



Center for Health

Health Care Reform Legal Update

HealthFlex Mini-Summit

March 11, 2015



General Board

Pension and Health Benefits

Caring For Those Who Serve

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Agenda

- ACA* Litigation
- ACA 2015 Outlook
- Reporting Requirements
- Cadillac Plan Tax
- Account-Based Plans

* ACA: Affordable Care Act (Patient Protection and Affordable Care Act, PPACA)

ACA Litigation

Premium Tax Credits

- Exchange plan premiums subsidized with federal assistance:
 - **Premium tax credit (PTC)**
 - Individuals and families with **household income*** **between 100-400%** of federal poverty level (FPL)

100% of FPL		400% of FPL	
\$11,670 (Single)	\$23,850 (Family of 4)	\$46,680 (Single)	\$95,400 (Family of 4)

- State and federal exchanges eligible for PTCs
 - Subject to ongoing federal court litigation challenge

* **Household income: Modified adjusted gross income (MAGI)**

Federal Exchange Litigation

Halbig v. Burwell*

King v. Burwell*

Challenged availability of premium tax credits through **federally-facilitated exchange** (FFE) and **partnership marketplaces** (“exchanges”)

- **4th Circuit: *King v. Burwell***
 - Held that PTCs were available through **all** exchanges
 - **Supreme Court granted *certiorari* on November 7, 2014**
- **D.C. Circuit: *Halbig v. Burwell***
 - 3-judge panel held that PTCs are available only for exchanges “established by a **state**”—July 22, 2014
 - Whole court (*en banc*) agreed to rehear the case December 17, 2014 (vacating three-judge panel’s ruling)
 - Case pended until Supreme Court rules in *King*

* **Sylvia Burwell: Secretary, U.S. Department of Health and Human Services (HHS)**

Tax Credit Cases

Halbig v. Burwell

King v. Burwell

Challenges to premium tax credits (PTCs) through federally-facilitated exchange/Marketplace (FFE)

- **ACA §1311:** “Each State shall...establish an American Health Benefit Exchange...for the State.”
- **ACA §1321:** “The [HHS] Secretary shall...establish and operate **such** Exchange within the State...”

Tax Credit Cases

- Code §36B(b)(2)(A) limits PTC availability to only taxpayers who enroll in exchange
“established by a state”
- IRS Final Rule authorized PTCs from FFE
- Similar cases in federal district courts
 - Indiana (7th Circuit area): Argued; decision pending
 - Oklahoma (10th Circuit area):
District court ruled **against** tax credits
 - Appealed to 10th Circuit
 - Oklahoma petitioned to be heard by Supreme Court with *King* → **Denied**

