



October 1, 2015

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 – Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage

These comments are submitted to the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) regarding Notice 2015-52 (Notice), pursuant to Section 4980I, the Excise Tax on High Cost Employer-Sponsored Health Coverage (Cadillac tax); on behalf of the National Federation of Independent Business (NFIB).

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

General Comment

NFIB appreciates the opportunity to comment on the second Cadillac tax Notice. NFIB previously submitted comments on Notice 2015-16 on May 15, 2015, specifically requesting more detail on employer responsibilities for administering the Cadillac tax, identifying inequitable Cadillac tax thresholds for certain businesses, and requesting relief from counting contributions to consumer-driven health insurance products from the Cadillac tax thresholds. Responding to Notice 2015-52, NFIB will focus comments on the following issues:

- Small employers' disproportionate liability burden
- Small employers' disproportionate compliance burden
- Other comments not addressed in the Notice

The Notice does provide additional details for employer responsibilities for administering the Cadillac tax. A careful reading of the Notice makes it clear that small employers will ultimately bear the full responsibility, both from a cost and compliance perspective, for paying the Cadillac tax. The second Notice creates new mandates and complicated requirements for employers to conquer and comply with.

On the cost side, the Notice states that an employer "must pay the excise tax on its applicable share of the excess benefit with respect to an employee for a taxable period." In terms of compliance, the Notice mandates a host of new calculation and reporting requirements. Mandates placed on the employer include: (1) "an employer must determine the extent, if any, to which the cost of applicable coverage provided to an employee during any month of a taxable period exceeds the dollar limit;" (2) the

“employer must then notify both IRS and the coverage provider of the amount of the excise benefit;” (3) “employers will be required to determine the cost of applicable coverage provided during a taxable year sufficiently soon after the end of the taxable year;” and (4) “an employer would be required to determine the age and gender of each employee as of the first day of the plan year.”

The general comment is meant to summarize previous comments and identify new issues. The following sections will focus more on each issue starting with the liability. Finally, NFIB requests that the IRS conduct an initial regulatory flexibility analysis (IRFA) prior to proposing the regulation (and publish a summary in the proposed rule) as the Cadillac tax will have a significant economic impact on a substantial number of small entities.

Liability

A. “Coverage Provider”

Under the Notice, the “coverage provider,” has the final obligation of payment to the IRS for any excise tax liability. Depending on the type(s) of insurance offered, a coverage provider could be an employer, an insurance company, a third party administrator, or a combination of these parties. Importantly, regardless of which party is determined to be the coverage provider, as the Notice makes clear, in true substance it is the employer which shoulders the ultimate responsibility. The coverage provider simply acts in an equivalent capacity to that of a withholding agent or similar middle-person responsible for collecting and remitting payment to the IRS.

As conceived in the Notice, if the employer offers employees a fully-insured health insurance plan, the health insurance issuer will issue a bill to the employer, collect the payment and then pass along the check from the employer to the IRS. If an employer contributes or designates funds to health savings accounts (HSAs), flexible spending accounts (FSAs), Archer medical savings accounts (Archer MSAs), or health reimbursement arrangements (HRAs), the employer must send a check directly to the IRS. NFIB is concerned that due to this shared liability, that coordination issues between health insurance companies and employers on determining liability will occur, and employers may have to write multiple checks to coverage providers and the IRS.

B. “Person that Administers the Plan”

If the employer self-insures, either the employer, a third party administrator, or another yet-to-be determined entity will pass along a check from the employer to the IRS. As stated in the Notice, the “person that administers the plan benefits,” is a novel otherwise undefined term.

The new concept will require clarification in the proposed rule to avoid confusion regarding the ultimate responsibility for remitting payment to the IRS. NFIB is concerned that if the definition is not clarified it may increase the administrative costs that will ultimately increase coverage costs to the employer. The Notice proposes a second approach which would place liability on “the person that has the ultimate authority or responsibility under the plan or arrangement with respect to the administration of the plan benefits (including final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility.” NFIB is concerned that such an approach for defining liability would lead to greater confusion and potentially would serve as an indirect way to force employers to take on all liability for the Cadillac tax administration. NFIB recommends clarification on both approaches.

Cost of Applicable Coverage

A. Taxable Period

NFIB appreciates that Treasury and IRS anticipate that the taxable period will be the calendar year for all taxpayers. Compliance with the Cadillac tax will be extremely difficult, especially initially. Any shorter time period – which would be permitted under Section 4980I(f)(8) – would make compliance even more problematic, and may cause many small employers to drop coverage out of frustration with administering the benefit.

