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Legislative Notice

No. 33

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**Baucus Amendment #3336 to H.R. 4213:
The American Workers, State, and Business Relief
Act of 2010**

Noteworthy

- On Monday, the Senate turned to H.R. 4213, the Tax Extenders Act of 2009. Chairman Baucus was recognized to offer a substitute amendment, which is the American Workers, State, and Business Relief Act of 2010.
- The bill is largely an extension through 2010 of aspects of current law, including a package of expiring tax laws, an extension of increased unemployment and COBRA benefits, extension of various provisions of the America Recovery and Reinvestment Act, and a Medicare Physician Payment update through the end of September 2010. New provisions in this legislation include additional state aid in the form of increased FMAP funds and funds for emergency agricultural assistance.
- The bill includes several offsets including pension funding relief, black liquor, modifications to the first time homebuyer credit, codification of the economic substance doctrine, and a revision of the Medicare Improvement Fund.
- The total gross cost of the bill is roughly \$148 billion between 2010 and 2020, offset by roughly \$44 billion in revenue raising provisions. Those provisions that are not offset, unemployment insurance, expanded COBRA subsidy, the doc fix, and FMAP, are either given emergency designations for purposes of pay-as-you-go (PAYGO) compliance or are exempt from the PAYGO statute.
- Although this amendment reflects the structure of a bipartisan compromise bill that was drafted by Senators Grassley and Baucus earlier in February, Senator Grassley pointed out in a floor speech that this amendment is significantly larger than that package, with most of the increase in size coming from the addition of FMAP state aid and longer unemployment and COBRA extensions.
- Many of the tax provisions expired at the end of calendar year 2009, and many of the other provisions expired at the end of February 2010. A bill to extend these provisions for one month has passed the House of Representatives but has not yet passed the Senate.

Background

In his State of the Union address, President Obama called for new legislation aimed at creating jobs, and members of the Democratic leadership in the Senate have said that jobs legislation will be their number one focus in 2010.

In addition to new measures aimed at creating jobs, several pieces of the American Recovery and Reinvestment Act (ARRA), including expanded COBRA subsidies and emergency unemployment benefits, were set to expire at the end of 2009. As economic weakness has continued into 2010, members of Congress have announced their desire to extend these provisions until they are no longer believed to be needed. Several short-term extensions of these provisions have been passed, and the latest extension expired on February 28, 2010.

On top of these new starts and extensions of expiring ARRA provisions, several other provisions of current law are scheduled to expire in 2010 or have already expired. These are mostly sections of the Internal Revenue Code that expire annually and are passed in a package of what has become known as “tax extenders.”

A temporary, one-month extension of all of the non-tax expiring provisions of this act passed the House by voice vote on February 25 and is awaiting Senate action.

House Action

The House of Representatives acted in 2009 to extend expiring provisions of tax law and extend expanded unemployment insurance and COBRA benefits. H.R. 4213, the Tax Extenders Act of 2009, passed the House December 8, 2009 by a vote of 241-181, with 171 Republicans voting against it and two voting for it. This act extended \$33.4 billion in expiring tax provisions and was paid for through the Foreign Account Tax Compliance Act and by taxing carried interest as ordinary income. The House also passed the Jobs for Main Street Act on December 16 by a vote of 217-212. This bill extended unemployment insurance and the expanded COBRA subsidy through June of 2010, but was later amended by the Senate to drop those features.

Bill Provisions

Tax Extenders (Title I)

Title I changes the expiration dates on a handful of tax provisions that have repeatedly been extended by the Senate by overwhelming majorities over the last 10 years. Provisions listed below expired at the end of calendar year 2009 and are extended in this legislation through calendar year 2010. The Congressional Budget Office (CBO) reports that extending these provisions will result in \$25.7 billion in lost revenue between 2010 and 2020.

