



American Benefits Council

Benefits Briefing: IRS Notice 2015-52

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Overview of the Excise Tax

- 40% nondeductible excise tax
- Effective beginning with 2018 tax year
- Applies to employer-sponsored group coverage (with limited exceptions)
- Tax determined based on value of coverage relative to certain dollar limits (with limited adjustments permitted)
 - \$10,200 for self-only
 - \$27,500 for other than self-only
- The tax raises a host of legal and business issues for employers as well as carriers and ASOs

Current State of IRS/Treasury Rulemaking

- Statutory language of IRC section 4980I
- IRS issued Notice 2015-16 this past spring
- Notice 2015-52 is a follow-on (and likely last) notice
- Proposed and final regulations to follow in sequence

Overview of Notice 2015-52

- Issued July 30th
- Comments due by October 1st
- Deals primarily with procedural and administrative issues related to the Tax
 - “Person that administers plan benefits” (“PAPB”)
 - The taxable period
 - Calculation and payment of the Tax
 - Exclusion of the Tax amount when valuing coverage
 - Employer aggregation rules

Overview of Notice 2015-52

- Also addresses:
 - Contemplated valuation rules for medical savings accounts, including specifically FSAs with flex credits
 - Contemplated methodology for age and gender adjustment
 - Interaction with employer mandate rules

Procedural and Administrative

- Who pays the tax?
 - The **health insurance issuer** is liable for paying the share of the 40 percent Tax attributable to health insurance coverage that it underwrites
 - The **employer** is liable for paying the share of the 40 percent Tax attributable to HSA and MSA contributions that are applicable employer-sponsored coverage
 - The “**person that administers the plan benefits**” is liable for paying the share of the 40 percent Tax attributable to “any other applicable employer-sponsored coverage”

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Procedural and Administrative

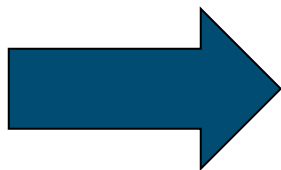
- “Person that administers the plan benefits”
 - The statutory language of IRC section 4980I does **not** define the phrase; nor is that phrase defined elsewhere in the IRC
 - Significantly, IRC section 4980I(f)(5) states:

(6) Person that administers the plan benefits

The term “person that administers the plan benefits” shall include the plan sponsor if the plan sponsor administers benefits under the plan.

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Procedural and Administrative

- “Person that administers the plan benefits”
 - Notice 2015-52 sets forth **two** (apparently alternative) approaches for determining who is the “PAPB”

Procedural and Administrative

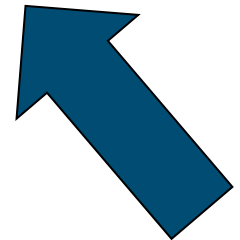
- “Person that administers the plan benefits”
 - Notice 2015-52 sets forth **two** (apparently alternative) approaches for determining who is the “PAPB”
 - 1. Performance of day-to-day functions:** PAPB would be the person responsible for performing the day-to-day functions that constitute the administration of plan benefits.
 - Per Notice 2015-52, day-to-day functions include, but are not limited to:
 - receiving and processing claims for benefits;
 - responding to inquiries; and
 - providing a technology platform for benefits information

Procedural and Administrative

- “Person that administers the plan benefits”
 - Notice 2015-52 sets forth **two** (apparently alternative) approaches for determining who is the “PAPB”
 - 2. *Ultimate responsibility:*** PAPB would be the person with ultimate responsibility regarding plan benefit administration.
 - Per Notice 2015-52, this includes ultimate responsibility for the following decisions even if the person is not routinely involved in the day-to-day administration of the plan:
 - Eligibility
 - Claims
 - Contracts with service providers

Procedural and Administrative

- “Person that administers the plan benefits”
 - Notice 2015-52 sets forth **two** (apparently alternative) approaches for determining who is the “PAPB”
 - 2. *Ultimate responsibility:*** PAPB would be the person with ultimate responsibility regarding plan benefit administration.
 2. Per Notice 2015-52, this includes ultimate responsibility for the following decisions **even if the person is not routinely involved in the day-to-day administration of the plan:**
 2. Eligibility
 3. Claims
 4. Contracts with service providers



Procedural and Administrative

- What is the taxable period?
 - Notice 2015-52 anticipates it will be the calendar year
 - IRS does **not** appear to be contemplating any special accommodations for non-calendar year plans
 - ***BUT REMEMBER:*** The Tax is calculated on a monthly basis. Thus, the employer will be measuring coverage on a monthly (versus annual basis)
 - In determining whether any Tax liability is owed, an employer will need to add up the value of coverage for a given employee for each calendar month and compare it to the applicable dollar limit applicable to that employee

