- applying adjustments for high risk professional or individuals who repair or install electric or telephone poles
- identifying the taxpayer responsible for calculating and paying the tax
- identifying the employer liable when a penalty is assessed for failure to properly calculate the tax

Cost of Applicable Coverage – Several issues are addressed in the cost of applicable coverage section of the Notice. The Cadillac Tax due will be determined based on the monthly excess benefit during the taxable period, which is the calendar (tax) year. Considering that the tax is calculated based on the excess amount (over the applicable limits) of the cost of coverage, the agencies continue to seek comments on determining the cost of coverage. Employers responsible for calculating the tax will have to determine the cost of coverage shortly after the end of the year to allow the coverage providers a large enough window to timely pay the tax. The agencies are requesting comments to understand potential challenges raised by the need to determine the cost of coverage soon after the tax year end.

The agencies also expressed in the Notice that timing issues may differ based on the funding mechanism, account type, and the benefit/policy year (when a benefit or policy is not administered on a calendar year) and recognize that employers may need additional time to calculate the cost of applicable coverage when benefit years don't align with a calendar year.

Comments are also being sought on issues that may arise when calculating the cost of coverage for experience-rated arrangements, under which payments or discounts may be made to or from an insurer after the end of the coverage period. Comments are also requested on how employers are addressing these payments or discounts currently for purposes of determining COBRA applicable premiums.

In cases where the coverage provider (such as an insurer or TPA) is liable for paying the excise tax, this entity may pass the cost of the tax back to the plan sponsor or employer. In the cases where the coverage provider does pass the tax along and receives reimbursement for the tax from the plan sponsor or employer, the reimbursement will be considered income for the coverage provider and is taxable. Because the Cadillac Tax guidance indicates that the tax is non-deductible, the coverage provider will experience an increase in taxable income. In this case, the

amount passed on to the employer from the coverage provider may include both the excise tax and an amount for the additional income tax the coverage provider will incur. The agencies are considering if some or all of the income tax reimbursement received by the coverage provider as a result of passing the cost along to the employer could be excluded from the cost of applicable coverage. Given the variability of tax rates and other factors, the agencies are concerned that a method for excluding the income tax may be too difficult to administer, but is still seeking comments on possible resolutions to this issue.

Notice 2015-52 also addresses approaches for determining the applicable cost of coverage under account based plans such as HSAs, FSAs and HRAs. The agencies are considering a pro-rata approach where by the value of the account-based benefit is allocated evenly among all the months in a year. The IRS is also considering methods that would address employers that use flex credits and carry-over amounts.

Age and Gender Adjustment -- Under the Cadillac Tax guidance, several adjustments may apply to the applicable dollar limits to increase the limits used to determine whether the Cadillac Tax is due. Among these adjustments are the age and gender adjustment. The agencies anticipate that the IRS will develop and publish tables to simplify calculating the age/gender adjustments. The Notice outlines the proposed steps under consideration for the development of the age and gender tables. It is noted that the age and gender adjustment will be determined separately for self-only coverage and for other than self-only coverage.

Notice and Payment – The Cadillac Tax provisions impose a notification requirement on the employer, since it is the employer who is responsible for calculating the tax and determining the applicable share of the tax for each coverage provider. The employer must notify the Secretary and each coverage provider of the amount so determined for each coverage provider under these notification requirements. The agencies are considering the form the employer will use to report this information and when information will be required to be reported. Further, the agencies are considering designating a specific quarter under Form 720 (“Quarterly Federal Excise Tax Return”) that entities may use to submit their portion of any Cadillac Tax due (similar to the procedure already in place for payment of PCOR fees).

Should you have questions regarding this or any other area of health reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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