

# Health Care Reform Act

March 25, 2010

Special Report

## HIGHLIGHTS

- Individual Responsibility Requirement
- No Employer Mandate
- Small Business Tax Credit
- Additional Medicare Tax On Higher-Income Individuals
- Excise Tax On High Dollar Plans
- Market Sector Fees
- Codification Of Economic Substance Doctrine
- And More

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## Congress Passes Reconciliation Act, Completing Overhaul Of Health Care Reform

Congress passed the Health Care and Education Reconciliation Act of 2010 (H.R. 4872) on March 25, 2010, completing a massive overhaul of the nation's health insurance and health delivery systems. The Reconciliation Act modifies the Patient Protection and Affordable Care Act of 2010 (P.L. 111-148), which the President signed on March 23. Combined, the two new laws include more than \$400 billion in revenue raisers and new taxes on employers and individuals.

The Reconciliation Act, which passed in the Senate by a 56-43 vote on March 25, is slightly different from the version passed by the House on March 21. It was changed to accommodate a technical rule related to student loan funding. Consequently, the bill was immediately sent back to the House, which approved it as amended, on March 25. President Obama has indicated he will quickly sign the Reconciliation Act to complete the health-care reform package.

**IMPACT.** *The health care reform package (the Patient Protection Act as amended by the Reconciliation Act) does not mandate employer-provided coverage but it includes "play or pay language." On the revenue side, the health care package includes an additional Medicare tax on higher-income individuals' wages, a new Medicare tax on net investment income, and a delayed excise tax on high-dollar insurance plans, among its \$437 billion in new taxes, fees and penalties.*

**IMPACT.** *The IRS would be responsible for overseeing a significant part of health*

*care reform, such as the administration of additional taxes on individuals and employers, determinations of various exemptions from those taxes, and oversight of new information reporting requirements. On March 25, IRS Commissioner Douglas Shulman said that one of the agency's first priorities will be guidance on the new small business tax credit for health insurance coverage.*

## IMMEDIATE CHANGES

Many of the key provisions in the health care package take effect in 2010:

- Small business tax credit;
- Creation of a temporary high-risk pool for individuals who are uninsured because of a pre-existing condition;
- Temporary reinsurance program for early retirees;
- No discrimination against children with pre-existing conditions;
- No lifetime limits on coverage;
- Extends coverage for young persons under age 27 through parents' insurance; and
- Provides a \$250 rebate to Medicare beneficiaries who are affected by the "donut hole."

## CORE CONCEPTS

The Patient Protection Act, as amended by the House Reconciliation Act, will fundamentally alter the health care landscape for individuals and employers. All individuals not covered by Medicare or Medicaid will be required to obtain health

care coverage or pay a penalty unless they are exempt from the individual responsibility mandate. Employer-provided coverage will generally satisfy the universal coverage requirement. Lower-income individuals, as well as some middle-income families, may qualify for a premium assistance tax credit or voucher to help pay for health insurance. Large employers electing not to offer qualifying coverage, that offer coverage that does not meet new standards, or that offer coverage but have at least one full-time employee who qualifies for a premium assistance tax credit or cost sharing, will be subject to an additional tax. Exceptions as well as a tax credit are available for small businesses. The health care reform package does not include a public option but does provide for state insurance exchanges where individuals can shop for coverage.

**COMMENT.** *Individuals who currently have coverage and wish to retain that coverage can do so under a “grandfather” provision in the health care package and the coverage will be deemed to meet the individual’s responsibility to have health coverage. A similar grandfather provision applies to employers that currently offer coverage.*

## INDIVIDUALS

Starting in 2014, the health care reform package (the Patient Protection Act as amended by the Reconciliation Act) requires most individuals not eligible for Medicaid, Medicare, other government-sponsored coverage or otherwise exempt to maintain minimum essential coverage. Individuals who fail to maintain minimum essential coverage would

be liable for a penalty. The health care package uses a formula to calculate the penalty taking into account the taxpayer’s household income and a flat dollar amount.