B. Determination Period

Employers must determine the cost of coverage and whether that coverage exceeds the dollar limits and must then notify both IRS and the coverage provider the amount of the excess benefit and the tax that must be paid. Employers must do so sufficiently soon after the end of that taxable year to enable coverage providers to pay any applicable tax in a reasonably timely manner. NFIB is very concerned that coordination and timing issues could potentially arise as a result of these new requirements.

As mentioned earlier, multiple entities will be responsible for sending employers' checks along to the IRS, including the businesses themselves, insurance carriers and third party administrators. NFIB recommends Treasury and IRS propose specific responsibilities, and timelines, for each entity and recommend ways for the entities to coordinate transmittal of Cadillac tax liability. NFIB recommends Treasury and IRS examine existing Affordable Care Act (ACA) compliance requirements and compliance timelines in order to avoid duplicity and additional administrative burdens, which could cause small employers to simply stop offering health insurance to employees. Moreover, any future deadlines for these responsibilities should be designed with tax compliance burdens of a small business employer in mind.

For example, midsize and large employers are required to transmit Form 1095-C to employees at the end of January and required to provide IRS with Form 1094-C at the end of February (or end of March if filing electronically). Adding additional reporting deadlines during this period would be problematic. Instead, NFIB recommends Treasury and IRS examine incorporating as much of the Cadillac tax reporting into existing measures.

C. Income Tax Reimbursement

As currently proposed, employers must calculate and report liability to insurance carriers and the IRS, then pay insurance carriers, which then pay IRS. In this scenario, extra costs for administration and income taxes will be passed along from insurance carriers to employers. As stated in the Notice, "It is expected that, if a person other than the employer is the coverage provider liable for the excise tax, that person may pass through all or part of the amount of the excise tax to the employer in some instances... As a result, it is anticipated that the amount the coverage provider passes through to the employer may include not only the excise tax reimbursement, but also an amount to account for the additional income tax the coverage provider will incur (the income tax reimbursement)." NFIB is concerned that the proposed structure which relies on a complicated formula for the exclusion of income will ultimately lead to an otherwise unnecessary increase in the cost of coverage due solely to these administrative and embedded taxes (income tax reimbursement and excise tax reimbursement). NFIB recommends Treasury and IRS consider removing steps from this process that may reduce the probability of embedded cascading taxes that will escalate the price of coverage ultimately borne by employers.

Other Comments

A. Penalties for Failure to Properly Calculate Excess Benefit

As employers – especially small employers – first attempt to comply with the complicated Cadillac tax reporting and liability requirements, mistakes and miscalculations will occur. Section 4980I(e) assesses penalties for failure to properly calculate the excess benefit, but permits relief where the employer neither knew, nor exercising reasonable diligence would have known, that such failure existed. In this instance, the Secretary may waive part or all of the penalty imposed. NFIB recommends Treasury and IRS propose a strong reasonable diligence exercise protection in the proposed rule.

B. Other Reporting Requirements

Section 9002, Inclusion of Cost of Employer-Sponsored Health Insurance Coverage on W-2s, currently requires businesses with greater than 250 W-2 Forms to report the aggregate cost on employees' Form W-2, under Code DD. Presumably, this reporting requirement was intended as an accounting tool for the Cadillac tax. NFIB requests Treasury and IRS clarify whether Section 9002 is associated with the Cadillac tax, and, if so, when businesses with fewer than 250 W-2s must comply with the reporting requirement.

C. Initial Regulatory Flexibility Analysis

NFIB requests that Treasury and IRS conduct an initial regulatory flexibility analysis (IRFA) prior to proposing the regulation (and publish a summary in the proposed rule), as the Cadillac tax will have a significant economic impact on a substantial number of small entities. An IRFA would ensure that Treasury and IRS have considered all reasonable regulatory alternatives that would minimize the Cadillac tax's economic burdens, would address the Cadillac tax's direct effects and would explain why Treasury and IRS chose the regulatory approach described in the proposal over the alternatives. In addition, NFIB believes that Treasury and IRS should explore reasonably foreseeable indirect effects on small businesses to ensure the rulemaking relies on the best possible data.

NFIB is keenly interested in estimates of the kind and number of small entities in which the proposed rule will apply (divided into multiple classes of business size); the projected reporting, recordkeeping and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule. Treasury and IRS frequently refrain from conducting regulatory flexibility analyses (for example, there was no analysis conducted for Section 4980H, the Employer Shared Responsibility provision), stating that the departments are conducting their statutory responsibility, but an IRFA is appropriate in this instance.

NFIB thanks Treasury and IRS for the opportunity to comment on this important issue. Should Treasury and IRS require additional information, please contact NFIB's director of federal public policy, Kevin Kuhlman, at 202-314-2091.

Sincerely,



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