Tax Credit Case Outlook

Supreme Court granted *certiorari* November 7, 2014

Oral argument March 4, 2015; decision likely June 2015

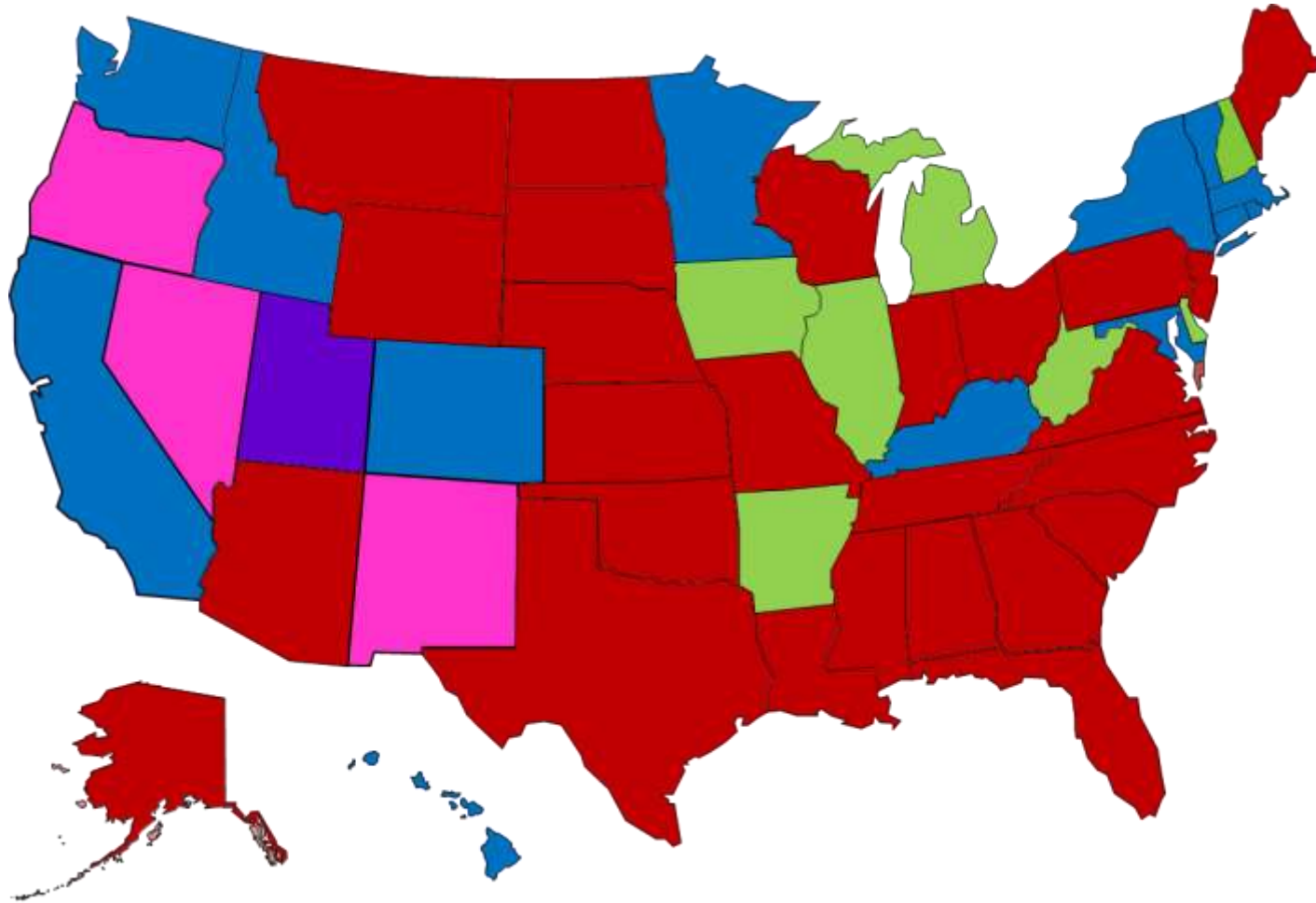
Arguments for Government: 1. Statute is unambiguous → 2. Statute is ambiguous →	1. Section must be read in context of whole statute (900 pages) 2. Agency ruling “reasonable,” so should be upheld (i.e., “ <i>Chevron</i> ” deference: courts defer to expert agencies)
Argument for Challengers: Statute is unambiguous →	Congress knows what it is doing when drafting text, and agency not given deference

Meanwhile: Tax credits allowed in FFE

2015 Outlook

Status of State Exchanges

February 2015



■ State Established Exchange
■ State Established Exchange Using Federal Exchange Support
■ Partnership Exchange

■ Federal Established Exchange (No State Exchange)
■ State SHOP/Federal Individual Exchange

ACA Enrollment 2014

As of November 2014	Overall Enrollment
ACA expanded enrollment	20.6 million
Expanded Medicaid enrollees	11.0 million
Marketplaces enrollees	9.6 million (6.7 million as of mid-November)

How many paid for Marketplace plans?	8.3 million (approx. 94%)
-----------------------------------------	---------------------------

PTC-eligible	87% (est.)
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Off-Marketplace QHPs*	8.0 million (est.)
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Previously uninsured	57% (est.)
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* QHPs: Qualified health plans

ACA Coverage Expansion—2015

As of February 2015	Open Enrollment Period
ACA expanded enrollment	24.7 million
Expanded Medicaid enrollees	13.0 million
Marketplaces enrollees	11.7 million

**How many paid
for Marketplace plans?** **10.4 million (approx.)**

PTC-eligible **87% (est.)**

Off-Marketplace QHPs **8.0 million (est.)**

2014 vs. 2015

Open Enrollment 2014

8.02 million
QHPs

7.08 million
paid

Open Enrollment 2015

11.74 million
QHPs

10.33 million
paid

46% increase

Open Enrollment

2014	October 1, 2013 – March 15, 2014
2015	November 15, 2014 – February 15, 2015 <ul style="list-style-type: none">• Projection: CBO*: 13 million vs. HHS: 9.1–9.9 million (<i>Charles Gaba of ACASignUps.net: 12 million</i>)• Outcome: As of February 15, 2015 → 11.74 million
2016	November 1, 2015 – January 31, 2016 <ul style="list-style-type: none">• Intended to be October 1 – December 15• Additional time for issuers to develop premium rates