Procedural and Administrative

- What is the taxable period?
 - **Example:** Employee Sarah is enrolled in major medical coverage for all of 2015 that costs \$450 per month. She is also enrolled in an HRA that costs \$400 per month and an FSA that costs \$200 per month. Assume the annual limit in 2018 for self-only coverage is \$10,200

The total value of Sarah's coverage is \$1,050, which is \$200 in excess of the \$850 monthly threshold (i.e., one-twelfth of \$10,200). Accordingly, there is an aggregate Tax liability of \$80 (i.e., 40% of \$200)

Procedural and Administrative

- Calculation and Payment of the Tax
 - Employer is at the center of this process
 - Technically will need to determine the value of applicable monthly coverages as well as the applicable monthly dollar limits on a per-employee basis (unless design benefit menu that is certain to NOT trigger the Tax)
 - Employer will then need to notice responsible parties of their share of any Tax liability owed with respect to an employee
 - The responsible parties will pay their respective shares of the Tax to the IRS

Procedural and Administrative

- Calculation and Payment of the Tax
 - Notice 2015-52:
 - Provides little detail about the notice and payment procedures that employers will need to follow
 - Does not address any appeal or resolution processes that must be followed prior to submission/payment of the Tax
 - Does not address timing for when parties must be noticed of their Tax liability
 - Does not address when the Tax must be paid
 - Does not address what information an employer must make available to the IRS and/or what role the employer must play if a downstream coverage provider (such as carrier) contests a Tax liability with the IRS

Procedural and Administrative

- Calculation and Payment of the Tax
 - Notice 2015-52:
 - Does state that excess reimbursements under discriminatory self-funded IRC section 105(h) arrangements **will** need to be valued when calculating the tax (even though currently excluded from Form W-2 reporting requirement)

Procedural and Administrative

- Exclusion of amounts attributable to the Tax

(2) Determination of cost

(A) In general

The cost of applicable employer-sponsored coverage shall be determined under rules similar to the rules of section 4980B(f)(4), except that in determining such cost, any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account and the amount of such cost shall be calculated separately for self-only coverage and other coverage. In the case of applicable employer-sponsored coverage which provides coverage to retired employees, the plan may elect to treat a retired employee who has not attained the age of 65 and a retired employee who has attained the age of 65 as similarly situated beneficiaries.

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - Three possible “costs”:
 - Tax itself
 - Indirect Tax effects for the responsible party:
 - Increased tax liability as a result of the lost deduction
 - Increased tax liability because if pass through Tax to employer or plan, any recouped amounts generally will need to be taken into income

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - Three possible “costs”:

- Tax itself

- Indirect Tax effects

- Increased tax deduction

- Increased tax liability because if pass through tax to employer or plan, any recouped amounts generally will need to be taken into income

Notice 2015-52 indicates that coverage providers that pass through the cost of the **Tax itself may *potentially* be able to exclude these amounts when valuing the coverage for purposes of IRC section 49801**

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - **Example:** In the above example, the issuer's insured group health plan coverage represented \$450 of the total \$1,050 of Sarah's monthly coverage, or 43 percent of the total coverage

The total monthly coverage of \$1,050 exceeds by \$200 the applicable monthly threshold of \$850. Thus, a Tax liability is owed with respect to the \$200 excess coverage

Given the issuer's coverage represents 43 percent of the total cost of Sarah's coverage, it would be liable for 43 percent of the amount of the 40 percent Tax owed, or \$34.40 (i.e., 43 percent of \$80)

If the issuer separately bills for this \$34.40, it appears it may not get counted when valuing Sarah's coverage

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - Three possible “costs”:
 - Tax itself
 - Indirect Tax effects for the responsible party:
 - Increased tax liability as a result of the lost deduction
 - Increased tax liability because if pass through Tax to employer or plan, any recouped amounts generally will need to be taken into income

Notice 2015-52 also seems to suggest that both indirect tax effects may *potentially* be excluded

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - **Example:** Using our current example, if the issuer charges Sarah's employer or the plan an additional \$34.40, this only recoups the amount of the tax.