“To help finance health care reform, the Patient Protection Act, as amended by the House Reconciliation Act, includes a 40 percent excise tax on high-dollar health insurance plans to begin in 2018, an increase in Medicare payroll taxes starting in 2013 on taxpayers in the \$200K-plus income category (\$250K for joint filers), and new fees on certain health-related industries.”

The monthly penalty with respect to an adult individual who fails to carry minimum essential coverage is equal to 1/12 of the greater of the:

- Flat dollar amount, or
- Applicable percentage of income.

The flat dollar amount starts at \$95 in 2014, rises to \$325 in 2015 and increases to \$695 in 2016. For calendar years after 2016, the

flat dollar amount is indexed for inflation. Further, a family’s total penalty generally cannot exceed 300 percent of the per adult flat dollar penalty (for example, \$285 for 2014, rising to \$2,085 by 2016) or the premium for the “bronze” level of coverage through the insurance exchange.

Additionally, the final health-care package sets the percentage of household income that is the alternative to the flat dollar annual penalty at one percent for 2014; two percent for 2015; and 2.5 percent for 2016 and subsequent years.

**EXAMPLE.** *Abby, a 34-year old single, does not have minimum essential coverage in 2016 and is not exempt from having minimum essential coverage. Abby would be liable for a penalty the greater of: \$695 or 2.5 percent of her modified adjusted gross income.*

**COMMENT.** *For individuals under the age of 18, the applicable flat dollar per individual penalty would be one-half of the above amounts.*

**CAUTION.** *Married couples who file a joint return are jointly and severally liable for any penalty.*

**COMMENT.** *The health care package also exempts religious objectors, undocumented aliens, qualified members of Native American tribes, certain hardship cases, and individuals whose contribution toward “bronze” level coverage through the insurance exchange would exceed a certain percentage of household income. Individuals with incomes below the federal income tax filing threshold would also be exempt from the individual responsibility requirement.*

**COMMENT.** *The state insurance exchanges will offer four levels of coverage: gold, silver, bronze and catastrophic.*

## COVERAGE SUBSIDIES

The health care reform package provides a refundable premium assistance tax credit

### INDIVIDUAL RESPONSIBILITY

Year	Penalty	Percent of Income*
2014	\$95	1%
2015	\$325	2%
2016	\$695**	2.5%

\* In lieu of the flat penalty if greater

\*\* Indexed for inflation thereafter

and reduced cost sharing to qualified individuals, on a sliding scale, to help make coverage more affordable, starting in 2014. The premium assistance tax credit is designed to guarantee that qualified individuals would not spend more than a specific percentage of their income on medical insurance premiums. Generally, these are individuals who cannot afford minimum essential coverage based on the relationship of their income to the federal poverty level. The health care package allows for the advanced payment of premium assistance tax credits.

**COMMENT.** *The premium assistance tax credit starts at 100 percent of the federal poverty level (FPL) and climbs to 400 percent of FPL. At the same time, the health care reform package expands Medicaid to cover those with income less than 133 percent of FPL (see inset).*

**COMMENT.** *The FPL is determined based on family size. For example, a family of four with household income of \$88,200 (approximately 400 percent of current FPL) would qualify for a premium assistance tax credit.*

**COMMENT.** *The IRS would be responsible for determining eligibility for the premium assistance tax credit. Further, premium assistance tax credits would be disregarded for federal or federally-assisted programs.*

**COMMENT.** *An individual who has employer-provided coverage will not be eligible for a premium assistance tax credit to obtain coverage in an insurance exchange unless the employer-provided coverage fails to meet certain coverage standards or if the individual's share of the premium would exceed a certain percentage of the individual's income.*

## LONG-TERM CARE

The health care reform package creates a national voluntary insurance program for purchasing community living assistance services and support. Premiums will be paid through

payroll deductions if an individual's employer decides to participate in the program.

