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FROM THE CO-CHAIRS

By: Marcia A. Kilby
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There is an old holiday tune that proclaims this as "the most wonderful time of the year." I think that this is undoubtedly true. The time spent with family and friends (and let's not forget the good eats) are indeed wonderful! However, for corporate counsel, this time of year also means strategizing for 2015 and determining what new issues are waiting for us on the horizon. In my opinion, if there is one issue that will require attention from corporate counsel in the upcoming year it is this: Cybersecurity.

It goes without saying that 2014 has been the year of the cyberattack. Major retailers, banks, e-commerce sites and even a movie studio have all been victims, with each instance resulting in turmoil for customers, employees, and corporate images. However, a company doesn't have to be huge and high-profile to become a target. With so much at stake, how can we help manage the cyber risks at our companies?

I think that the first step is to understand that managing this inevitable risk will be more than just a technology solution. At a minimum, companies will also have to manage this risk as part of its day-to-day operations by:

(1) Establishing employee security roles and responsibilities;

(2) Determining which company assets are critical and require additional oversight;

(3) Developing a cybersecurity plan that not only helps reduce the risk of a cyberattack but also serves as a guide for responding to a cyberattack; and

(4) Restoring normal operations and corporate image as soon as possible following a cyberattack.

The Federal Communications Commission has published a cybersecurity "Planning Guide" that is intended to help companies develop their own cybersecurity plan. I encourage you to take a look at it here as you consider whether this is an issue your company needs to tackle in 2015.

Wishing you a Happy (and digitally secure) New Year,

Marcia A. Kilby
Co-Chair

TAX TIDBIT: INVERSION TRANSACTIONS.

TAX TIDBIT

By: Ashley H. Morgan
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INVERSION: THE BASICS AND WHY WE SHOULD CARE

Unlike the British Invasion of the nineteen-sixties, which gave us wonderful things like the Beatles and the Rolling Stones, the Irish Inversion of the twenty-tens has given us nothing but heartburn. A corporate inversion occurs when an existing American corporation changes is residency to a different country with a more preferable corporate tax system. Generally, the corporation becomes a subsidiary of an existing foreign corporation that is at least twenty five-percent the size of American corporation. This is because the required post-transaction result is more than twenty-percent foreign ownership. If the American corporation's shareholders in-turn obtain between sixty and eighty percent of the foreign corporation's stock, the foreign corporation will still be respected as a foreign corporation. The result: the domestic shareholders are in control and the corporation's tax residence changes.

The President's proposed fiscal year 2015 budget targeted these transactions, as national attention turned towards the corporate tax system. Although Democrats and Republicans approach a solution to this problem differently, our esteemed delegates in Washington agree that inversion is a real problem for the American tax system, effectively gutting the United States corporate income tax base and sheltering billions of dollars of corporate income offshore. In the meantime, inverted corporations are reaping the benefits of being an American corporation while shifting the burden of paying for those benefits to the smaller corporations that maintain their residency in the United States.

In order to combat the incentives associated with corporate inversions, the Internal Revenue Service issued Notice 2014-52 on September 22, 2014, which describes measures the Service is taking to combat the inversion strategy. The Treasury Department and Internal Revenue Service also intend to issue new regulations addressing tax avoidance via inversion.

While relatively few inversion transactions have occurred, it's definitely a trend among massive corporations, with Burger King being the most famous company to move forward with this strategy, and nine other large companies negotiating inversion transactions in 2014 alone. As widely recognized companies make the move media attention will translate into congressional attention and we can expect significant corporate tax reform in the near future. The question is not whether the corporate laws will change, but when and how they will change in light of the approaching mid-term elections and the utter stagnation of congressional action in the recent past. Generally, both Republicans and Democrats agree that the increased number of inversion transactions triggers a need for corporate tax reform that includes closing loopholes, lowering the overall corporate tax rate and simplifying the Internal Revenue Code. These proposed changes are comprehensive, and will not apply solely to titan corporations with billions of dollars in foreign and domestic income.

EMPLOYEE BENEFITS

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EMPLOYEE BENEFITS: RECENT OPINIONS ON FEDERAL TAX SUBSIDIES UNDER THE ACA

TWO COURTS OF APPEAL ISSUE CONFLICTING OPINIONS ON FEDERAL TAX SUBSIDIES UNDER THE AFFORDABLE CARE ACT.