But issuer also cannot deduct the \$34.40 as a business expense, so its taxable income is effectively increased, resulting in greater corporate income tax liability for the issuer. Assume issuer's corporate income tax rate is 20%, it would effectively owe an addition \$6.88 as a result of the lost deduction. (Indirect Tax Effect)

If the issuer separately bills for the \$6.88, it appears it may not get counted when valuing Sarah's coverage

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - **How to determine extent of lost deduction?**

$$\text{Income Tax Reimbursement} = \left[\frac{\text{Amount of the 40 percent Tax}}{1 - [\text{Marginal Tax Rate}]} \right] - \text{Amount of the 40 percent Tax}$$

**** Notice 2015-52 indicates IRS/Treasury is considering whether to require use of actual or standard tax rate**

Procedural and Administrative

- Exclusion of amounts attributable to the Tax
 - **Example:** Using our current example, if the issuer charges Sarah's employer or the plan an additional \$34.40, this only recoups the amount of the tax.

But issuer generally will need to take any recouped amounts (i.e., the \$34,40 and \$6.88) into income, so its taxable income is effectively increased, resulting in greater corporate income tax liability for the issuer. Assume issuer's corporate income tax rate is 20%, it would effectively owe an additional 20% of tax on \$41.28 (i.e., \$34.40 + \$6.88) (Another Indirect Tax Effect) or \$8.26

If the issuer separately bills for this \$8.26, it appears it may not get counted when valuing Sarah's coverage

Procedural and Administrative

- Employer aggregation rules
 - Notice 2015-52 restates IRC section 4980I:

(9) Aggregation rules

All employers treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as a single employer.

Procedural and Administrative

- Employer aggregation rules
 - Notice 2015-52 restates IRC section 4980I:

(9) Aggregation rules
All employers treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as a single employer.
 - However, it is unclear what exactly this language means:
 - Just about joint and several liability for Tax owed?
 - Or must you aggregate coverage of all affiliated entities?
 - How to allocate Tax liability among affiliated entities?

Valuation Rules

- Regarding medical savings accounts (such as FSAs, HRAs, HSAs generally)
 - Notice 2015-16 stated that contributions to HSAs (made on a pre-tax basis), Archer MSAs, FSAs and HRAs will all be taken into account when determining the cost of coverage
 - Notice 2015-52 sets forth a contemplated methodology for valuing these accounts

Valuation Rules

- Regarding medical savings accounts (such as FSAs, HRAs, HSAs generally)
 - **Notice 2015-52 contemplated approach:**
 - Example: Acme's HRA plan document provides that it will make an annual notional contribution of \$2,400 to employee Max's HRA

Under the contemplated approach, the \$2,400, regardless of when actually contributed and regardless of when used by Max, would be allocated ratably over the plan year

Thus, \$200 would be allocated to each calendar month of the plan year when valuing the extent of Max's coverage

Valuation Rules


- Regarding medical savings accounts (such as FSAs, HRAs, HSAs generally)
 - **Notice 2015-52 contemplated approach:**
 - Quite administrable:
 - Disregards timing of actual cash contributions
 - Disregards extent and timing of reimbursements
 - Would seem to exempt from valuation pre-2018 legacy amounts
 - But, could overvalue coverage in year of contribution if utilization is less than 100% of contribution

Valuation Rules

- Regarding **FSAs** with **employer flex credits**
 - Notice 2015-52 sets forth a contemplated special rule for FSAs with respect to employer “flex credits”

(B) Health FSAs

In the case of applicable employer-sponsored coverage consisting of coverage under a flexible spending arrangement (as defined in section 106(c)(2)), the cost of the coverage shall be equal to the sum of—



(1) the amount of employer contributions under any salary reduction election under the arrangement, plus

(ii) the amount determined under subparagraph (A) with respect to any reimbursement under the arrangement in excess of the contributions described in clause (1).

Valuation Rules

- Regarding **FSAs** with **employer flex credits**
 - Notice 2015-52 sets forth a contemplated special rule for FSAs with respect to employer “flex credits”

(B) Health FSAs

In the case of applicable employer-sponsored coverage consisting of coverage under a flexible spending arrangement (as defined in section 106(c)(2)), the cost of the coverage shall be equal to the sum of—

(1) the amount of employer contributions under any salary reduction election under the arrangement, plus

(ii) the amount determined under subparagraph (A) with respect to any reimbursement under the arrangement in excess of the contributions described in clause (1).



Valuation Rules

- Regarding **FSAs** with **employer flex credits**
 - Notice 2015-52 sets forth a contemplated special rule for FSAs with respect to employer “flex credits”

(B) Health FSAs

In the case of employer-sponsored coverage under a flexible spending arrangement in section 125, the cost shall be equal to

(1) the amount paid under any arrangement under the arrangement

(ii) the amount of the paragraph (b) reimbursement in excess of the amount of the clause (1).