* CBO: Congressional Budget Office

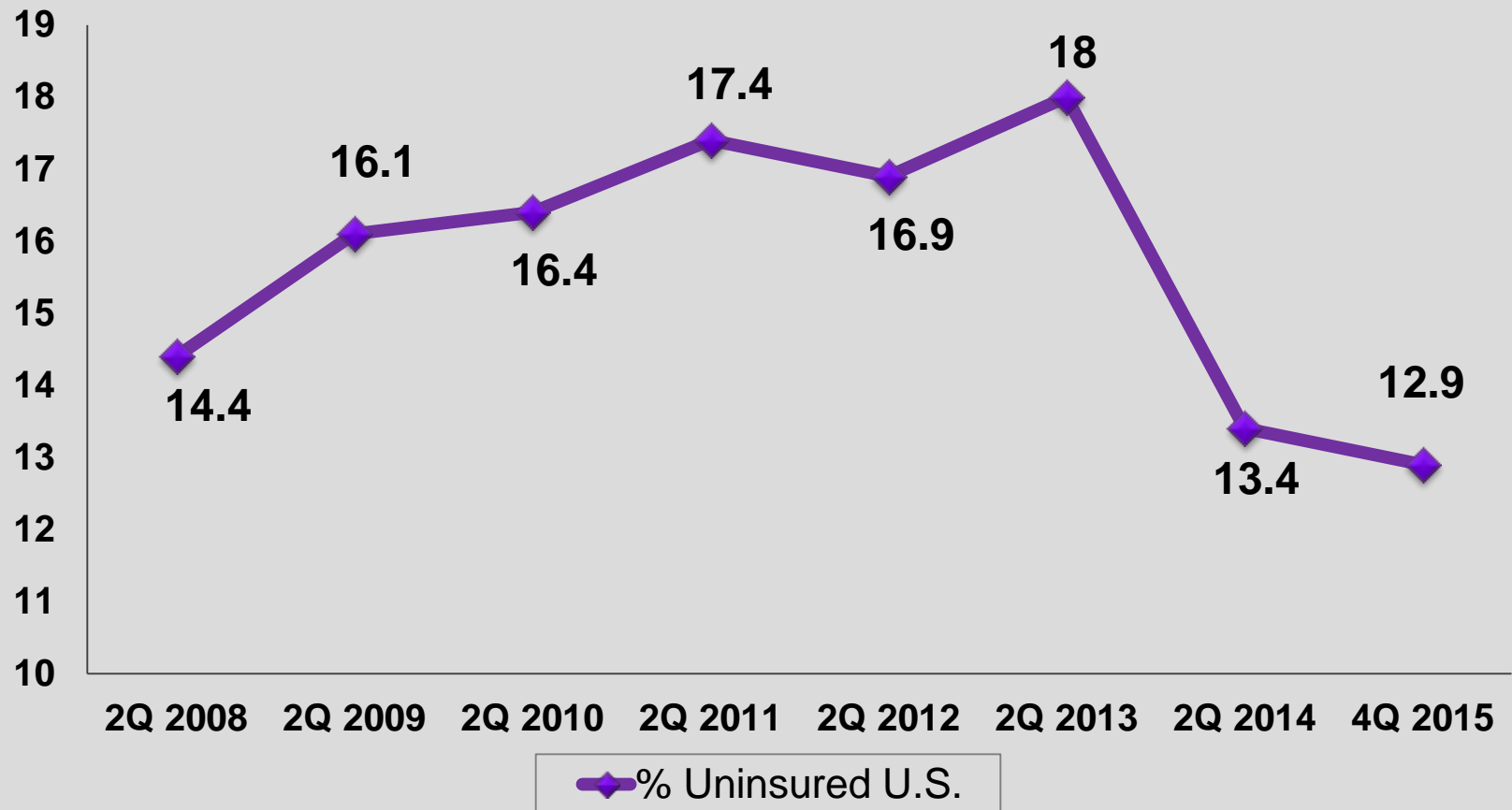
Special Enrollment Period

- **Tax Season Special Enrollment** → **47** states
- **www.healthcare.gov** →
March 15, 2015 – April 30, 2016