## EARLY RETIREES

The health care reform package creates a temporary reinsurance program for employer-sponsored early retiree coverage. Payments made under the reinsurance program for retirees would be excluded from gross income.

**COMMENT.** *Health services provided or purchased by the Indian Health Service would also be excluded from gross income.*

## EMPLOYERS

The health care reform package (the Patient Protection Act as amended by the Reconciliation Act) does not require employers to provide health insurance coverage. However, "large" employers (generally employers with 50 or more full-time employees) will be subject to "play or pay" rules after 2013. The health care reform package generally treats employees working 30 or more hours per week as full-time employees.

A penalty will be assessed on a large employer that:

- (1) Fails to offer minimum essential coverage to full-time employees and has at least one full-time employee enrolled in an insurance exchange who receives a premium assistance tax credit or cost-sharing; or
- (2) Offers minimum essential coverage to full-time employees but has at least one full-

time employee enrolled in an insurance exchange who receives a premium assistance tax credit or cost-sharing.

Generally, the applicable penalty for employers that do not offer minimum essential coverage to full-time employees will be 1/12 of \$2,000 per full-time employee per month (\$166.67 per month). Similarly, the applicable penalty for employers that offer minimum essential coverage but have employees receiving premium tax assistance credits or cost-sharing will be 1/12 of \$2,000 per full-time employee per month (\$166.67 per month).

**IMPACT.** *The penalty would apply to employers with 50 or more workers but would subtract the first 30 workers from the payment calculation. Businesses with fewer than 50 employees would be exempt from any employer responsibility.*

**EXAMPLE.** *In 2014, ABC Co. has 101 full-time employees, does not offer its employees minimum essential coverage, and has at least one employee enrolled in an insurance exchange who receives a premium assistance tax credit or cost-sharing. ABC Co. will be liable for a penalty.*

**Free choice vouchers.** An employer that offers minimum essential coverage through an eligible employer-sponsored plan and pays any portion of the plan's costs is required to provide free choice vouchers to its qualified employees. Qualified employees are those individuals who do not participate in a health plan offered by the employer and meet other low-income related requirements.

## PREMIUM TAX CREDITS FOR AFFORDABILITY

Household income*	Initial premium percentage	Final premium percentage
Up to 133%	2.0	2.0
133% up to 150%	3.0	4.0
150% up to 200%	4.0	6.3
200% up to 250%	6.3	8.05
250% up to 300%	8.05	9.5
300% up to 400%	9.5	9.5 (and special indexing rules)

\* Household income expressed as a percent of the federal poverty level

**COMMENT.** *Employers and other entities providing minimum essential coverage would be required to file information returns with the IRS identifying the individual, the coverage and the amount of premium, if any, paid by the individual. Penalties would be imposed for failure to file an information return.*

## SMALL BUSINESSES

The health care reform package provides a temporary sliding-scale small employer tax credit to help offset the cost of employer-provided coverage. Generally, a small employer is one with no more than 25 employees and average annual wages of less than \$50,000.

In 2010 through 2013, eligible employers may qualify for a tax credit for up to 35 percent of their contribution toward the employee's health insurance premium. In 2014 and beyond, eligible employers who purchase coverage through an insurance exchange may qualify for a credit for two years of up to 50 percent of their contribution. Qualified tax-exempt employers would be eligible for a reduced credit. Salary reduction contributions are not counted.

**Impact.** Employers with 10 or fewer employees and average annual wages of less than \$25,000 would be eligible for the full credit. These wage limits are indexed for inflation.

**Cafeteria Plans.** The health care reform package relaxes the cafeteria plan rules to encourage more small employers to offer tax-free benefits to employees, including those related to health insurance coverage. It does so by carving out a safe harbor from the nondiscrimination requirements for cafeteria plans for qualified small employers.