Recently, two federal courts issued opinions on the same issue – whether a regulation issued by the Internal Revenue Service authorizing a federal tax subsidy to individuals purchasing insurance on the federal exchange is inconsistent with the language of the Affordable Care Act ("ACA"). *Halbig v. Burwell*, No. 14-5018 (D.C. Cir.) and *King v. Burwell*, No. 14-1158 (4th Cir.). Specifically, the appellants in each case argued that the regulation conflicts with the plain language of Section 36B of the ACA, which provides for tax credits to subsidize the purchase of insurance on an "exchange established by the State under section 1311 of the [ACA]."

The appellants in each case were residents of states in which the health insurance exchange is run by the federal government, not by the state. In fact, one of the appellants in the *Halbig* case is a resident of Tennessee. The cases address a key feature of the ACA – tax subsidies from the federal government to individuals purchasing health insurance. Penalties under both the individual mandate and the employer mandate hinge on the availability of these subsidies.

In a 2-1 decision, the Court of Appeals for the District of Columbia Circuit held that the regulation was in conflict with the plain meaning of Section 36B of the ACA – that subsidies are only available to individuals who purchase insurance through a state-run exchange. The Court rejected claims by the government that disallowing the regulation goes against the overall purposes of the ACA and renders other provisions of the ACA absurd. While the Court recognized the magnitude of its decision and its effect on "millions of individuals," it stated that it must defer to the Court's limited role when interpreting statutes enacted by Congress – "to ascertain the meaning of the words of the statute."

The Court of Appeals for the Fourth Circuit addressed the identical question but came to the opposite result. In a unanimous opinion of the three judge panel issued just hours after the decision in *Halbig*, the Court found the language of Section 36B of the ACA "ambiguous and subject to multiple interpretations." In ruling to affirm the judgment of the lower court, the Court of Appeals deferred to the Internal Revenue Service and upheld the regulation "as a permissible exercise of the agency's discretion."

The full implications of these decisions remain to be seen. The Department of Health and Human Services has filed a petition for an *en banc* hearing regarding the *Halbig* decision. Therefore, the federal government is asking for the full D.C. Court of Appeals, not just a three judge panel, to reverse the decision. *King* has filed a petition for certiorari with the Supreme Court regarding the Fourth Circuit case. The *Halbig* plaintiff in the D.C. Court of Appeals case filed a response to the motion for *en banc* hearing on August 18, 2014 stating that the petition should be denied and that this matter should be resolved by the U.S. Supreme Court. The impact of these decisions is substantial for the ongoing sustainability of the ACA. As everyone knows, the employer play or play mandate issues certain penalties if employers do not offer health insurance or offer health insurance that does not meet certain requirements and an individual employed by such an employer obtains a tax subsidy through an exchange. If the reasoning of *Halbig* is sustained by the Supreme Court, individuals in thirty six states will not be eligible for a tax subsidy. Therefore, there will be no penalties under the play or pay mandate as currently drafted under the ACA. We will be keeping a close eye on these matters and will update you when there is more news.

EMPLOYEE BENEFITS: HEALTH PLAN IDENTIFIERS

By: Ashley Trotto
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Health Plan Identifiers: Are Your Clients Prepared for Implementation?

If you ask an employer about compliance obligations under the Affordable Care Act ("ACA"), he or she will likely tell you about the Employer Mandate. If you ask a particularly astute employer, you may also hear about additional fees and taxes required by the ACA. You are not likely, however, to have a discussion on the ACA's changes to the administrative simplification rules of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Although these rules are important for employers to understand, they have not received the same exhaustive attention as other aspects of the ACA. One of these changes is immediately relevant as the deadline for complying is quickly approaching. In fact, the deadline may have come and gone for some employers by the time this article hits your inbox.

The ACA requires certain health plans to have a unique Health Plan Identifier (HPID).[1] The final regulations require all Controlling Health Plans ("CHPs") to obtain HPIDs. A Controlling Health Plan is defined as a health plan that controls its own business activities, actions, or policies or is controlled by an entity that is not a health plan.[2] The regulations also describe Subhealth Plans ("SHPs") which are eligible for, but are not required to obtain an HPID. These entities are health plans whose business activities, actions, or policies are directed by a CHP.[3]

The distinction between these entities can generally be boiled down to whether a health plan is fully insured or self-insured. If the plan is fully insured it is more than likely an SHP and is not required to obtain an HPID. However, the CHP that controls it may separately require that an HPID be in place. In this case, the CHP would either apply for an HPID on the SHP's behalf or direct the SHP to apply for its own. On the other hand, if a plan is self-insured, it is required to obtain its own HPID.