Energy Provisions

- Alternative motor vehicle credit for hybrid cars
- Biodiesel and renewable diesel credits
- Open-loop biomass facility credit
- Refined coal credit
- Low-sulfur diesel fuel credit
- Credit for producing fuel from coke or coke gas
- New energy efficient home credit
- Alternative fuel and alternative fuel mixtures excise tax credit
- Special rule for qualified electric utilities
- Percentage depletion for oil and gas from marginal wells

Individual Tax Relief

- Above-the-line deduction for teacher classroom expenses
- Additional standard deduction for state and local real property taxes
- Deduction of state and local sales taxes
- Contributions of real property for conservation purposes
- Above-the-line deduction for qualified tuition
- Tax-free distributions from individual retirement plans
- Gross estate look-thru for investment company stock

Low-income Housing Credits

- Adds an election for a refundable low-income housing credit for 2010. This provision modifies the existing low-income housing credit to allow for a certain amount of the credits paid by states to be payable to taxpayers with no tax liability.

Business Tax Relief

- Research and experimentation credit
- Indian employment tax credit
- New Markets Tax Credit
- Railroad track maintenance credit
- Mine rescue team training credit
- Employer wage credit for active duty uniformed service members
- Five-year depreciation for farm equipment
- 15-year straight-line cost recovery for leaseholders, restaurants, and retail establishments
- Seven-year recovery period for motorsports entertainment complexes
- Accelerated depreciation for business property on an Indian reservation
- Charitable deduction for food contributions
- Charitable deduction for book contributions
- Charitable deduction for computer contributions
- Election to expense mine safety equipment
- Special expensing rules for film and TV productions
- Expensing of environmental remediation costs
- Section 199 deduction for domestic production activities in Puerto Rico

- Modification of tax treatment for payments to controlling exempt organizations
- Expensing of remediation costs for Brownfields
- Timber REIT modernization
- Treatment of dividends and assets of regulated investment companies
- Extend the qualified treatment of regulated investment companies for FIRPTA
- Exemption under Subpart F for active financing income
- Look-thru treatment of payments between related controlled foreign corporations
- Temporary reduction in corporate rate for qualified timber gain
- S-corp stock basis adjustment for charitable contributions of property
- Empowerment zone tax incentives
- DC empowerment zone tax incentives, including empowerment zone bonds, zero-percent capital gains rate, and the DC first-time homebuyer credit
- Renewal of community tax incentives, including the zero-percent capital gains rate, commercial revitalization deduction, and increased 179 expensing
- Temporary increase in the limit on cover-over of rum excise taxes to Puerto Rico and the Virgin Islands
- American Samoa Economic Development Credit

Temporary Disaster Relief Provisions

- Waiver of certain mortgage revenue bond requirements for residences destroyed in federally declared disasters
- Special loss deduction rule for losses attributable to federally declared disasters
- Additional first-year depreciation allowance for disaster property
- Additional five-year net operating loss carryback for losses attributable to federally declared disasters
- Expensing of qualified disaster expenses for demolition, repair, clean-up, and environmental remediation expenses for businesses that have been affected by federally declared disasters

Regional Provisions

- New York Liberty Zone: extends the special depreciation allowance for non-residential property and residential real property, and extends the timing for issuing tax-exempt bond financing for infrastructure in areas of lower Manhattan designated as the New York Liberty Zone
- GO Zone: extends special depreciation allowance, increase in the rehabilitation credit, and extension of the Work Opportunity Tax Credit with respect to individuals affected by Hurricane Katrina for states that are identified as being part of the Gulf Opportunity Zone
- Midwestern disaster area: extends special rules for use of retirement funds and the exclusion of cancellation of mortgage indebtedness for areas targeted by the Heartland Disaster Tax Relief Act of 2008

Unemployment Insurance Extension (Title II, Subtitle A)

This bill would extend emergency unemployment benefits through December 31, 2010 (with no benefits payable after May 31, 2011). Extended benefits would be 100 percent federally

financed through January 1, 2011, and the \$25 additional benefit would be extended through December 31, 2010 (with no benefits payable after June 30, 2011). This extension is made retroactive to the passage of the 2010 Department of Defense Appropriations Act, signed into law on December 19, 2009.

