

Compensation and Benefits Insights

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Looking Under the Hood of the “Cadillac Tax”

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The Patient Protection and Affordable Care Act (“ACA”)’s 40% excise tax on high-cost employer-sponsored health coverage (commonly known as the “Cadillac tax”) is slated to take effect in 2018. The IRS has issued several pieces of guidance to help administer the Cadillac tax, most recently through its issuance on July 30, 2015 of [Notice 2015-52](#), which supplemented [Notice 2015-16](#) (issued in February 2015). Like its predecessor, Notice 2015-52 identifies implementation challenges raised by the Cadillac tax, which may be helpful information for employers hoping to avoid or limit their exposure to the Cadillac tax.

Background

The Cadillac tax is governed by Section 4980I of the Internal Revenue Code (the “Code”), which was added by ACA in 2010. Effective for tax years beginning in 2018, Section 4980I imposes a 40% excise tax on the excess, if any, of the aggregate cost of coverage for a month over the applicable dollar limit for the month. The applicable dollar limit will differ for self-only coverage and coverage other than self-only coverage. The applicable dollar limit for 2018 is \$10,200 for self-only coverage and \$27,500 for other-than-self-only coverage, subject to various adjustments, (which, interestingly, do not include any regional cost-of-living adjustments). Notice 2015-16, the first IRS guidance on the Cadillac tax, was intended to initiate the process of developing regulatory guidance under Code Section 4980I. Notice 2015-16 described potential approaches related to the definition of applicable coverage, the calculation of the cost of applicable coverage and the applicable dollar limit. Notice 2015-52 proposes additional approaches related to the identification of taxpayers who may be liable for the tax, employer aggregation, the age and gender adjustment to the dollar limit, the allocation of the tax among applicable taxpayers, and notice and payment of the

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Cadillac tax. Some highlights from Notice 2015-52 that may be of interest to employers are discussed below.

Identifying “Coverage Providers”

Under Section 4980I, the employer is responsible for determining the amount of any Cadillac tax due and allocating the tax to one or more “coverage providers,” but the “coverage provider” is liable for actually paying the tax. Section 4980I clearly identifies who the “coverage provider” is in the case of insured group health plan (the insurer), and where coverage is provided under a health savings account (HSA) or Archer medical savings account (the employer). In all other cases, Section 4980I states that the “coverage provider” is the “person that administers the plan benefits.” The phrase “person that administers the plan benefits” includes the ERISA plan sponsor, if the plan sponsor administers plan benefits. However, because that phrase is not defined in Section 4980I (nor elsewhere in the Code, ERISA, the ACA or the Public Health Service Act (PHSA)), the IRS indicated in Notice 2015-52 that it is considering two alternative approaches to defining the phrase: under one approach, the “person that administers plan benefits” would be the person responsible for performing day-to-day administration of plan benefits (e.g., processing claims or handing participant inquiries). For self-insured benefits, this person generally would be the plan's third-party administrator (TPA). Under the second proposed approach, the phrase would mean the person having ultimate authority or responsibility under the plan regarding administration of plan benefits (for example, final decisions on administrative matters), regardless of whether that person typically uses this authority. Usually the plan administrator that is defined in the plan, such as a benefits administration committee that has been delegated administrative duties, would have this authority. Notice 2015-52 requests comments on each of the two proposed approaches.

INSIGHT: Notice 2015-52 echoes the prediction made by many benefits practitioners: that ultimately, the employer will be responsible for increased costs due to imposition of the Cadillac tax, either directly (e.g., because the employer’s plan is self-insured and the employer is deemed to be the “coverage provider”) or indirectly (e.g., because although the employer’s plan is insured and the insurer is the “coverage provider,” the insurer passes those costs through to the employer in the form of additional fees).

Controlled Group Issues

Under Section 4980I, all employers treated as a single employer under the Code's controlled group rules are treated as a single employer; however, the Cadillac tax is applied separately to each member of the controlled group. Notice 2015-52 requests comments on the practical challenges of applying the controlled group rules to Section 4980I, including identification of (i) the applicable coverage that is considered to be made available by an employer, (ii) the employees taken into account for purposes of adjustments under Section 4980I (including the age and gender adjustment and the adjustment for employees in high risk professions or who repair and install electrical or telecommunications lines), (iii) the taxpayer responsible for calculating and reporting an excess benefit, and (iv) the employer liable for penalties for failing to properly calculate the Cadillac tax.

