

**DESCRIPTION OF H.R. 6199,
A BILL TO AMEND THE INTERNAL REVENUE CODE OF 1986
TO INCLUDE CERTAIN OVER-THE-COUNTER MEDICAL
PRODUCTS AS QUALIFIED MEDICAL EXPENSES**

Scheduled for Markup
by the
HOUSE COMMITTEE ON WAYS AND MEANS
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Prepared by the Staff
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INTRODUCTION

The House Committee on Ways and Means has scheduled a committee markup of H.R. 6199, a bill to amend the Internal Revenue Code of 1986 to include certain over-the-counter medical products as qualified medical expenses, on July 11, 2018. This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

¹ This document may be cited as follows: Joint Committee on Taxation, *Description of H.R. 6199, A Bill to Amend the Internal Revenue Code of 1986 to Include Certain Over-the-Counter Medical Products as Qualified Medical Expenses* (JCX-51-18), July 10, 2018. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended, unless otherwise stated.

A. Inclusion of Certain Over-the-Counter Medical Products As Qualified Medical Expenses

Present Law

Individual deduction for medical expenses

Expenses for medical care, not compensated for by insurance or otherwise, are deductible by an individual under the rules relating to itemized deductions to the extent the expenses exceed 7.5 percent (for 2017 and 2018) of adjusted gross income (“AGI”).² Medical care generally is defined broadly as amounts paid for diagnoses, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure of the body.³

Under an explicit limitation in the Code, any amount paid during a taxable year for medicine or drugs is deductible as a medical expense only if the medicine or drug is a prescribed drug or insulin.⁴ The term prescribed drug means a drug or biological which requires a prescription of a physician for its use by an individual.⁵ Thus, any amount paid for medicine available without a prescription (“over-the-counter medicine”) is not deductible as a medical expense, including any medicine prescribed or recommended by a physician.⁶

Exclusion for employer-provided health care

The Code generally provides that employees are not taxed on (that is, may exclude from gross income) the value of employer-provided health coverage under an accident or health plan.⁷ In addition, any reimbursements under an accident or health plan for medical care expenses for employees, their spouses, and their dependents generally are excluded from gross income.⁸ An employer may agree to reimburse expenses for medical care of its employees (and their spouses and dependents), not covered by a health insurance plan, through a flexible spending account (“FSA”) which allows reimbursement not in excess of a specified dollar amount. Such dollar amount is either elected by an employee under a cafeteria plan (“Health FSA”) or otherwise specified by the employer under a health reimbursement account (“HRA”). Reimbursements

² Sec. 213(a). The 7.5 percent of AGI threshold increases to 10 percent for taxable years beginning after December 31, 2018 under section 9013 of the Affordable Care Act. However, this increase in the percentage does not apply until taxable years beginning after December 31, 2016 with respect to any taxpayer if the taxpayer or the taxpayer’s spouse has attained age 65 before the close of the taxable year.

³ Sec. 213(d). There are certain limitations on the general definition including a rule that cosmetic surgery or similar procedures are generally not medical care.

⁴ Sec. 213(b).

⁵ Sec. 213(d)(3).

⁶ Rev. Rul. 2003-58, 2003-1 CB 959.

⁷ Sec 106.

⁸ Sec. 105(b).

under these arrangements are also excludible from gross income as reimbursements for medical care under employer-provided health coverage.

Health savings accounts

Present law provides that individuals with a high deductible health plan (and generally no other health plan) purchased either through the individual market or through an employer may establish and make tax-deductible contributions to a health savings account (“HSA”).⁹ Subject to certain limitations,¹⁰ contributions made to an HSA by an employer, including contributions made through a cafeteria plan through salary reduction, are excluded from income (and from wages for payroll tax purposes). Contributions made by individuals are deductible for income tax purposes, regardless of whether the individuals itemize. Distributions from an HSA that are used for qualified medical expenses are excludible from gross income. Distributions from an HSA that are not used for qualified medical expenses are includible in gross income and are subject to an additional tax of 20 percent. The 20-percent additional tax does not apply if the distribution is made after death, disability, or the individual attains the age of Medicare eligibility (i.e., age 65). Similar rules apply for another type of medical savings arrangement called an Archer MSA.¹¹

Medical care for excludible reimbursements

For purposes of the exclusion for reimbursements under employer-provided accident and health plans (including under Health FSAs and HRAs), and for distributions from HSAs and Archer MSAs used for qualified medical expenses, the definition of medical care is generally the same as the definition that applies for the itemized deduction for the cost of medical care. However, prior to the enactment of the Patient Protection and Affordable Care Act (referred to as the “Affordable Care Act”),¹² the limitation (applicable to the itemized deduction) that only prescription medicines or drugs and insulin are taken into account did not apply. Thus, for example, amounts paid from a Health FSA or HRA, or funds distributed from an HSA to reimburse a taxpayer for nonprescription drugs, such as nonprescription aspirin, allergy medicine, antacids, or pain relievers, were excludable from income even though, if the taxpayer paid for such amounts directly (without such reimbursement), the expenses could not be taken

⁹ Sec. 223.

¹⁰ For 2009, the maximum aggregate annual contribution that can be made to an HSA is \$3,100 in the case of self-only coverage and \$6,250 in the case of family coverage (\$3,050 and \$6,150 for 2012). The annual contribution limits are increased for individuals who have attained age 55 by the end of the taxable year (referred to as “catch-up contributions”). In the case of policyholders and covered spouses who are age 55 or older, the HSA annual contribution limit is greater than the otherwise applicable limit by \$1,000 in 2009 and thereafter. Contributions, including catch-up contributions, cannot be made once an individual is enrolled in Medicare.

¹¹ Sec. 220.

¹² Patient Protection and Affordable Care Act, Pub. L. No 111-148. Various provisions of the Affordable Care Act are amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152.

into account in determining the itemized deduction for medical expenses.¹³ For years beginning after December 31, 2010, the Affordable Care Act changed the definition of medical care for purposes of the exclusion for reimbursements for medical care under employer-provided accident and health plans and for distributions from HSAs and Archer MSAs used for qualified medical expenses to require that over-the-counter medicine (other than insulin) be prescribed by a physician in order for the medicine to be medical care for these purposes.¹⁴ Thus, under present law, a Health FSA or an HRA is only permitted to reimburse an employee for the cost of over-the-counter medicine if the medicine is prescribed by a physician and distributions from an HSA or an Archer MSA used to purchase over-the-counter medicine is not a qualified medical expense unless the medicine is prescribed by a physician.

Description of Proposal

Under the proposal, distributions from an HSA that are qualified medical expenses are no longer limited only to those medicines and drugs which are prescribed, and include amounts paid for menstrual care products, such as tampons, pads, liners, cups, sponges, or similar products used by women with respect to menstruation or other genital-tract secretions.

The proposal amends the definition of qualified medical expense for Archer MSAs to include amounts paid for menstrual care products as described above.

The proposal also amends the definition of qualified medical expense for health FSAs and HRAs to include expenses incurred for menstrual care products as described above.

Effective Date

The proposal for amendments to distributions from HSAs and MSAs is effective for amounts paid after December 31, 2018.

The proposal for amendments to health FSAs and HRAs is effective for expenses incurred after December 31, 2018.

¹³ Rev. Rul. 2003-102, 2993-2 C.B. 559, now obsolete by Rev. Rul. 2010-23, 2010-39 I.R.B. 388, September 3, 2010.

¹⁴ Sec. 9003 of the Affordable Care Act. Notice 2010-59, 2010-39 I.R.B. 388, provides guidance on this change to the definition of medical care for these purposes.