## ADDITIONAL MEDICARE PAYROLL TAX

Starting in 2013, the Patient Protection Act, as amended by the House Reconciliation Act, broadens the Medicare tax base for higher-income taxpayers by:

1. Imposing an additional of 0.9 percent on earned income in excess of \$200,000 for individuals and \$250,000 for married couples filing jointly; and
2. Imposing a 3.8 percent "unearned income Medicare contributions" tax

The 3.8 percent unearned income Medicare contributions tax is imposed on the lesser of (i) net investment income or (ii) the excess of modified adjusted gross income (AGI) over the threshold amount. The thresholds are \$200,000 for single individuals or heads of households; \$250,000 for married couples filing a joint return and surviving spouses; and \$125,000 for married couples filing separate returns.

**IMPACT.** *The 3.8 percent Medicare "contribution" will apply only to the employee portion of the tax. When added to the 0.9 percent tax also imposed by the health care reform package on these high-income earners' portion of their Hospital Insurance (HI) payroll tax, \$210 billion is estimated to be raised over the 2013 to 2019 period.*

**IMPACT.** *Neither the \$200,000 nor \$250,000 amounts are indexed for inflation.*

**IMPACT.** *Modified AGI is adjusted gross income increased by the amount excluded from income as foreign earned income (less deductions attributable to such income).*

**EXAMPLE.** *Tom has modified AGI of \$220,000 and net investment income of \$40,000. The tax applies to the lesser of (i) net investment income (\$40,000) or (ii) modified AGI (\$220,000) over the threshold amount for a single person (\$200,000) or \$20,000. The tax is 3.8 percent of \$20,000 or \$760. The tax in this case is not applied to the entire \$40,000 of investment income.*

Net investment income includes interest, dividends, royalties, rents, gain from disposing of property from a passive activity, and income earned from a trade or business that is a passive activity. Self-employed individu-

als, as well as estates and trusts, would also be liable for the tax.

Distributions from qualified retirement plans, including pensions and certain retirement accounts, would be exempt from paying the additional tax. For example, income from individual retirement accounts (IRAs), 401(a) money purchase plans, 403(b) and 457(b) plans would be exempt.

**IMPACT.** *The changes in Medicare tax on qualified higher-income taxpayers would not start until 2013. Issues over how certain deferred compensation arrangements would be taxed are certain to arise.*

## TAX ON HIGH-COST INSURANCE

Beginning in 2018, the health care reform package will impose a 40 percent nondeductible excise tax on insurance companies or plan administrators for any health insurance plan with an annual premium in excess of an inflation-adjusted \$10,200 for individuals and an inflation-adjusted \$27,500 for families. The excise tax applies to the amount in excess of the \$10,200/\$27,500 levels (adjusted for inflation in subsequent years).

The health care reform package provides higher premium levels for employees in certain high-risk professions: \$11,850 for individual coverage and \$30,950 for family coverage. Non-Medicare retirees age 55 and older are also eligible for the higher thresholds.

**IMPACT.** *Congress delayed application of the excise tax from 2013 until 2018 to give plans "time to implement and realize the cost savings of reform." Because of this delay, however, the health care reform package eliminates the three-year transition relief that had been available in the Patient Protection Act for coverage in 17 high-cost states.*

**IMPACT.** *An insurer would be free to pass along the excise tax to consumers in the*

*form of higher premiums as an alternative to, or in combination with, finding cost-cutting opportunities.*

**Cost of living adjustments.** The threshold amounts originally would have been indexed for inflation using CPI-U plus one percent. The health care reform package keeps that inflation-adjusted calculation for 2018 and 2019 only. Thereafter, the amounts will be adjusted only using the base CPI-U. The dollar thresholds will be increased automatically in 2018 if the Congressional Budget Office is incorrect in its forecast of the premium inflation rate between 2010 and 2018. Estimates are that the new indexing will more than offset any benefits given under the higher base dollar premium levels.

The health care reform package removes completely the value of stand-alone dental and vision plan coverage from determining the excise tax thresholds. The health care reform package also provides adjustments to the thresholds to account for plans that carry a higher premium cost because of the participants' age or gender.

