

Device Tax Repeal Faces Tough Slog Despite Senate Vote

By **Jeff Overley**

Law360, New York (March 26, 2013, 7:23 PM ET) -- Medical device makers shouldn't get too excited about last week's symbolic U.S. Senate vote to scrap a controversial health reform tax on their sales, according to experts who say repeal must confront a \$30 billion price tag and the prospect that hospitals, drug firms and health insurers might demand similar reprieves.

The device industry's anti-tax campaign has been undeniably impressive; at least 40 corporations and trade groups have prodded lawmakers to ax the 2.3 percent levy, disclosure reports show. But a nonbinding vote — even a resounding 79-to-20 vote — is a far different animal than wiping out a major piece of funding for health care reform, observers say.

"It is hard to miss the lopsidedness" of the vote, said Bruce Merlin Fried, a health partner at SNR Denton. "[But] the interesting question is going to be, 'OK, where are the replacement dollars coming from?'"

The question is especially tough to answer at a time when Congress has in recent years slashed domestic spending and tapped wealthier Americans for tax increases to the tune of \$2.5 trillion. Many industries and government agencies have already gone under the knife during all the fat trimming, and are loath to do so again.

"If there is alternative funding, then the question is, 'Whose ox gets gored?'" Fried asked.

Even if elected officials could find the money, they might open up a Pandora's box in the process, spurring other health care interests to clamor for their own concessions. The Affordable Care Act is expected to add tens of millions of people to the ranks of the insured, and in return for creating a bigger customer base, it extracted huge sums of cash from the private sector.

Reimbursements to hospitals were slashed, as were payments to private Medicare Advantage plans. Insurers must pay a new annual fee, and the drug industry kicked in \$100 billion, according to trade group Pharmaceutical Research and Manufacturers of America.

"Every major stakeholder put money into the pot for Obamacare," said Kevin Outterson, an associate professor at the Boston University School of Law. "Why should the device industry — and only the device industry — get its money back?"

America's Health Insurance Plans, a national trade association, has been waging an aggressive fight against the annual fee, which it labels a tax, saying it will drive up premiums and hurt the economy. The latter point has been the device industry's main selling point, with Stryker Corp., Zimmer Inc. and Hill-Rom Holdings Inc. among those blaming the tax for layoffs.

Robert Zirkelbach, spokesman for AHIP, told Law360 that the ACA's levies defeat the law's purpose of giving consumers more bang for their buck. "All the new taxes will ultimately add to the cost of health care coverage, and that is opposite of what reform was supposed to accomplish," he said.

The device tax took effect Jan. 1, and one wildcard in the debate is how manufacturers adapt while it remains the law of the land. Peter S. Reichertz, co-leader of the life sciences team at Sheppard Mullin Richter & Hampton LLP, said some firms will simply pass along the costs to middlemen and providers.

"One thing that's certainly happening is [device makers] are trying to push the tax onto other people," Reichertz said.

The Healthcare Supply Chain Association — a trade group that includes 15 group-purchasing organizations, which bring hospitals together to maximize their bargaining power with suppliers — in January launched a website called Medical Device Tax Watch in which it accuses more than three dozen device companies of shifting costs to hospitals and doctors.

At the same time, some firms have dialed back their estimates of the financial impact, with Medtronic Inc. predicting a first-year cost of \$25 million instead of \$50 million and Boston Scientific Corp. eyeing a \$75 million hit instead of \$100 million, according to published reports.

In an unexpected win for industry, the tax ended up not applying to existing inventory, which could soften the initial blow. Officials at Medtronic and Boston Scientific didn't respond to repeated requests for comment.

While the brighter forecasts don't appear to have harmed the industry's clout in Congress, they could eat into the ardor for repeal, Reichertz said.

"There was a whole lot of fear about the effect this was going to have, and like a lot of things, once it's implemented, people learn to live with it," he said.

For now, however, device makers appear intent on making their case. Last month, the Advanced Medical Technology Association trade group said it was "doubling down" on repeal advocacy to eliminate the tax's "toxic effect on innovation."

Those efforts bore serious fruit in the symbolic vote, said Rosemary Becchi, a Patton Boggs LLP partner who said the development "definitely adds momentum" to the industry's cause.

Nonetheless, repeal will be a daunting task, partly because of the cost but also because there needs to be a procedural mechanism for approval, Becchi said. The hotly contested item has little chance of passing as a standalone measure, meaning it will probably have to hitch a ride on must-pass legislation.

Experts suggested a sweeping tax reform bill might do the trick, or perhaps the device industry could stick repeal onto an item related to Medicare's so-called sustainable growth rate, which lawmakers are itching to reform and which they pass legislation on each year to address.

Otterson counts himself among skeptics, saying, "Congress can't even do eminently reasonable things right now," much less come together on divisive matters.

Becchi, however, predicted repeal will eventually cross the finish line. "There is overwhelming support to do this, and I think they're going to get there," she said.

--Editing by Sarah Golin and Lindsay Naylor.

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