As under current law, in high unemployment states it would be possible for individuals to receive up to 99 weeks of unemployment benefits (including 26 weeks of state unemployment benefits and extended benefits).

Health-related Provisions (Title II, Subtitle B)

The most significant health provisions are the extension of increased COBRA subsidies through the end of calendar 2010 and a six-month extension through July 2011 of the federal Medicaid increase included in ARRA. Section 701 of the bill exempts Sections 211 (COBRA subsidy extension) and 232 (FMAP increase extension) from statutory PAYGO under the emergency designation provision.

The remaining package of health provisions are paid for by a draw-down of \$8 billion from the Medicare Improvement Fund. Health-related provisions in the bill include the following:

COBRA Subsidies: Extends eligibility for the 65-percent health insurance premium subsidies enacted in ARRA to those laid off through December 31, 2010—a 10-month extension of the current deadline of February 28, 2010. Subsidies would last for up to 15 months (this was extended from nine months in the Department of Defense (DoD) appropriations bill, P.L. 111-118, in December.) The bill also clarifies that individuals whose hours were reduced prior to being laid off would become eligible for COBRA subsidies upon loss of employment.

The bill also addresses various “Medicare extenders” that (unlike the doc fix and COBRA subsidies) were not included in the DoD appropriations package in December and therefore expired on January 1. These include:

Therapy Caps: Provides a full-year extension to the Medicare therapy caps exception process, through December 31, 2010.

Durable Medical Equipment: Waives accreditation requirements through January 2011 for certain pharmacies and provides an alternative form of accreditation for pharmacies whose sales of DME constitute less than five percent of overall revenues. A three-month waiver of the accreditation requirements was enacted in October as P.L. 111-72 and expired on January 1, 2010.

One Year Medicare Payment Extensions (all of which would expire at the end of December 2010 unless otherwise noted):

- Mental health reimbursements (five percent increase)
- Reimbursement raises for ambulance services
- Geographic floor for work
- Technical component of certain physician pathology services

- Outpatient hold-harmless provision
- Reimbursement for Part B services provided at Indian hospitals and clinics
- Payment rules for long-term care services through July 2011 (and a moratorium on the establishment of facilities)
- Rural hospital flexibility program (expires at the end of Fiscal Year 2011)
- Section 508 hospital reclassifications (expires at the end of Fiscal Year 2010)
- Medicare Advantage plans for special needs individuals
- Reasonable cost contracts and
- Gainsharing demonstration.

Other Provisions: The bill includes clarifications to the definition of electronic health records, amending the stimulus bill's language to allow clinic-based physicians who bill through hospitals to receive bonus payments. The bill includes technical corrections related to critical access hospitals and the waiver policy for employer group Medicare Advantage plans. The bill extends the continuing care retirement community program and family-to-family health information centers through 2011, and provides several million dollars of additional funding related to low-income programs, as well as another \$100 million to the Centers for Medicare and Medicaid Services (CMS) to implement the legislation.

Other Extensions of Current Law and New Provisions (Title II, Subtitle C)

Federal poverty guidelines: Section 241 includes a provision to freeze the Department of Health and Human Services (HHS) poverty guidelines at 2009 levels in order to prevent a reduction in eligibility for certain means-tested programs, including Medicaid, the Supplemental Nutrition Assistance Program, and child nutrition, through March 1, 2011. In the absence of this legislative change, HHS would be required to issue 2010 poverty guidelines that would be lower than the 2009 poverty guidelines, which would reduce services to low-income individuals.

Refunds Disregarded in the Administration of Federal Programs and Federally Assisted Programs: Section 242 changes the income guidelines used for calculating benefits under federal assistance programs by removing income from tax refunds or advance refundable credits in the calculation of income for purposes of federally administered assistance programs.

State Court Improvement Program: A straight extension through FY2010 for grant funding for improved data collection and training.

National Flood Insurance Program: A straight extension through December 31, 2019.