(2) Determination of cost

(A) In general

The cost of applicable employer-sponsored coverage shall be determined under rules similar to the rules of section 4980B(f)(4), except that in determining such cost, any portion of the cost of such coverage which is attributable to the tax imposed under this section shall not be taken into account and the amount of such cost shall be calculated separately for self-only coverage and other coverage. In the case of applicable employer-sponsored coverage which provides coverage to retired employees, the plan may elect to



Valuation Rules

- Regarding **FSAs** with **employer flex credits**
 - Notice 2015-52 sets forth a contemplated special rule for FSAs with respect to employer “flex credits”
 - **Notice 2015-52 contemplated approach:**
 - Could be read to be an exclusion of “flex credits” for valuation. HOWEVER, appears rather to be a rule that would permit all contributions to be treated like employee salary reduction contributions
 - ONLY APPLIES IF the employer flex credits, when added to the employee’s salary reduction contributions are less than the Code section 125(i) limit (e.g., \$2,550 for 2015)

Valuation Rules

- Regarding **FSAs** with **employer flex credits**
 - Notice 2015-52 sets forth a contemplated special rule for FSAs with respect to employer “flex credits”
 - **Notice 2015-52 contemplated approach:**
 - **Example:** If an employee with a \$1,000 non-elective flex credit available reduces salary by an additional \$5,000 under a cafeteria plan and allocates \$2,550 to the FSA, the FSA would be treated as funded solely by salary reduction
 - As a result, the cost of applicable coverage would be \$2,550. Under the safe harbor proposal, the salary reduction taken into account would be counted only in the year an amount was elected for the FSA and, therefore, would be disregarded in later years if amounts were carried over

Age and Gender Adjustment

- IRC section 4980I(b)(3)(C)(iii) provides for an increase in the applicable dollar limits equal to the excess of
 1. The premium cost for the provision of FEHBP BCBS standard option, “if priced for the age and gender characteristics of all employees of the individual’s employer”, **AND**
 2. The same premium cost “if priced for the age and gender characteristics of the national workforce”

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 1: Determination of average cost for FEHBP coverage.** The average cost of applicable coverage under the Federal Employees Health Benefit Plan (“FEHBP”) (i.e., FEHBP average cost) would be determined by aggregating all claims expenses of the FEHBP standard option and dividing the total by the number of coverage units. Each employee policyholder would be a coverage unit

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 2: Determination of average cost for each age and gender group.** Claims expense data would be sorted into groups, separating the population into male and female coverage units and further separating each gender population into multi-year age bands. For example, the dollar amount of claims for all male individuals between the ages of 30 and 34 would be added together. The dollar amount of claims for each group would then be divided by the number of coverage units in that age and gender group to yield the average cost for that group (group average cost). A group average cost would be calculated in this way for each of the age and gender groups

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 3: Determination of group ratios.** Each group average cost would be divided by the FEHBP average cost to establish the ratio (group ratio) of the group average cost to the FEHBP average cost. The group ratio would be expressed as a fraction or percentage and would be determined periodically, but less frequently than annually

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 4: Determination of group premium cost.** The group ratio would be multiplied by the most recent annual premium cost of the FEHBP standard option to determine the annual premium cost for each age and gender group (group premium cost). The dollar amounts representing each group premium cost would then be used to populate the adjustment tables, to be published annually

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 5: Determination of national premium cost.** To determine the national premium cost, each group premium cost would be multiplied by the fraction of employees in the national workforce who are in that group. The product of each of these calculations would be added together to yield the national premium cost, which would be a single dollar amount that would be published annually