For individuals:

- Not enrolled in coverage for 2015
 - Can attest: Paid tax penalty for not having health coverage in 2014 with tax return
 - Can attest: First became aware of Shared Responsibility Payment **after February 15, 2015** while preparing 2014 tax return
- **10** state exchanges have similar dates

ACA Impact on Uninsured



Source: Gallup

Lower Uninsured Rates

State Category	% Uninsured		
	2013	2014 (Mid Year)	Changes
<ul style="list-style-type: none">• Expanded Medicaid• State or Partnership Exchange	16.1%	11.3%	- 4.8%
With only one of the above or neither	18.7%	16%	- 2.7%

Medicaid Expansion

By January 1, 2014 → 24 states
Expanded Medicaid

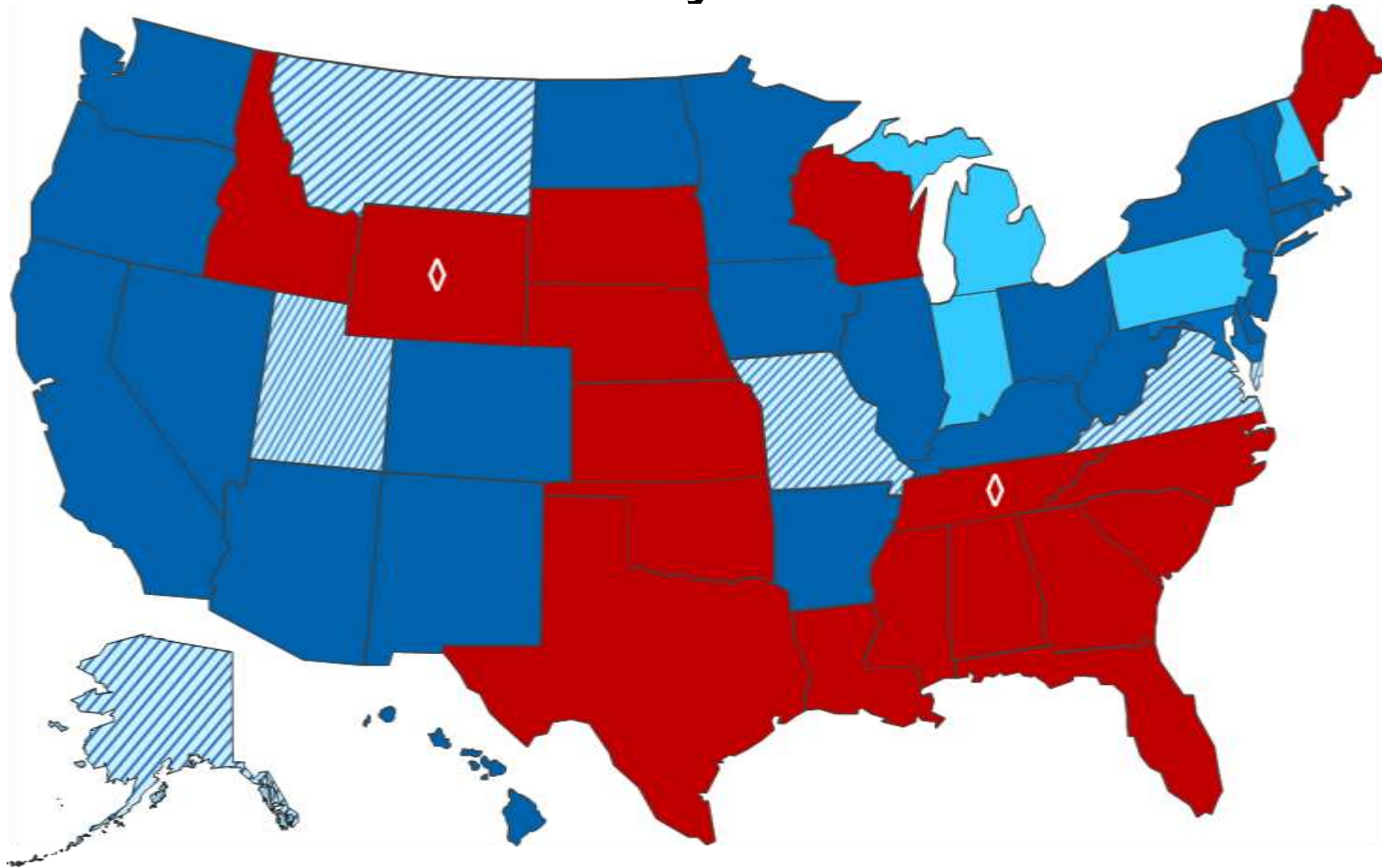
By January 2015 → 3 more states:
Michigan, New Hampshire, Pennsylvania
(Total 27)