Timing of Calculation

The IRS indicates in Notice 2015-52 that the taxable period for calculating the Cadillac tax will likely be the calendar year for all taxpayers, regardless of their plan year. However, an employer may not be able to calculate the applicable cost of coverage at the end of the calendar year due to various timing issues with different types of plans. For example, self-

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insured plans may not be able to calculate the applicable cost of coverage until the close of the plan's run-out period. Therefore, Notice 2015-52 requests comments on whether a claims run-out period would be appropriate.

The timing of contributions to account-based plans, such as health savings accounts (HSAs), is also addressed in Notice 2015-52. Although the Cadillac tax will likely be calculated on a calendar-year basis, it is required to be calculated monthly. Notice 2015-52 states that the IRS recognizes that the required timing could be an issue for plans, such as HSAs, which make annual contributions, since such contributions could trigger the Cadillac tax in the month of contribution. To remedy this problem, Notice 2015-52 proposes an approach that would allow employers to apply annual contributions on a pro-rata basis over the period to which the contributions relate (in most cases, the plan year), regardless of when the contributions are made.

Age and Gender Adjustments

Section 4980I(b)(3) provides that the two baseline per-employee dollar thresholds can be increased based on the age and gender characteristics of a particular employer's employee population in comparison to the national workforce. (Generally, older individuals have higher healthcare costs on average than younger individuals, and younger women have higher costs than younger men.) To determine the age and gender characteristics of an employer's population, Notice 2015-52 states that the IRS may require employers to use the first day of the plan year as a "snapshot date" for assessing the composition of its employee population. Under this approach, the employer would determine the age and gender of each employee as of the first day of the plan year, and such distribution of age and gender characteristics would govern for purposes of the age and gender adjustment. In Notice 2015-52, the IRS requests comments regarding this approach (for example, whether it is administrable and whether employers should be allowed to use a snapshot day other than the first day of the plan year).

Conclusion

Notice 2015-52 demonstrates the complexity of the Cadillac tax and the difficulties that its implementation present. Comments that the Treasury and the IRS have already received in response to Notice 2015-16 express deep concerns as to the tax and the possibility that ordinary inflation in medical costs will cause plans simply meeting the ACA's minimum value requirements to progressively approach the Section 4980I thresholds. Although Notice 2015-52 (like Notice 2015-16) does not constitute formal guidance, it does provide some insights into the practical issues that employers will likely face when the Cadillac tax is implemented. Comments on issues discussed in Notice 2015-52, as well as those in Notice 2015-16, are due by October 1, 2015.

October and November 2015 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

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The filing and notice deadline table below provides key filing and notice deadlines for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
October 14	Medicare Part D Creditable Coverage Notice to Individuals	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to provide a written disclosure notice to Medicare eligible individuals and their dependents covered under the plan indicating whether their prescription drug coverage is creditable coverage.	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
October 15 (2 ½ months after extension granted)	DOL Form 5500	Deadline for plan administrator to file Form 5500 for prior year if deadline was extended by filing a Form 5558.	Retirement Plans Health and Welfare Plans
	IRS Form 8955-SSA	Deadline for plan administrator to File Form 8955-SSA if deadline was extended by filing a Form 5558.	Retirement Plans
October 15 (9 ½ months after the previous plan year)	PBGC Premium Filing	Deadline for plan administrator of large plans (500 or more participants) to pay flat-rate or variable PBGC premium for current plan year.	Defined Benefit Plans with 500 or more participants
November 1 (by the first day of open enrollment)	Summary of Benefits and Coverage for Health Plans that Require Reapplication	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if written application materials are required for renewal.	Group Health Plans and Health Insurance Issuers

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Deadline	Item	Action	Affected Plans
November 14 (within 45 days after the close of the third quarter)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the third quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the third quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
November 15 (the 15th day of the 11th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a second 3-month extension by filing a Form 8868.	Qualified Retirement Plans* Voluntary Employee Beneficiary Associations
November 15	Transitional Reinsurance Report and Second Installment Fee (if applicable)	Deadline for sponsors of self-insured health plans (including retiree plans) to report the number of “covered lives” under the plan. If the entity chose to pay the 2014 fee in installments, it must pay the remaining \$10.50 for each covered life by this date.	Self-insured Group Health Plans (including retiree plans)

* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Code §401(a).

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