Emergency Disaster Assistance: Section 245 provides emergency agricultural disaster assistance in a similar manner to S.2810, introduced by Senators Cochran (R-MS) and Lincoln (D-AR) in November 2009. In most cases, eligible producers are those located in counties receiving a primary disaster declaration by the Secretary of Agriculture in 2009 and will not receive duplicative benefits under the farm bill disaster programs.

Assistance is provided in various forms for losses affecting 2009 crops. If the producer can prove at least a 5 percent loss, disaster assistance is provided in the amount of 90 percent of the

direct payment that the eligible producer received in 2009. Other provisions include: \$150 million as specialty crop assistance to producers through block grants to states; \$50 million as livestock assistance; \$42 million as cottonseed assistance; \$25 million as aquaculture assistance; \$21 million for a Hawaii transportation cooperative; a poultry emergency loan program; and \$15 million in implementation costs.

Small Business Loan Guarantee Enhancement: Appropriates \$354 million through December 31, 2010, to fund an extension of the lower fees and higher loan guarantees provided for the Small Business Administration's 7(a) loan program in ARRA.

Pension Funding Relief (Title III)

The bill would provide pension funding relief for single- and multi-employer defined benefit pension plans by giving them more time to absorb losses attributable to the 2008 market downturn and ensuing economic slow-down. Single-employer pension plans may elect to pay off their unfunded liabilities over nine years (instead of seven years), with interest-only payments in the first two years. Alternatively, a plan sponsor may pay off these unfunded liabilities over 15 years. To take advantage of the longer payment schedules, employers must comply with limits on executive compensation and certain dividends and stock buyback transactions for four years in the case of relief over the nine-year period, and seven years in the case of the relief over the 15-year period.

In the case of multi-employer plans, these plans may spread their 2008 investment losses (including losses resulting from criminal or fraudulent activity) over 30 years. Multi-employer plans may also choose to smooth (i.e., average) their assets over 10 years (instead of five years).

This provision raises \$7.3 billion over 10 years because it results in firms making fewer tax-preferred pension contributions, increasing their taxable income.

Offsets (Title IV)

Titles III and IV include provisions that raise revenue to offset the deficit impact of this bill.

Black Liquor: Section 401 excludes certain unprocessed fuels that have more than four percent water and sediment content or ash content of more than one percent from qualifying for the \$1.01 per gallon cellulosic biofuel producer credit. Section 402 prohibits black liquor, which is any fuel derived from the production of paper and pulp, from qualifying for the alternative fuel credit or the alternative fuel mixture credit. Although *The Washington Post* has reported that currently the paper industry is not using this tax credit,¹ the Joint Committee on Taxation (JCT) believes the paper industry may begin to do so and that preventing them from using the credit will raise \$24 billion over the next 10 years.

Homebuyer Credit: Section 441 adds two new limitations to the current homebuyer tax credit. First, long-time homeowners who may be eligible for the tax credit by purchasing a subsequent

¹ "An elixir for health reform? Lawmakers offer 'black liquor,'" Steven Mufson, *Washington Post*, November 8, 2009.

principal residence would not get the credit if they do not attach their property tax bills or other documentation as required by the IRS to their tax return. Second, homebuyers who qualify for additional time for the tax credit because they have a binding contract to purchase a home prior to tax credit expiration would not get the tax credit unless they attach a copy of the applicable binding contract to their tax return.

Codification of the Economic Substance Doctrine: The tax code currently provides detailed rules specifying the computation of taxable income, including the amount, timing, source, and character of items of income, gain, loss, and deduction. Courts generally deny tax benefits if the transaction that gives rise to those benefits lacks “economic substance” independent of tax considerations. However, according to the JCT, there is a “lack of uniformity” regarding the proper application of the economic substance doctrine and the type of non-tax economic benefit a taxpayer must establish in order to satisfy the economic substance.