After January 1, 2015 → 1 more state: Indiana
(Total 28)

4 more states seriously considering expansion:
Alaska, Missouri, Montana, Utah

ACA's Medicaid Expansion

February 2015



■ No Expansion ■ Expansion ■ Expansion Since January 1, 2014 ■ Considering Expansion

◇ Considered expansion for 2015, but defeated by state legislature.

Pressures for Expansion

- **23 non-expansion states:**
 - Forgo **\$423 billion** federal Medicaid through 2022
 - Health systems could lose **\$167 billion** in enhanced Medicaid payments
 - **Could cover 6 million more uninsured people through expanded Medicaid**
- Three largest health systems—Medicaid **expansion** states:
 - Hospital admissions: **↓ 10%–32%**
 - Uncompensated care: **↑ 47%**

ACA Reporting and Tax Forms

ACA Tax Reporting Regime

Individual Mandate

- *Form 1095-A, Form 1095-B or Form 1085-C*
- *Form 8965, Form 1040*

Employer Mandate

- *Form 1095-C*

PTCs

- *Form 1095-A, Form 1095-C*
- *Form 8962, Form 1040*

Tax Forms

Form 1040

- **Line 61 (New):** Individual

Form 8962

- Premium tax credit

Form 1095

- *1095-A*: Marketplace coverage
- *1095-B*: Plan coverage
(insured or self-funded employer plans)
- *1095-C*: Employer-provided coverage

[illegible]

Reporting Mandates

Minimum essential coverage

- **Issuers**—*Form 1095-A*
- **Plan sponsors**—*Form 1095-B*
 - **Regardless of size**
- **Employers**—*Form 1095-C*
 - **Applicable large employers only (ALEs)**

Employer Shared Responsibility

- **ALEs**—*Form 1095-C*

Individual Tax Returns

Form 1040

- **Line 61 (New):**
Individual Mandate
- **Line 69 (New):**
Net premium tax credit

Form 8962

Premium tax credit

Form 8965

Health coverage exemption

1040 U.S. Individual Income Tax Return **2013**

File for the year 2013. If you are a nonresident alien, you must file Form 1040-NR.

Personal Information: Last name, first name, middle initial, Social Security number, Date of birth, Marital status, Spouse's name, Spouse's Social Security number, Home address, City, State, ZIP code, Foreign country name, Foreign postal code, Foreign country name.

Filing Status: Single, Married filing jointly, Married filing separately, Qualifying widow(er), Head of household, Joint filer.

Exemptions: Yourself, Dependents, Exemptions for other persons.

Income: Wages, salaries, tips, etc., Taxable interest, Dividend income, Capital gains or losses, Other income, Retirement income, Unemployment compensation, Social Security benefits, Other income, Total income.

Adjusted Gross Income: Education expenses, Charitable contributions, State and local taxes, Health savings account deduction, Moving expenses, Deductible part of self-employment tax, Self-employment tax, Self-employed health insurance deduction, Penalty on early withdrawal of savings, Alimony paid, IRA deduction, Student loan interest deduction, Tuition and fees, Domestic production activities deduction, Add back (a) through (d), Subtract line 36 from line 35. This is your adjusted gross income.

Information Returns

Form 1095

- 1095-A: Marketplace coverage
- 1095-B: Plan coverage (insured or self-funded employer plans)
- 1095-C: Employer-provided coverage

Form W-2*

- **Box 12, Code DD:**
Cost of employer-sponsored health coverage

1095-B Health Coverage
Form 1095-B (2014)
DRAFT AS OF August 28, 2014 DO NOT FILE

Part I: Responsible Individual (File if 1095-B)

Part II: Employer-Sponsored Coverage (If Line 1 is A or B, complete this part)

Part III: Issuer or Other Coverage Provider

Part IV: Covered Individuals (Enter the information for each covered individual)

