



**GET INSURANCE, PAY THE TAX, OR GO TO JAIL?
FAILING TO COMPLY WITH INDIVIDUAL MANDATE COULD RESULT IN FINE & JAIL**

September 28, 2009

On Thursday, September 24, 2009, during the Senate Finance Committee's discussion of Sen. Baucus's (D-MT) national health care reform bill, Sen. Bunning (R-KY), offered an amendment to allow anyone who requests an exemption on their tax form from the excise tax for not maintaining health insurance to receive an exemption. The amendment failed in Committee.¹ As written, Sen. Baucus's bill imposes an excise tax, "assessed through the tax code and applied as an additional amount of Federal tax owed" as a "consequence for not maintaining insurance."² The bill provides exemptions from the excise tax for certain individuals. For example, under the bill, "[n]o excise tax will be assessed for individuals not maintaining health insurance for a period less than or equal to three months in the tax year."³ Also,

[e]xemptions from the excise tax will also be made for individuals below 100 percent of [federal poverty level] FPL, any health arrangement provided by established religious organizations comprised of individuals with sincerely held beliefs (e.g., such as those participating in Health Sharing Ministries), those experiencing hardship situations (as determined by the Secretary of Health and Human Services) and an individual who is an Indian as defined in Sec. 4 of the Indian Health Care Improvement Act. Additionally, in 2013, individuals at or below 133 percent of FPL will be exempt from the excise tax.⁴

During the Committee's discussion of this amendment, Sen. Ensign (R-NV), asked Thomas Barthold, chief of staff for the Joint Committee on Taxation, what type of penalty an individual could face for willfully failing to pay the tax. Mr. Barthold responded that the IRS

¹ Live Pulse, *Flout the Mandate Penalty? Face the IRS*, Politico.com, Sept. 24, 2009, available at http://www.politico.com/livepulse/0909/Flout_the_mandate_penalty_Face_the_IRS.html?showall.

² Chairman's Mark, *America's Healthy Future Act of 2009*, at 29, available at http://finance.senate.gov/sitepages/leg/LEG%202009/091609%20Americas_Healthy_Future_Act.pdf [hereinafter *Chairman's Mark*].

³ *Id.*

⁴ *Id.*

would take the individual to court and pursue “normal collection proceedings.”⁵ Later, Sen. Ensign received a handwritten note from Mr. Barthold, “confirming the penalty for failing to pay the up to \$1,900 fee for not buying health insurance.”⁶ According to the note, “[s]ec[ti]on 7203 of the [Internal Revenue] Code provides that if there is a willful failure to file, pay, maintain appropriate records and the like that the taxpayer may be charged with a misdemeanor with a penalty of up to \$25,000 and not more than one year in jail.”⁷

The section of the Internal Revenue Code that Mr. Barthold was referring to is codified at 26 U.S.C. § 7203. The title of the section is entitled “Willful failure to file return, supply information, or pay tax,”⁸ and it reads, in part,

Any person required under this title to pay any estimated tax or tax . . . who willfully fails to pay such estimated tax or tax . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.⁹

Since the excise tax, according to the Baucus bill, would be assessed through the tax code, this section and its penalties would appear to apply to those who willfully refused to pay the excise tax for failing to maintain health insurance.

⁵ Live Pulse, *Flout the Mandate Penalty? Face the IRS*, Politico.com, Sept. 24, 2009, available at http://www.politico.com/livepulse/0909/Flout_the_mandate_penalty_Face_the_IRS.html?showall.

⁶ Live Pulse, *Ensign Receives Handwritten Confirmation*, Politico.com, Sept. 25, 2009, available at http://www.politico.com/livepulse/0909/Ensign_receives_handwritten_confirmation_.html#comments.

⁷ Note from Thomas A. Barthold to Sen. Ensign, available at http://www.politico.com/static/PPM110_090925_document2.html

⁸ 26 U.S.C. § 7203.

⁹ *Id.*