Health plans that are not subject to HIPAA's administrative simplification rules are exempt from the HPID requirement. Exempted health plans are those under which benefits for medical care are secondary or incidental to other insurance benefits.[4] For example, coverage for accident or disability income insurance, liability insurance, and workers' compensation are excepted benefits. [5] In addition, the HPID requirement does not apply to any self-funded, self-administered group health plan with fewer than fifty participants.[6]

Like many other employer-related provisions of the ACA, size matters. Generally, CHPs must obtain an HPID by November 5, 2014.[7] However, "small health plans" do not have to comply with HPID requirements until November 5, 2015. A "small health plan" for this purpose is defined as one that has annual receipts of $5 million or less.[8] All CHPs, small or otherwise, must use their HPIDs in transactions with other covered entities as of November 7, 2016.

The regulations do not specify penalties for failing to obtain an HPID. However, it appears that a violation of HPID rules may lead to penalties under HIPAA's administrative simplification rules. Under HIPAA rules, plans that do not obtain an HPID could be subject to penalties ranging from $100 to $1.5 million, depending on the assessed degree of culpability, for failing to obtain an HPID.[9]

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[1] A "health plan," as defined in 45 C.F.R. § 160.103, includes a group health plan, health insurance issuer, or HMO.
[2] 45 C.F.R. § 162.103.
[3] Id.
[4] 42 U.S.C.A. § 300gg-91(c)(1) (West).
[5] Id.
[6] 45 C.F.R. § 162.103.
[7] 45 C.F.R § 162.504.
[8] 45 C.F.R. § 160.103.
[9] 42 U.S.C.A. § 1320d-5(a) (West).

In this ever growing labyrinth called the ACA, it is crucial for counsel to make sure his or her clients are aware of these looming HPID requirements. As complicated as it is, employers, with assistance of counsel, need to ensure they are meeting ACA compliance obligations.

INTELLECTUAL PROPERTY

By: William Fortunato
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INTELLECTUAL PROPERTY: INTER PARTES REVIEWS

A New Shield Against Questionable Patents: *Inter Partes* Reviews

A strong patent portfolio can create a competitive advantage for your company in the marketplace, but what happens when someone seeks to enforce their patent against your company? In many cases, you might consider licensing or buying the patent to avoid patent litigation. These options work fine if the patent in question is of high quality and the holder is willing to negotiate reasonably, but what if the threat of patent litigation is based on a patent of questionable quality?

To combat this threat, the America Invents Act has given innovators and their businesses a new shield against patents of questionable quality: the *inter partes* review (IPR). An IPR is a proceeding in the United States Patent and Trademark Office that allows third parties, who did not initiate patent litigation over the patent's scope and validity, to challenge any patent that has been issued for at least nine months.[10] If the third party has been sued by the patent holder, an IPR is still available to determine the scope of the patent, and will stay proceedings in the trial until the IPR has concluded. This effectively allows innovators to strike down patents that should not have been issued, and avoid the threat of a lengthy lawsuit over a questionable patent.

An IPR produces a binding decision on the scope of a patent, just like a decision from a court in patent litigation, but the procedures involved in an IPR are simpler, faster, and generally less expensive than determining the scope of a patent during patent litigation. This is primarily because of the accelerated timetable for an IPR compared to a federal trial; an IPR is statutorily required to be completed within one year of institution (or up to 18 months when good cause is shown). Patent litigation, in contrast, can last for years.

Due to these time constraints, an IPR proceeds much like a streamlined trial. Both the petitioner and the patent holder will have the opportunity to seek (limited) discovery, negotiate a possible settlement, and present their respective

[10] This time period may be extended if a Post-Grant Review that began during the first nine months of issuance has not yet terminated.

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cases. The evidence, however, is focused on the scope and validity of the claims and can include earlier patents and publications that show that the invention was publically known before the patent holder applied for the challenged patent.[11] Another key difference is that the patent holder has only a single chance to amend the claims in its patent as part of the proceedings – generally to clarify any ambiguous language and thereby narrow the scope of the patent to the point that the patent is no longer applicable to the third party's operations. The parties have the option of having an oral hearing before the Patent Trial and Appeal Board, which will ultimately issue a written decision on the scope and validity of the claims challenged in the petition.

When choosing to submit a petition for an IPR, the makeup of the Patent Trial and Appeal Board is also important to consider. The administrative judges who make up the Patent Trial and Appeal Board are specialists in patent law, who are often experts in the challenged patent's field of technology. This expertise and specialization can help reduce the need for expert witnesses for establishing the scope of the challenged patent's claims.

The risk posed by a questionable patent hanging over your business's operations can lower your profits, distract your management team, and stifle true innovation. Your patent counsel can now deal with those risks faster and with lower expenses than ever before with *inter partes* reviews, so you can get back to business.

[11] The grounds are equivalent to 35 U.S.C. §§ 102 & 103