Individual's name (last, first, and middle initial)	DOB (MM/DD/YYYY)	SSN (or EIN if self-employed)	All covered all 12 months	All months of coverage												
				Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
1			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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* Delayed for small employers (< 250 W-2s) and employers in self-insured church plans

W-2 Cost of Coverage

W-2 Reporting

Employers (e.g., local churches) required to report “cost” of health coverage on employees’ W-2s



January 2013 on secular, large employer W-2s



Temporary exemptions* remain for:

- **Employers in self-funded church plans** (unless church plan is subject to ERISA)
 - **Small employers** (fewer than 250 W-2s)
 - Union plans
 - Health reimbursement arrangements (HRAs)
-

* Called “Transition Relief” in *IRS Notice 2011-28*.

W-2 Reporting

IRS may end exemption upon 6 months' notice

- 2017 tax year likely (ahead of Cadillac Tax)
 - **Notice 2015-16** hints exemption will end when Cadillac Plan tax regulations are final
- Cost of health coverage
 - For self-insured plans: **§4980B(f)(4)** “COBRA Rate”
- Church plans → exempt from COBRA
 - What about: blended rates, percentage of compensation, part of generalized church apportionment/assessment?
- Church Alliance comment letter

Cadillac Plan Tax

Cadillac Plan Tax

Excise Tax on high-cost plans: ACA Section 9001(a) ...added Tax Code §4980I

- Applies to “employer-provided health plans”—self-insured or fully-insured
- Provided to employee, former employee (retiree), surviving spouse or other “primary insured”
- Towers Watson Survey:
 - **73%** of companies are concerned about excise tax
 - **62%** are using “glide paths” of plan changes 2015 – 2018
 - **48%** likely to trigger excise tax in 2018
 - **82%** likely to trigger excise tax by 2023

Cadillac Plan Tax—2018

Applies to fully-insured and self-funded plans

Assessed on “cost of coverage”
for plans in excess of certain thresholds



40% excise tax on plan’s cost in excess of:

- **\$10,200** for **individual** coverage
- **\$27,500** for coverage “**other than individual**” coverage



Increased threshold for plans that cover pre-Medicare retirees or employees in high-risk jobs

- **\$1,650** individual or **\$3,450** family



Adjusted for inflation (CPI-U*)+1% (2018-2020);
CPI-U only after 2020

* **CPI-U: Consumer Price Index-Urban**

Notice 2015–16

- **February 23, 2015**
- Beginning of “regulatory conversation” with stakeholders
- Similar process used for ACA Employer Shared Responsibility Rule
- Future notices to follow before publication of proposed regulations

Cadillac Plan Tax

***Notice 2015-16* defines “applicable coverage” (subject to the Tax)**

- Coverage under a group health plan provided by an employer that is excluded from taxable income under Code Section 106 or would be if it were paid by the employer
- Applicable coverage can be paid:
 - **By employer** with nontaxable dollars, **or**
 - **By employee** with pre-tax or after-tax dollars

Cadillac Plan Tax

Likely to be **included**:

- Employer and employee contributions to health flexible spending account (FSA)
- Employer and employee pre-tax contributions to health savings account (HSA)
- Health reimbursement arrangements (HRA)
- **Where applicable:**
 - Executive physical programs
 - On-site medical clinics

Cadillac Plan Tax

Likely to be **excluded**:

- Vision and dental benefits if “**excepted benefits**” either fully-insured or self-insured
- Employee after-tax contributions to HSAs
- Employee assistance programs (possibly)
- Long-term care insurance

