

## Potential Repeal of the Medical Device Tax: Another ACA Challenge

Resistance to increasing the taxes on medical devices is beginning to manifest in Congress. The medical device tax, which became effective on January 1, 2013, has been viewed as an additional method to promote the goals of the *Patient Protection and Affordable Care Act* (ACA). Imposing a 2.3% tax on the manufacturers and importers of certain medical devices is expected to generate nearly \$30 billion in revenue from 2013 to 2023, which the federal government would subsequently apply to balance the costs associated with Medicaid expansion and operation of the health insurance exchanges.<sup>1</sup> Many proponents of the tax argue that device manufacturers deserve to be taxed, because the expansion of health coverage was expected to also expand the market of medical device users, thus theoretically boosting sales and profits for these manufacturers.<sup>2</sup> However, the medical device industry has emphatically opposed the financial concessions required by the tax since the infancy of the ACA.<sup>3</sup> This Health Capital Topics article will discuss the circumstances surrounding the potential repeal of the medical device tax as well as possible implications of a successful repeal.

When Congress passed the ACA in 2010, the law included a provision granting authority to the *Internal Revenue Service* (IRS) to impose a 2.3% tax on certain medical devices, including but not limited to: (1) x-ray equipment; (2) surgical instruments; and, (3) pacemakers.<sup>4</sup> The IRS issued final regulations on, as well as guidance for, the tax on December 7, 2012, with the tax becoming effective on January 1, 2013.<sup>5</sup> The ACA excluded medical devices that were available for public purchase, such as glasses, hearing aids, and contacts, in what became known as the “*retail exemption*.”<sup>6</sup> The ACA bestowed upon the IRS with authority to broaden the scope of this exemption, which the IRS used to exempt from the tax over-the-counter products and tests, some durable medical equipment, prosthetics, orthotics, and other supplies that are rented to patients under Medicare Part B payment rules.<sup>7</sup>

Despite the exemptions and reduced tax consequences for many companies, there has been considerable resistance toward the medical device tax. Much of this resistance stems from the medical device industry, which has engaged in large-scale lobbying efforts to repeal the tax. In 2014, the medical device industry spent approximately \$33 million on lobbying efforts to

repeal the tax, the most funds spent by this industry on lobbying Congress for a single year since 1998, when medical device companies spent \$8.9 million on lobbying Congress.<sup>8</sup> Since Congress passed the ACA in 2010, the medical device industry has spent more than \$150 million on lobbying Congress, focusing primarily on repealing the medical device tax.<sup>9</sup> Further, unlike many other issues relating to the ACA that have created divisions between Republicans and Democrats in Congress, efforts to repeal the medical device tax are supported by members of both the Republican and Democratic parties.<sup>10</sup> This bipartisan support may be attributed to the fact that many of the medical device manufacturers that create surgical tools and knee and hip replacements are located in states that are represented by Democratic members of Congress, such as Senator Amy Klobuchar (D-MN), who is one of five co-sponsors of the repeal bill in the Senate.<sup>11</sup> In June 2015, the U.S. House of Representatives voted to repeal the tax by a 280 to 140 majority, with 46 Democrats joining the Republicans.<sup>12</sup> However, the House failed to generate the two-thirds majority required to override a presidential veto, missing the majority by a single vote.<sup>13</sup> The U.S. Senate is expected to vote on this measure in the fall of 2015, and past votes may provide insight into the Senate’s discussion. In a 2013, nonbinding budget blueprint vote that including a provision to repeal the medical device tax, the Senate garnered enough Democratic votes to override a presidential veto.<sup>14</sup> However, it is unclear if the same number of Senate Democrats would vote again to repeal the tax.<sup>15</sup> Alternatively, Republicans are seeking ways to lessen the likelihood of a presidential veto by packaging the measure with other tax deals that must be passed.<sup>16</sup>

