Treatment of Certain Types of Health Coverage Under Select Provisions of the Patient Protection and Affordable Care Act[1]

PPACA Provision	Major Medical	Section 125 Health FSA	HRA	HSA	Dental or Vision	LTC	Specified Disease or F/H Indemnity	Medicare Supp	On-Site Medical Clinic	Disability	Mini-Med	Medicare Advantage	Reinsurance
If employer-sponsored, does the coverage count for purposes of the **40% high-cost excise tax?** (See PPACA § 9001)	YES	YES, to extent of employee salary reduction contributions	YES[2]	YES, to extent of employer contributions[3]	NO, but only if stand-alone coverage	NO	NO, but only if HIPAA-excepted coverage and paid with after-tax premiums	YES	YES	NO, but only if HIPAA-excepted	YES		NO
If employer-sponsored, must the coverage be valued for purposes of the new **Form W-2 reporting requirement?** (See PPACA § 9002)	YES	NO	YES	NO, but existing law requires reporting of employer contributions									
Is the coverage subject to **the individual and group market reforms** (including adult child coverage extension and restrictions on lifetime/annual limits and recissions)? (See PPACA § 1001)	YES[4]	NO, to extent HIPAA-excepted[5]	YES, with limited exception from annual/lifetime limits	NO[6]	NO, but only if HIPAA-excepted[7, 8]							YES	
If insurance, is it subject to the new **nondiscrimination rules?** (See PPACA § 1001(5))	YES	N/A, because not usually provided as insurance											
Does providing the insurance subject the issuer to a **$2 per participant fee for patient-centered outcomes research trust fund?** (See PPACA § 6301)	YES												
Could providing the insurance subject the issuer to limits on **executive compensation?** (See PPACA § 9014)	YES												
Could providing the insurance subject the issuer to the **health insurer annual fee?** (See PPACA § 9010)	YES				YES	NO	NO, but only if HIPAA-excepted	NO	YES	NO, but only if HIPAA-excepted	YES		YES[9]

1 H.R. 3590, the Patient Protection and Affordable Care Act (PPACA) (Pub. L. No. 111-148), as amended by H.R. 4872, the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152).

2 The statutory language indicates that one counts the COBRA value of the HRA "with respect to reimbursements". This language is a bit odd given that COBRA coverage usually is not in reference to actual reimbursements. Hopefully Treasury will clarify this prior to 2018.

3 This includes direct employer contributions and amounts salary reduced by an employee through a cafeteria plan.

4 With respect to the restrictions on the use of annual and lifetime limits, it appears that only major medical plans that seek to qualify as essential benefits within the meaning of PPACA § 1302(b) must satisfy such restrictions.

5 Although the insurance reforms are included in the Public Health Service Act only, it appears likely that Health FSAs are excepted from the insurance reforms to the extent they are HIPAA-excepted within the meaning of ERISA Technical Release 97-01.

6 HSAs generally do not constitute employee welfare benefit plans and, thus, generally would not be subject to the insurance reforms.

7 PPACA § 9014 (regarding the new executive compensation limits) uses one definition of "health insurance provider" for tax years 2010, 2011 and 2012 and a different definition for tax years after 2012. For an insurer that does not sell major medical insurance (and thus would not be a "health insurance provider" in tax years after 2012), but does sell other types of health insurance, including dental, vision, specified disease or illness, hospital or fixed indemnity, Medicare supplemental, and mini-medical, regardless of whether such coverage is HIPAA-excepted, it is possible that the statute could be read to limit certain deferred compensation payable in or after 2013 for services performed in 2010, 2011, and 2012. There appears to be a reasonable reading of the statute that selling qualified LTC does not subject an insurer to the new executive compensation limits.

8 Mini-medical plans do not enjoy their own express HIPAA exception. However, to the extent a mini-medical plan is able to fit within one of the express exceptions (such as fixed indemnity insurance), it would be treated as all other HIPAA-excepted coverage.

9 Only for the reinsurance of health insurance (but specifically excluding (i) reinsurance of LTC, (ii) Medicare supplemental, and (iii) HIPAA-excepted accident, disability, specified disease or illness and hospital/fixed indemnity insurance).

Seth Perretta and Randy Hardock – May 5, 2010