Cadillac Plan Tax

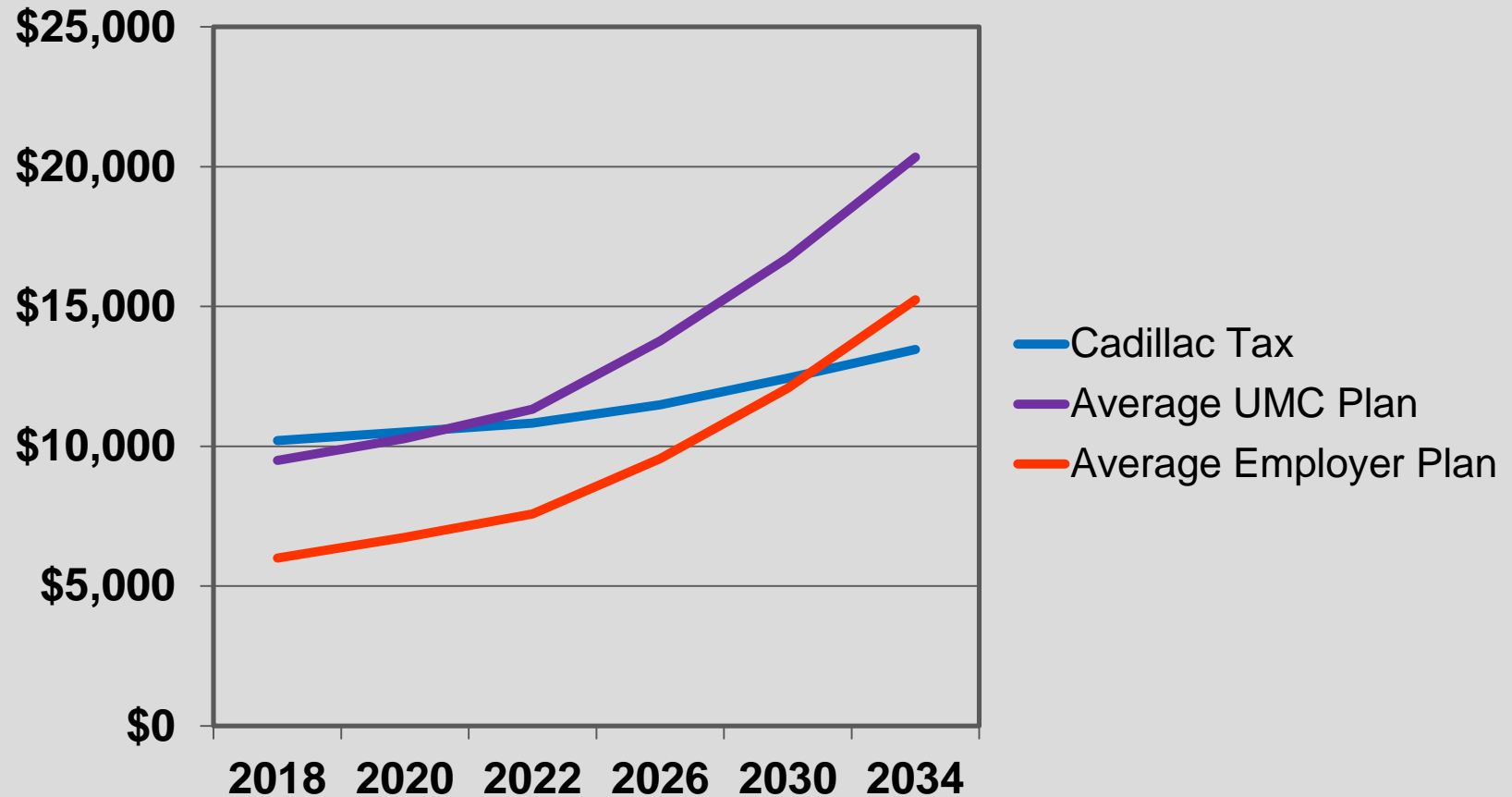
- Cost of applicable coverage is:
 - Employer-paid portion **and**
 - Employee-paid portion (cafeteria plan) of:
 - Premium cost for fully-insured plans
 - “COBRA cost” for self-insured plans
 - COBRA can be actuarial calculation, **or**
 - Past cost basis—last 12 months
- HRAs—Two options under consideration
 - Amount newly available to employee each year **or**
 - Total amount spent by employer through HRAs divided by number of employees
- Applies only to coverage in which employee is **enrolled, not simply offered**

Cadillac Plan Tax

- Other items for implementing regulations:
 - Inflation adjustment in 2018 (possible)
 - If per-employee cost of Blue Cross and Blue Shield option under FEHBP* for plan year **2018** exceeds such cost for plan year **2010** by more than **55%**
 - Demographic adjustment factor **probable**
 - Geographic adjustment factor **possible**
- Unions benefit §4980I(b)(3)(B)(ii):
 - Union plans only subject to **family coverage** threshold—no matter the type of coverage

* FEHBP: Federal Employee Health Benefit Plan

Cadillac Plan Tax—Illustration



Account-Based Plans and Excepted Benefits

Health Reimbursement Arrangements

IRS Notice 2013-54: restrictions on health reimbursement arrangements (HRAs)