It is important to note that a repeal of the medical device tax may increase the federal deficit. Following the House’s vote to repeal the tax, the White House issued a statement claiming that a repeal of the tax would increase the federal deficit by \$24.4 billion over ten years, because the revenue from the tax is necessary to offset the costs of expanding Medicaid and operating health insurance exchanges.<sup>17</sup> The statement also confirmed that the President will veto the bill if the Senate fails to procure enough votes to override a presidential veto.<sup>18</sup> Without the revenue from the tax, the federal government may lack sufficient funding to support efforts to expand the number of persons covered

by a health insurance policy, or it may be forced to raise healthcare costs for consumers or other industries.<sup>19</sup>

The debate over whether or not to repeal the medical device tax has placed arguments in support of repealing the tax under close scrutiny. In support of efforts to repeal the medical device tax, the medical device industry cites a study authored by the *Advanced Medical Technology Association* (AdvaMed), which spent \$2.4 million for lobbying efforts against the tax in 2014.<sup>20</sup> The AdvaMed study claims that the tax has resulted in thousands of lost jobs from companies that already have or plan to cut employees to allow companies to afford to pay the tax.<sup>21</sup> However, a study conducted by the *Emergo Group*, a private consulting company for members of the medical device industry,<sup>22</sup> found that over 56% of medical device companies have not made significant staffing changes to offset the costs of the tax.<sup>23</sup> Other opponents of the tax, such as small and large manufacturers, argue that the tax has driven jobs to foreign countries with lower taxes.<sup>24</sup> Opponents of the tax, such as Senator Elizabeth Warren (D-Mass), also argue that company spending has shifted toward paying the tax and away from research and development spending, thus inhibiting medical innovation.<sup>25</sup> However, a 2014 Ernst and Young report on the medical device industry found that spending on research and development by medical technology companies, which includes medical device companies, grew by 7% from 2012 to 2013, an increase from the 1% growth from 2011 to 2012.<sup>26</sup> Even though arguments supporting repealing the tax have faced scrutiny, these concerns may be enough to convince a sufficient number of senators to vote to repeal the tax.

Since the ACA was signed into law in 2010, there have been numerous attacks on the validity of many of its provisions. Within the past year, certain tax provisions of the ACA have come under substantial fire, e.g., federal subsidies and the Cadillac tax (discussed in the August 2015 *Health Capital Topics Newsletter* article “*King v. Burwell: What’s Next?*”). Based on recent movement in Congress, the medical device tax may become the next ACA provision to face the potential of repeal. The results of Congressional votes on the medical device tax may provide an indication of the political climate surrounding the ACA and the potential for further attacks on ACA provisions.

---

1 “Devicemakers Step Up Lobbying to Kill ACA Tax” By Paul Demko, March 7, 2015, <http://www.modernhealthcare.com/article/20150307/MAGAZINE/303079963> (Accessed 9/4/15).

---

2 “Fight Over Affordable Care Act Turns to Medical-Device Tax” By Isaac Stanley-Becker, July 6, 2015, <http://www.wsj.com/articles/fight-over-affordable-care-act-turns-to-medical-device-tax-1436209691> (Accessed 9/4/15).

3 See lobbying expenditures to repeal the tax, below.

4 “Medical Device Excise Tax” Internal Revenue Service, September 2, 2015, <http://www.irs.gov/uac/Newsroom/Medical-Device-Excise-Tax> (Accessed 9/4/15).

5 “Taxable Medical Devices” Federal Register, Vol. 77, No. 236 (December 7, 2012) p. 72924.

6 Internal Revenue Service, September 2, 2015.

7 “Taxable Medical Devices,” December 7, 2012, p. 72927.

8 “Medtech’s \$33m Lobbying Spend Last Year Hits 16-Year High,” By Brad Perriello, Mass Device, March 9, 2015, <http://www.massdevice.com/medtechs-33m-lobbying-spend-last-year-hits-16-year-high/> (Access 9/10/15).

9 Demko, March 7, 2015.

10 Stanley-Becker, July 6, 2015.

11 *Ibid.*

12 “House Passes Repeal of Medical Device Tax, White House Threatens Veto” AHLA Weekly, June 19, 2015, <https://www.healthlawyers.org/News/Health%20Lawyers%20Weekly/Pages/2015/June%202015/June%2019%202015/White-House-Threatens-Veto-of-Bills-to-Repeal-IPAB,-Medical-Device-Tax.aspx> (Accessed 9/4/15).