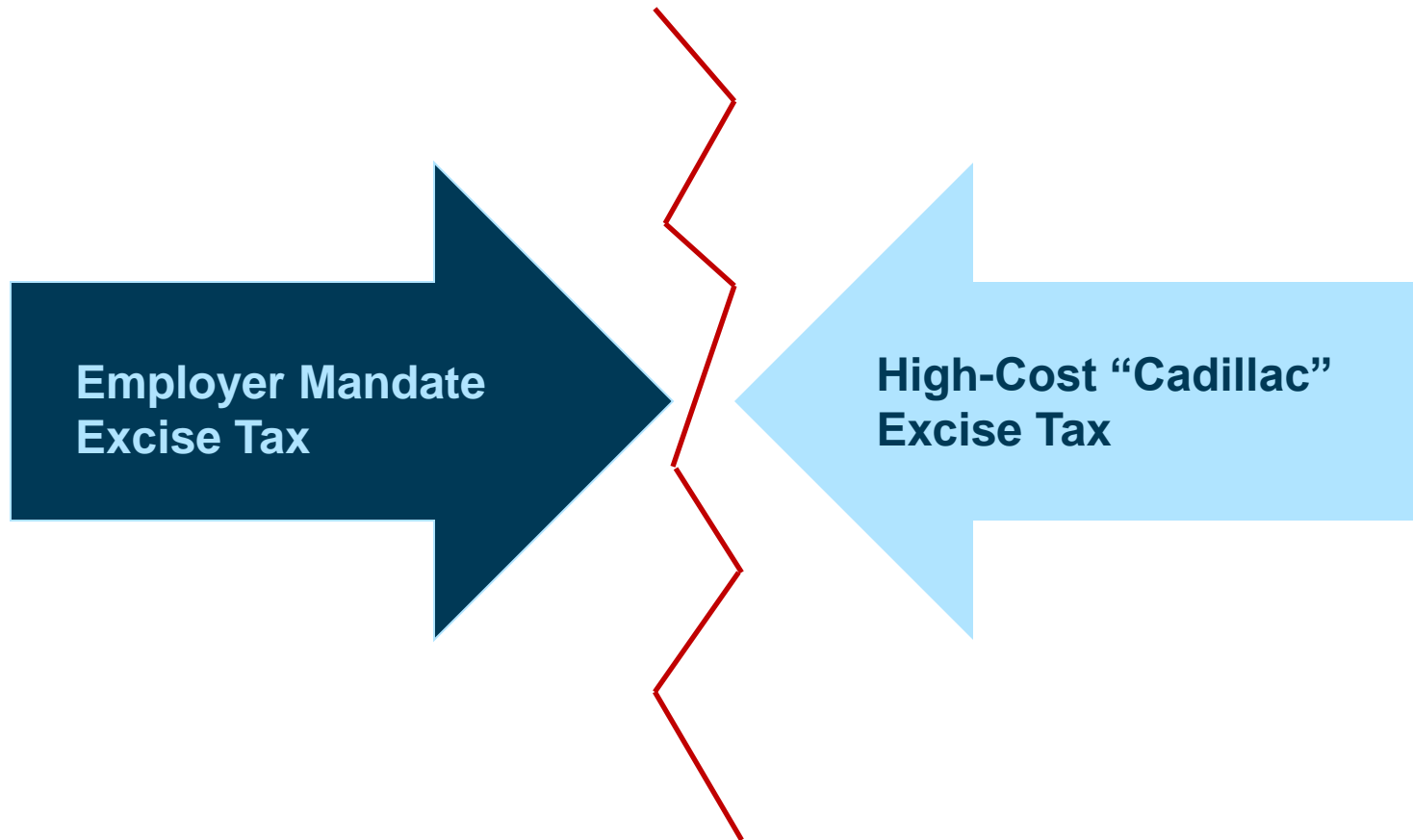
Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 6: Determination of employer's premium cost.**
Each employer would determine the fraction of its employees who are in each age and gender group. The employer would then multiply the group premium cost from the relevant adjustment table by the fraction of its employees in each group. The product of each of these calculations would be added together to yield the employer's premium cost, which would be a single dollar amount

Age and Gender Adjustment

- Notice 2015-52 sets forth a VERY complicated contemplated methodology
- **Notice 2015-52 contemplated approach:**
 - **STEP 7: Determination of adjustment.** The employer's premium cost would then be compared to the national premium cost. If the employer's premium cost exceeds the national premium cost, the excess dollar amount would be added to the dollar limit for that employer for purposes of determining the amount of any excess benefit

Interaction with Employer Mandate Rules



Interaction with Employer Mandate Rules

- Notice 2015-52 requests comments on the interaction between the employer mandate rules and the 40% Excise Tax
- Requests comments on how the provisions can be coordinated
 - “consistent with the statutory requirements”
 - In a manner that is administrable for the employer and the IRS

What Next?

- Proposed and final regulations to follow thereafter
 - Informal statements suggest proposed regulations by year-end
- Legislative activity
 - H.R.879 - Ax the Tax on Middle Class Americans' Health Plans Act (Rep. Guinta, R-NH), Introduced on 2/11/15
 - H.R. 2050 - Middle Class Health Benefits Tax Repeal Act (Rep. Courtney, R-CT), Introduced on 4/28/15
 - The Council's "Fight the 40" Coalition