

The new health care legislation makes sweeping changes to the Internal Revenue Code. The following, non-exclusive summary identifies the key tax changes set forth in the Patient Protection and Affordable Care Act (PL 111-148, 3/23/2010)(the "Health Care Act"), as amended by the Health Care and Education Reconciliation Act of 2010 (the "Reconciliation Act") (PL 111-152, 3/30/2010 H.R. 3590). The following is subject to revision based on further review of these extensive statutes. Please contact the undersigned for clarifications or suggestions.

- **"Surtax" On Net Investment Income** – An additional 3.8% tax on "net investment income", which can include dividends and capital gains, for "higher income" taxpayers (using a \$200,000 threshold, as calculated in the statute)
- **Excise Tax on Medical Devices** - A 2.5% excise tax would apply to manufacturers of medical devices sold for use in the U.S. The tax does not apply to exported devices or retail sales
- **HSA Pretax Funds or HSA/FSA Reimbursement May No Longer Be Used For Over-The-Counter Medication** – This pre-tax income may be used in this manner only for prescribed medications and insulin.
- **Increased Penalties For "Non-Qualified" HSA Distributions** - The penalty for nonqualified HSA distributions would be increased from 10% to 20% for disbursements made during tax years beginning after 2010. (IRC § 223)
- **New Excise Tax "Executive" Insurance Coverage** – Levies a 40% nondeductible excise tax on health coverage with premiums exceeding \$10,200 for singles and \$27,500 for family coverage (indexed for inflation), effective for tax years beginning after 2012. Taxpayers over 55 years old and certain high-risk professions (*e.g.* firefighters, construction and mining workers) have higher thresholds. There are also higher limits for health insurance plans maintained in the 17 states in which health care is least affordable for the year ended December 31, 2012. Employers offering such plans are required to aggregate the coverage subject to the limit and file an informational return reporting the amount subject to the excise tax. The insurance companies are responsible for paying the tax, the costs of which will likely be passed on to the companies offering such coverage
- **Cap On Contributions To Flexible Spending Accounts In Cafeteria Plans** – Now limited to \$2,500 per year, effective for tax years beginning after 2010. (IRC § 125)

- **Additional Informational Returns** - Information returns are required for payments aggregating \$600 or more in a tax year, including one time payments and payments made to corporations in addition to individuals. (IRC § 6041)
- **Increased Regulation of Hospitals** - Effective for tax years beginning after the enactment date, IRC § 501(c)(3) hospitals would be subject to new requirements, e.g., a community health needs assessment, promulgation and dissemination of a written financial assistance policy, and new reporting and disclosure rules. (IRC § 501)
- **Elimination of Medicare Part D Deductions** - The deduction for expenses allocable to Medicare Part D subsidy would be eliminated, effective for tax years beginning after 2010. (IRC § 139A)
- **Reduced Income Tax Deduction For Medical Expenses** - The floor beneath itemized medical expense deductions would be raised from 7.5% of adjusted gross income (AGI) to 10%, effective for effective for tax years beginning after 2012. The AGI floor for individuals age 65 and older (and their spouses) would remain unchanged at 7.5% until 2017. (IRC §§ 56, 213)
- **Limitations on Deductibility of Insurance Company Executive Compensation** - A \$500,000 deduction limit would apply to the remuneration of officers, employees, directors, and service providers of covered health insurance providers. This limit would be effective for remuneration paid in tax years beginning after 2012 with respect to services performed after 2009. (IRC § 162)
- **Small Business Safe Harbor From Non-Discrimination Provisions Applying To Cafeteria Plans** - For tax years beginning after 2010, a safe harbor from the nondiscrimination requirements for cafeteria plans would be provided for eligible small employers. The safe harbor would also apply to the nondiscrimination requirements for specified qualified benefits offered under the cafeteria plan, including group term life insurance, coverage under a self insured group health plan, and benefits under a dependent care assistance program. (IRC § 125)
- **Tax Credit For Health Care Research** - A temporary tax credit, subject to an overall cap of \$1 billion, would be created to encourage investments in new therapies to prevent, diagnose, and treat chronic diseases, effective for expenditures paid or incurred after 2008 for tax years beginning after 2008. The credit would sunset at the end of 2010.
- **Penalty For Employers Not Offering Health Insurance** - Employers will have to either provide health insurance to their employees or make a contribution to help fund affordable health insurance. Those choosing to offer coverage contribute at least 72.5% of premiums for workers, 65% for families. Low-wage workers who cannot afford coverage could choose subsidized coverage from a health insurance exchange, to which the employer would have

contribute. Employers not offering qualified coverage would pay a payroll tax equal to 8% of their payroll. Small businesses (annual payrolls below \$500,000) would be exempt from coverage requirements, including the 8% payroll contribution for failure to provide health benefits to their workers. The 8% contribution requirement would be phased in for small businesses with an annual payroll between \$500,000 and \$750,000. (IRC § 3111)

- ***Tax Credits For Small Businesses Offering Health Insurance*** - Tax credits would be available for businesses with 10 or fewer employees and \$20,000 or less in average wages. The credits phase out for companies having 25 or more employees, or where employees' average wages are \$40,000 or more. The credits roll over to the first two years that an employer offers qualified coverage. Under certain circumstances, firms with relatively few employees and relatively low average wages would be eligible for tax credits to cover up to half of their contributions toward health insurance premiums.
- ***Individual Penalty For Failing To Purchase Health Insurance*** - Individuals without health insurance coverage would be subject to an additional tax equal to the greater of 2.5% of their adjusted income above the filing threshold, or \$695 per uninsured adult in the household (the penalty amount to be phased in beginning in 2014). There are other enumerated exemptions to the coverage penalty. The legislation provides for financial assistance for premiums and cost sharing for individuals and families with incomes up to 400% of the federal poverty level (FPL).
- ***After-Tax Purchases of Coverage From Insurance Exchange*** - Coverage purchased through the insurance exchange could not be purchased on a pre-tax salary reduction basis (*i.e.* in a cafeteria plan) unless the purchaser's employer is also eligible to offer employer coverage through the exchange. (IRC § 125)
- ***Reinsurance*** - A temporary reinsurance program will be established to reimburse participating employers that provide health benefits to retirees (age 55-64) and their families. Subsidies received by the employer or health plan would not be includable in gross income. (IRC § 139A)
- ***Health Coverage For Domestic Partners*** - Certain health related benefits applicable to spouses and dependents would be extended to a person who is eligible for coverage under the employer's plan but is not a spouse or dependent. (IRC § 106)
- ***Fee Regime*** - Annual fees would apply to health insurance providers as well as to certain pharmaceutical manufacturers and importers, medical device manufacturers and importers.
- ***Allocation of Interest Expense and Application of Foreign Tax Credit Rules*** - Liberalized rules for allocating interest expenses between U.S. and foreign source income for purpose of the timing limitations of the foreign tax credit rules. (IRC § 864)

- ***“Tax Avoidance Jurisdiction” Rules and Recognition of U.S. Source Income*** – Increased income recognition requirements for foreign multinational corporations incorporated in “tax avoidance” jurisdictions. (IRC § 894)
- ***Codification of the Economic Substance Doctrine*** (IRC § 7701)
- ***Increased Scrutiny of Reporting Positions*** - Certain large or publicly traded persons will be made subject to a more-likely-than-not standard for purposes of avoiding underpayment penalties. (IRC § 6664)

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