**EXAMPLE.** *Dan, age 40, elects family coverage under an employer-provided fully-insured health care policy covering major medical with a value of \$37,000. The amount subject to the excise tax would be \$9,500 (\$37,000 - \$27,500 (the threshold for family coverage)). Dan's employer would report \$9,500 as taxable to the insurer. The insurer calculates and pays the tax to the IRS.*

**PLANNING NOTE.** *Starting in 2011, to increase employee awareness of the premium costs, employers will be required to disclose the value of employer-provided health insurance to employees annually on Form W-2.*

## MARKET SECTOR FEES

The health care reform package imposes annual nondeductible fees on pharmaceutical manufacturers and importers and health insurance providers. The annual

fees would be allocated across industry sectors according to market share. The annual fee for the pharmaceutical manufacturing and importing industry is \$2.5 billion for 2011; \$3 billion for 2012 to 2016; \$4 billion for 2017; \$4.1 billion for 2018; \$2.8 billion for 2019 and subsequent years. The annual fee for the health care provider industry is \$8 billion for 2014; \$11.5 billion for 2015 and 2016; \$13.5 billion for 2017; \$14.3 billion for 2018 and subsequent years.

**COMMENT.** *The health care reform package removes an annual fee that would have been imposed on medical device manufacturers. However, as a trade-off, the health care reform act adds an excise tax on medical device sales. However, certain medical devices routinely purchased by consumers, such as eyeglasses and hearing aids, would be exempt from the excise tax.*

**COMMENT.** *Certain small pharmaceutical manufacturers and importers and health insurance providers, including nonprofit insurance providers serving lower income and other targeted groups, are exempt from the fees.*

**TAX-EXEMPT HOSPITALS.** *The health care reform package requires Code Sec. 501(c)(3) hospitals to conduct periodic community health needs assessments and adopt written financial assistance policies. Individuals who qualify for financial assistance would be billed at the same rates as insured individuals. The bill would also add some consumer protection provisions to debt collection activities by nonprofit hospitals.*

**COMMENT.** *The IRS would be required to review a nonprofit hospital's community benefit activities at least once every three years.*

**COMMENT.** *The health care reform package authorizes the IRS to share return information with the U.S. Department of Health and Human Services to curb Medicare fraud.*

**Health Insurance Executive Pay.** The health care reform package modifies Code Sec. 162(m) as it applies to remuneration paid by health insurance providers to high-level executives. If at least 25 percent of the premium income to the insurer does not meet minimum essential coverage requirements under the Act, no Code Sec. 162(m) deduction would be allowed to the extent the remuneration exceeds \$500,000, with a special provision for deferred compensation.

**Indoor Tanning Tax.** The health care reform package imposes a tax of 10 percent on qualified indoor tanning services effective for services provided on or after July 1, 2010.

**New Therapies Tax Credit.** On the positive side of the ledger for the health industry, the health care reform package creates a new two-year temporary tax credit to encourage investments in new health care therapies for tax years beginning in 2009 and 2010.

## FSAs AND HSAs

The health care reform package modifies the definitions of qualified medical expenses for health FSAs, HSAs, and HRAs to conform them to the definition used for the medical expense itemized deduction (excluding over-the-counter medicines unless prescribed by a health care professional) beginning in 2011. The health care package also caps health FSA contributions at \$2,500 per year after 2012, which is indexed annually for inflation after 2013.

The health care reform package also increases the additional tax on nonqualified distributions from health savings accounts (HSAs) from 10 percent to 20 percent and from Archer MSAs from 15 to 20 percent beginning in 2011.

