SMALL BUSINESS MAJORITY

Comments regarding Notice 2015-16, proposed excise tax regulations

Small Business Majority is a national small business advocacy organization, founded and run by small business owners, to support America's 28 million small businesses. We conduct extensive opinion and economic research and work with our rapidly growing network of small business owners across the country to ensure their voices are an integral part of the public policy debate. We regularly engage our network of 40,000 small business owners and thousands of business organizations, along with a formal strategic partnership program of more than 125 business organizations, enabling us to reach more than 500,000 entrepreneurs.

We are writing today to express our concerns regarding proposed regulations on the excise tax, otherwise known as the "Cadillac tax," on employer-sponsored health coverage—particularly how the excise tax will be calculated and collected and its potential impact on small businesses. While many of the proposed rules may work for self-funded employers, we feel they would present problems in the small group market, where multiple parties and payers are involved.

Specifically, we believe including all pre-tax contributions to health savings accounts (HSAs), health reimbursement accounts (HRAs) and flexible savings accounts (FSAs) as part of the excise tax calculation could be burdensome and problematic for small business owners.

Most products in the small group market currently fall well below the dollar limit for the Cadillac tax; however, many small employers also offer HRAs, HSAs and FSAs in addition to employer-sponsored health plans. In fact, nearly one-quarter of small to medium-sized firms offer either an HSA or HRA, according to United Benefit Advisors. If all employer and employee pre-tax contributions to HRAs, HSAs and FSAs are factored into the excise tax, then the dollar limit for the Cadillac tax could be exceeded.

Many small employers purchase a health insurance product from an insurance company, and then separately, the employer may set up an HRA, HSA and/or FSA through a broker, bank or other institution for their employees. The insurance company typically will have no idea that the business has even set up one of these additional savings or reimbursement accounts for its employees. The insurer is only privy to the fact that it has sold a small business a health plan that is well below the threshold of the Cadillac tax, and thus, the insurer presumes it is exempt from the excise tax for selling this particular product.

The proposed regulations seem unclear as to who would be responsible for adding up the value of the insurance product and contributions to the savings or reimbursement account to determine whether or not an excise tax payment is owed by the employer and/or insurer. Will the IRS be making these calculations and then notifying the insurer and employer that they owe an excise tax and the amount they owe? Will the employer be responsible for making these calculations? If so, is the employer also responsible for telling his/her insurance company that it now owes the IRS an excise tax payment?

We highly advise against requiring employers to be responsible for making these calculations. Employers, particularly small businesses, do not have the administrative or HR capacity to make these sort of calculations and should not be held responsible for determining how much of an excise tax an insurance company does or does not owe.

We are also concerned about the proposed regulations counting an employee contribution to an HSA or FSA through payroll deduction as an employer contribution to these accounts. An employee contribution through payroll is made with employees' own money, and therefore should not be considered an employer contribution. Classifying employee contributions as employer contributions could mean that some insurance carriers and employers will owe a Cadillac tax payment solely because an employee has decided to place a large sum of money in an HSA or FSA.

If these proposed regulations are finalized as written, they could vastly reduce the use of HSAs, HRAs and FSAs because an individual employee's action could trigger an excise tax for the employer and insurer. What's more, insurers may seek to block employers from setting up HRAs, HSAs and FSAs because if the employer does so, the insurer could end up being responsible for paying an excise tax, even though they have sold a plan that is well below the Cadillac tax threshold.

As such, we recommend that employee contributions through payroll deduction not be considered employer contributions in determining the excise tax. We also recommend that employers not be subject to any additional reporting or other requirements. The IRS should be responsible for determining the total plan value of an insurance product combined with an HRA, HSA or FSA.

We urge you to consider exempting HRAs, HSAs and FSAs from the Cadillac tax if they are sold separately from a health plan. Without this exemption, we are concerned that insurers will seek ways to ban employers from using HRAs, HSAs and FSAs to reduce their potential liability of paying the excise tax. This would be burdensome to small business owners and their employees who rely on these benefit programs.

Sincerely,

David Chase, Healthcare Policy Director & California Director
Small Business Majority