- No “stand-alone” HRAs for active employees
- HRAs allowed if “integrated” with **group** plan
 - Allows establishment of “private exchanges”
 - Prohibits combining HRAs with public exchanges
- Stand-alone HRAs allowed for “**retiree-only**” plans
 - However, no PTC for those retirees (i.e., no “double dip” on tax benefits because they have minimum essential coverage)

Employer Payment Plans (EPPs)

Restricts 1961 IRS rule (*Rev. Rul. 61-146*)—
had allowed employers to reimburse premiums paid for
individual health insurance policies on tax-favored basis
("employer payment plans")

- Many local churches relied on this practice
 - Particularly for lay employees and part-time clergy (not in denominational plan)
- Individual policies (through exchanges or private market) **can only be paid with increased taxable salary**

Marketplace plans generally cannot be paid tax-free:

- By employer, or
- Through cafeteria plan pre-tax (other than SHOP*)

* **SHOP: Small Business Health Options Program**

ACA FAQ Part XXII

- IRS/DOL/HHS* repeat warnings on EPPs and HRAs with individual market and exchange policies/plans
 - ACA FAQ Part XI
 - *Notice 2013-54*
 - ACA FAQ Part XXII
- “Shot across the bow” for some vendors:
Employer may not utilize a **Section 105** plan or any other mechanism to reimburse employees on **pre-tax or tax-free basis** for individual health insurance premiums purchased on ACA Marketplace or off-Marketplace

* IRS: Internal Revenue Service; DOL: Department of Labor;
HHS: Department of Health and Human Services

ACA FAQ Part XXII

- **Taxable reimbursements disallowed:**
 - Employer payment plan (EPP) that reimburses employee for premiums paid for individual plan also **prohibited**—even if treated as taxable income by ACA Market Reforms
- Paying employees with high claims to waive coverage under the employer’s health plan—**prohibited** under ACA and HIPAA
- **Schemes for reimbursing individual health insurance premiums are “group health plans”**
 - Must comply with health reform law mandates—even if employer has no involvement in choosing individual’s health coverage

Excise Tax Penalties

- Code §4980D
 - **\$100 per day per “affected individual” ... can accumulate quickly!**
 - Applies to church plans – no exemption
- ACA Market Reforms
 - **No annual limit, no lifetime limit**
 - **Preventive health coverage with no cost-sharing**

Penalties for violations—accrue to plan sponsor

Notice 2015–17

- **Repeats rule:** No employer payment plans taxable or nontaxable after **June 30, 2015**
- **However—provides transition relief:**
No §4980D penalty for violations
January 1, 2014 – June 30, 2015
- **One Employee Plan Exception**

Two Safe Harbors

- **Added Compensation:** Unconditional access to cash wages, not encumbered by the requirement to purchase health coverage.
- **Payroll Practice (DOL safe harbor):**
 - **Employer makes no contributions—**
Payment is part of employee's taxable salary being forwarded by employer to issuer
 - Employee participation is **completely voluntary**
 - Employer collects premiums through **payroll deduction**; remits them to issuer without endorsing the program
 - Employer receives **no consideration (e.g., cash)** other than reasonable compensation for administrative services

“Retiree-Only” Plans

- Group health plans **do not include** plan with “fewer than two current employees”
 - Mostly, these are “retiree-only” plans
- Exempt from ACA Market Reforms
 - **Key:** Exempt from annual limits prohibition
- Exempt from HIPAA (partly)

Medicare Exchange HRAs: OK (generally)

Areas of Concern

Certain types of individuals covered in plans for retirees...may cause plan to have **more than one** “current employee”

- **Long-term disabled covered**
 - ACA: FAQ temporary guidance from Departments (government) allows them in retiree plans
- **“Working aged”**
 - **Retired-rehired** (reappointed retired clergy)
 - **Active employees age 65 and older**

“One Employee” Exception

Strict reading of Tax Code (§9831):

Employer plan with **only one*** employee may be **exempt** from ACA Market Reforms, i.e., not a “group” health plan

- **Example:** Plan of small local church with one clergyperson, no lay employees

Would permit **single employee** stand-alone HRA or EPP

- **Nontaxable** employer \$ used to purchase individual plan (however → no premium tax credit according to IRS guidance)
- **Notice 2015-17 does not state this expressly, but appears to support this interpretation**
 - Statements from IRS officials support, too

* Fewer than two “current employees”

Questions?

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