13 Stanley-Becker, July 6, 2015.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 “Statement of Administrative Policy H.R. 160- Protect Medical Innovation Act of 2015” Executive Office of the President, June 15, 2015, [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr160r\\_20150615.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr160r_20150615.pdf) (Accessed 9/4/15).

18 *Ibid.*

19 *Ibid.*

20 Demko, March 7, 2015.

21 “The Recurring Claim that the Medical Device Tax Has Cost More than 30,000 Jobs” By Michelle Ye Hee Lee, June 30, 2015, <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/06/30/the-recurring-claim-that-the-medical-device-tax-has-cost-more-than-30000-jobs/> (Accessed 9/4/15).

22 “Company Overview of Emergo Group Inc.,” Bloomberg Business, September 14, 2015, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=91873162> (Accessed 9/14/15).

23 “Global Medical Device Industry Outlook for 2015” Emergo Group: Austin, TX, January 2015, p. 21; “The Recurring Claim that the Medical Device Tax Has Cost More than 30,000 Jobs” Lee, June 30, 2015.

24 “Has the Medical Device Tax Shipped Jobs Overseas and Stunted Innovation” By Michelle Ye Hee Lee, November 21, 2014, <https://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/21/has-the-medical-device-tax-shipped-jobs-overseas-and-stunted-innovation/> (Accessed 9/4/15).

25 *Ibid.*

26 “Pulse of the Industry: Medical Technology Report 2014” Ernst and Young, 2014, [http://www.ey.com/Publication/vwLUAssets/ey-pulse-of-the-industry-report/\\$FILE/ey-pulse-of-the-industry-report.pdf](http://www.ey.com/Publication/vwLUAssets/ey-pulse-of-the-industry-report/$FILE/ey-pulse-of-the-industry-report.pdf) (Accessed 9/14/15).



(800) FYI - VALU

*Providing Solutions  
in the Era of  
Healthcare Reform*

Founded in 1993, HCC is a nationally recognized healthcare economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients & Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

**HEALTH CAPITAL CONSULTANTS (HCC)** is an established, nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, Missouri, with regional personnel nationwide. Founded in 1993, HCC has served clients in over 45 states, in providing services including: valuation in all healthcare sectors; financial analysis, including the development of forecasts, budgets and income distribution plans; healthcare provider related intermediary services, including integration, affiliation, acquisition and divestiture; Certificate of Need (CON) and regulatory consulting; litigation support and expert witness services; and, industry research services for healthcare providers and their advisors. HCC's accredited professionals are supported by an experienced research and library support staff to maintain a thorough and extensive knowledge of the healthcare reimbursement, regulatory, technological and competitive environment.



**Robert James Cimasi**, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: “*Accountable Care Organizations: Value Metrics and Capital Formation*” [2013 - Taylor & Francis, a division of CRC Press], “*The Adviser’s Guide to Healthcare*” – Vols. I, II & III [2010 – AICPA], and “*The U.S. Healthcare Certificate of Need Sourcebook*” [2005 - Beard Books]; and, “*Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services*” was published by John Wiley & Sons in 2014. Mr. Cimasi is the co-author of the soon-to-be released “*Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “*Shannon Pratt Award in Business Valuation*” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).



**Todd A. Zigrang**, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of the soon-to-be released “*Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies; Business Appraisal Practice*; and, *NACVA QuickRead*. Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



**John R. Chwarzinski**, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis.



**Jonathan T. Wixom**, MBA, is Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Wixom holds a Master of Business Administration degree from Washington University, a Bachelor of Arts in Economics from St. Louis University, and a Bachelor of Science in Business Administration from St. Louis University. Mr. Wixom’s areas of expertise include valuation consulting, financial analysis, due diligence, and financial modeling. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a Level III Candidate in the Chartered Financial Analyst Program.



**Jessica L. Bailey-Wheaton**, Esq., is Senior Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



**Kenneth J. Farris**, Esq., is a Research Associate at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Farris is a member of the Missouri Bar and holds a J.D. from Saint Louis University School of Law, where she served as the 2014-2015 Footnotes Managing Editor for the *Journal of Health Law & Policy*.