**COMMENT.** *This modified definition of qualified medical expenses is effective for tax years beginning in 2013. To prevent an end-run around the new FSA restrictions using cafeteria plan rules, the health care reform package*

*provides that, if a benefit is available under a cafeteria plan through employer provided contributions to a health FSA, the benefit will not be treated as a qualified benefit unless the cafeteria plan provides that an employee may not elect for any taxable year to have salary reduction contributions in excess of \$2,500 made to the arrangement.*

## MEDICAL EXPENSE DEDUCTION/EXCLUSION

The health care reform package raises the threshold for the itemized medical expense deduction from 7.5 percent of adjusted gross income (AGI) to 10 percent of AGI for regular income tax purposes effective for tax years beginning after December 31, 2012. However, individuals age 65 and older (and their spouses) would be temporarily exempt from the increase. The exemption for seniors would apply to any tax year beginning after December 31, 2012 and ending before January 1, 2017 if the taxpayer or the taxpayer's spouse attained age 65 for the tax year.

**IMPACT.** *The health care reform package makes no adjustment to the allowable medical expense deduction for purposes of computing alternative minimum tax (AMT) liability. For now, the AGI floor for AMT purposes remains at 10 percent.*

**COMMENT.** *The health care reform package does not extend the employer-provided health coverage gross income exclusion for employees' spouses and dependent children to coverage provided to domestic partners. Pending legislation, the Domestic Partnership Benefits and Obligations Act of 2009 would provide the same employment benefits to federal employees in same-sex partnerships currently provided to married federal employees and their spouses, including health-care, retirement, family leave, and other benefits.*

**Adult children coverage.** The health care reform package extends the employer-pro-

vided health coverage gross income exclusion to coverage for adult children under age 27. Self-employed individuals are allowed a deduction for the premiums paid on such dependent coverage.

**Adoptions.** The health care reform package makes the adoption credit refundable. It also raises the dollar limitation for the credit to \$13,170 and extends the credit through 2011. The health care package also enhances the incentives for adopting children with special needs and the adoption assistance exclusion.

## MEDICARE PART D

The health care reform package eliminates the deduction for the subsidy for employers that maintain prescription drug coverage for retirees who are eligible for Medicare Part D, starting in 2013.

## OTHER REVENUE RAISERS

In addition to health-care related taxes and fees, several other areas have been targeted to raise more revenue as an offset to the overall cost of the entire reform package. These additional provisions are estimated to raise \$28.1 billion over the 2010-2020 scoring period.

### BIOFUEL CREDIT

The cellulosic biofuel credit was intended to reward taxpayers that use alternative fuels in industrial and other processes. The health care reform package targets what some lawmakers perceive as certain industries' abuse of the credit by denying the credit to a by-product known as "black liquor." The provision applies to fuels sold or used on or after January 1, 2010.

**COMMENT.** *This nonmedical revenue provision is a money maker, raising \$23.6 billion. However, both this provision and codification of the economic substance doctrine are used as the primary revenue raisers in the version of*

*the Extenders bill the Senate passed on March 10, thus jeopardizing a quick resolution of that bill between House and Senate negotiators.*

## ECONOMIC SUBSTANCE DOCTRINE

The health care reform package codifies the economic substance doctrine. A transaction would have economic substance only if the taxpayer's economic position (other than its federal tax position) changed in a meaningful way and the taxpayer had a substantial purpose (other than a federal tax purpose) for engaging in the transaction. The provision applies to transactions entered into after date of enactment.

**COMMENT.** *Violations are subject to stiff, automatically-applied penalties of 20 or 40 percent, depending on the underlying transaction and level of disclosure. This no-fault penalty regime concerns many advisors, especially in connection with corporate and partnership tax planning strategies in which tax reduction has been an acceptable principal reason for structuring certain deals.*

## CORPORATE ESTIMATED TAX PAYMENTS

The health care reform package increases the required corporate estimated tax payments factor for corporations with assets of at least \$1 billion for payments due in July, August, and September 2014 by 14.5 percentage points.

## INFORMATION REPORTING

The health care reform package imposes new information reporting requirements. Generally, businesses that pay any amount greater than \$600 during the year to corporate and noncorporate providers of property and services will be required to file an information report with each provider and with the IRS.

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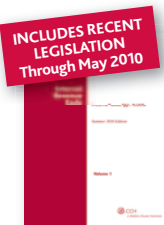
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