According to JCT, this provision is meant to clarify and enhance the application of the economic substance doctrine by clarifying that a transaction has economic substance if it 1) changes in a meaningful way the taxpayer’s economic position, and 2) the taxpayer has a substantial purpose for entering into such transactions.² The provision would also impose a 40 percent strict liability penalty on underpayments attributable to a transaction lacking economic substance (unless the transaction was disclosed, in which case the penalty is 20 percent). The proposal is estimated to raise \$5 billion over 10 years.

Reduction in the Medicare Improvement Fund: The Medicare Improvement Fund (MIF) contains funds that are available to the Secretary of HHS to make improvements to the original fee-for-service program under Parts A and B of Medicare. Under current law, approximately \$20 billion is available for services furnished during FY2014. This provision would reduce the funding available in the MIF by \$8 billion. This proposal is estimated to save \$8 billion over 10 years.

Satellite Television Extension (Title V)

This is a five-year extension of key provisions of the Satellite Home Viewer Extension and Reauthorization Act of 2004, including:

- Updates statute to reflect the digital TV transition;
- Allows DISH Network to regain the ability to provide distant signals, overriding a federal injunction, if it provides local-into-local service in all 210 markets;
- Phantom signals fix, which would codify the deal reached between cable and the broadcasters;
- Requires DISH Network to retransmit local HD signals of public broadcast TV stations by 2011 if it does not reach a deal with public broadcasting within 60 days of enactment;
- Clarifies when “significantly viewed” stations can be provided in HD by satellite carriers;
- Orders the Copyright Office to report on market-based alternatives to statutory licensing for broadcast TV content; and

² For more information, see “Technical Explanation of the ‘AMT Relief Act of 2007,’” JCT Document JCX-113-07, December 12, 2007.

- Orders GAO to report on the potential impact a phase-out of statutory licenses would have on communications law.

“Doc Fix” (Title VI)

Extends the current Sustainable Growth Rate (SGR) fix through September 30, 2010—a seven-month extension. Note that as the bill amends the DoD appropriations bill, it also therefore incorporates the DoD bill’s funding “cliff,” such that this year’s fix will be disregarded for the purposes of determining payment levels beyond October 1, 2010. This provision would therefore result in a payment cut of at least 21 percent as of October 1 absent further congressional action.

Budgetary Effects and Emergency Designation

While the offsets cover \$37 billion of the cost of this legislation, Sections 201, 211, and 232 of the Act, the extensions of unemployment benefits, COBRA, and the FMAP extension, are given emergency designation for purposes of the PAYGO Act of 2010 (P.L. 111-139) and section 403(a) of S. Con. Res. 13, the FY2010 Budget Resolution. Title VI, the extension of the current SGR formula, is not offset or given an emergency designation because it is exempt from the requirements of the statutory PAYGO. The exemptions from PAYGO cover roughly \$104 billion of budgetary cost of this bill, all of which will be added to the deficit.

Cost

A preliminary cost estimate from CBO showed the following deficit impact of this bill:

CBO preliminary cost estimate for Reid “jobs” bill #2		
Combined deficit impact of spending and revenue changes unless noted		
Provision	2010-2019 (billions)	2010-2020 (billions)
Tax extenders	\$30.20	\$30.30
UI, COBRA, FMAP, and various health and misc. extenders	\$109.73	\$109.80
<i>UI (spending effects)</i>	\$65.87	\$65.87
<i>Health extenders including COBRA and FMAP (spending effects)</i>	\$29.01	\$29.08
Pension funding relief	-\$8.09	-\$5.97
Offsets	-\$36.94	-\$37.57
<i>Offsets (revenue effects)</i>	-\$28.72	-\$29.35
<i>Offsets (spending effects)</i>	-\$8.22	-\$8.22
Satellite TV	\$0.09	\$0.10
Doc Fix	\$7.31	\$7.31
TOTAL DEFICIT INCREASE	\$102.29	\$103.98

Amendments

There is currently no unanimous consent agreement or time agreement in place for consideration of H.R. 4213 or amendments. Amendments are expected to improve the bill to sharpen its focus on job creation and to reprogram unspent funds from ARRA to pay for provisions of the bill.