ACA Enforcement Update:

IRS Employer Mandate Enforcement and Cadillac Tax Implementation

To the surprise of the employer community, the Internal Revenue Service ("IRS") quietly announced in November 2017 that they will begin enforcement of the Employer Mandate. In the wake of this announcement, the IRS has already sent out a number of letters to employers assessing penalties for the 2015 calendar year. Many of these letters have included sizeable, multi-million dollar assessment amounts.

As a refresher, the employer mandate under the Affordable Care Act ("ACA") penalizes employers who do offer employee coverage or do not offer coverage which meets minimum value and affordability requirements. It is important to note that the mandate penalties apply to firms with 50 or more full-time employees.

Despite the IRS's enforcement of the employer mandate, it has been suggested that the Service may be barred from assessing penalties, at least for 2015, for several important reasons. First, the law requires, as a pre-condition to assessing penalties, that ACA Exchanges notify an employer that one or more of its full-time employees are: 1) enrolled in an Exchange plan; and 2) assessed a premium subsidy. Considering that law requirement, the

Federally-facilitated Exchange did not send any of the required notifications to employers for the 2015 calendar year, nor did the majority of the State-based Exchanges. Thus, it has been argued that the failure to follow this "process" outlined in the ACA language potentially bars the IRS from assessing penalties for 2015, unless and until the ACA Exchanges "cure" this process defect by actually sending a 2015 notification to employers.

Importantly, no notifications have been sent by any ACA Exchange for 2017, although the Federal Exchange did send out some notifications in the summer of 2016 (for the 2016 calendar year). While this argument is unlikely to derail the IRS's current enforcement activities, it may delay enforcement if it resonates with the court or Administration.

Legislation Introduced on Employer Mandate Penalty Waivers and Cadillac Tax Delay

Waiver of Employer Mandate Penalties

In the wake of these IRS enforcement actions and letters, Rep. Devin Nunes (R-CA) and Rep. Mike Kelly (R-PA) of the House Ways and Means Committee introduced legislation in early-December 2017 that seeks to waive the employer mandate penalties retroactively (2015-2017) and prospectively for 2018. The "waiver" proposal could potentially be included in an end-of-year legislative package, which may be enacted in the beginning of next year (Note: This may occur after the publishing deadline).

Cadillac Tax Delay

Republicans on the House Ways and Means Committee have also called for an additional one-year delay of the Cadillac Tax. Recently, SIIA joined 35 other industry associations on a letter imploring Congress to further delay implementation in the short-term, while looking at a long-term solution.

With Treasury signaling a move towards issuing Cadillac tax regulations – and employers already planning for 2020 – addressing the tax now is critical in preventing cost increases to employees. As previously reported, while the Cadillac tax was intended to target only high-value plans, it is just a matter of time before the tax is triggered on a much larger majority of employees and their dependents, particularly among small businesses.

SIIA continues to talk to Members of Congress on these issues and engaging in coalition activities, and will provide updates as Congress moves on year-end legislation. ■