PUBLICATION

Spotlight on Health Care Reform: Therapeutic Discovery Project Tax Credit

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Among the thousands of pages of health care reform measures contained in the Patient Protection and Affordable Care Act of 2010 (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010 (Reconciliation Act) (collectively, the "Health Care Reform Law"), a new income tax credit is provided to small companies employing 250 employees or less that invested in therapeutic discovery projects in 2009 or that make such investments in 2010.

The Health Care Reform Law established Internal Revenue Code § 48D, which provides "eligible taxpayers" an income tax credit for 50% of the qualifying costs of investments made in 2009 and 2010 in "qualified therapeutic discovery projects." The project must be designed to develop a product or therapy to diagnose, treat, or prevent diseases by: (1) conducting pre-clinical activities, clinical trials, clinical studies, and research protocols, or (2) developing technology or products designed to diagnose diseases and conditions or to further the delivery or administration of therapeutics. A company's project must be certified by the U.S. Department of the Treasury (Treasury) for project costs to qualify for the credit.

The credit is limited to taxpayers that employ no more than 250 employees. Aggregation rules cause members of a controlled group of corporations or an affiliated service group that employs more than 250 persons in the aggregate to be ineligible for the tax credit. Therefore, certain strategic alliances and joint ventures with qualifying companies will likely be of interest to large biotech companies.

Treasury, in consultation with the Department of Health and Human Services, is required to "establish a qualifying therapeutic discovery program to consider and award certifications for qualified investments eligible for" the new § 48D tax credit by May 22, 2010. The program will establish the process and standards to apply for and be certified by Treasury for the § 48D tax credit. Among the selection criteria, Treasury is directed to consider: (1) whether the project has reasonable potential to result in new therapies to treat unmet medical needs or detect, prevent, or treat chronic or acute diseases, reduce long-term health care costs, or advance the goal of curing cancer; and (2) create new jobs in the U.S. and advance U.S. competitiveness in life, biological and medical sciences.

Since no more than $1 billion of credits will be awarded, the Treasury's award program will be competitive. In lieu of the tax credit, eligible taxpayers with certified projects may elect to obtain a grant (although tax-exempt organizations and partnerships having one or more partners that are tax-exempt organizations are not eligible for these grants). Because of the short timeframe expected for application submissions, interested companies should begin planning and organizing supporting materials.

If you would like to discuss the new therapeutic discovery project tax credit, please contact one of the members of our Tax or Health Departments.