Omnibus Bill Signed Into Law; Delays Cadillac Tax

President Obama has signed the omnibus legislation that includes the Consolidated Appropriations Act for 2016 and a tax extenders package. The agreement will keep the federal government running through September 2016. Within the legislation is language that significantly impacts provisions of the Patient Protection and Affordable Care Act (ACA), largely through delays of upcoming taxes.

Cadillac Tax Delay

The most significant delay contained in the omnibus bill is a two-year delay on the “Cadillac tax” or the 40 percent excise tax on high-cost health insurance.

The Cadillac tax was set to go into effect on January 1, 2018. That is now delayed until January 1, 2020. If it goes into effect in 2020, it will now be tax deductible for employers. Previously the tax was non-deductible from federal income tax.

The excise tax is levied on each component of a high cost insurance plan (health, HSA, dental, etc.) based on its share of the total aggregate value. Insurers will pay the tax on insured plans, employers will pay the tax on plans under which the employer makes health savings account (HSA) or medical savings account (MSA) contributions, and the entity or person administering the plan will pay the tax on self-insured plans.

The IRS had unofficially indicated that proposed regulations relating to the Cadillac tax would be issued by April 2016, and the agency would not begin to work on proposed regulations for nondiscrimination rules for fully insured plans until the Cadillac tax regulations were released. It is unclear how this delay will affect that timeline.

Health Insurance Provider Fee Moratorium

The omnibus bill also put a moratorium on the Health Insurance Provider (HIP) Fee for 2017, which went into effect in 2013 and will return in 2018. The HIP fee imposes an aggregate annual tax apportioned among health insurers of “United States health risks” whose annual net premiums written exceed $25 million based on relative market share.

Insurers required to pay the tax are those providing health insurance during the calendar year in which the tax is due.

The annual tax burden shared by health insurers is:

- $8 billion in 2014
- $11.3 billion in 2015
- $11.3 billion in 2016
- $13.9 billion in 2017 (now in moratorium)
- $14.3 billion in 2018

After 2018 the applicable tax is indexed to the rate of premium growth of the prior year's premium, defined as "the applicable amount for the preceding calendar year increased by the rate of premium growth for such preceding calendar year."

Medical Device Excise Tax Delay

The omnibus bill also eliminated the medical device excise tax for 2016 and 2017. The tax imposes a non-deductible tax on the sale of any taxable medical device sold by the manufacturer, producer or importer of the device (according to market share) in the amount of 2.3 percent of the price for which the medical device is sold. Generally, the manufacturer or importer of a taxable medical device is responsible for filing Form 720, Quarterly Federal Excise Tax Return, and paying the tax to the IRS.

The ACA defines a "taxable medical device" as any device as defined in the Federal Food, Drug and Cosmetic Act intended for humans, but does *not* include: (1) eyeglasses; (2) contact lenses; (3) hearing aids; and (4) any other medical device determined by the Department of Treasury to be of a type which is generally purchased by the general public at retail for individual use.

There has been bipartisan opposition to the medical device excise tax in recent years.

Miscellaneous

The omnibus bill also limits funding for the mandatory "risk corridor" program established by the ACA (for calendar years 2014 to 2016) and a permanent "risk adjustment" program for qualified health plans in the individual and small group markets offered through an Exchange, excluding grandfathered coverage. The program is intended to limit losses and gains but provide more certainty to insurers in the Exchange. The spending limit means that payments to insurance companies with excess loss will not be fully funded.

The legislation also eliminates funding for the Independent Payment Advisory Board (IPAB) for the 2016 year. IPAB, or "the death panel" as politicians famously called it, is a panel of experts that are convened to recommend spending cuts if Medicare spending grows too quickly. However, since the enactment of the ACA, Medicare has never grown at a rate that triggered the convening of the panel.

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