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INSURANCE PRACTICE GROUP

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# "What keeps you up at night?"


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## Congress nears the finish line for passage of comprehensive federal health care reform

By Laura L. Katz and Daniel D. Santos

We are now in uncharted waters with respect to the progress that Congress has made to pass comprehensive federal health care reform legislation. The United States has not come this close to enacting health care reform since Theodore Roosevelt first called for it in the early 1900s. If Congress succeeds, this will mark the most significant piece of domestic policy since Social Security, and the single largest expansion of health care coverage since Medicare.

Much has happened since the firm's last update on health care reform was issued in mid-October. On November 7, 2009, the U.S. House of Representatives ("House") passed its version of health care reform legislation, H.R. 3962, entitled the "Affordable Health Care for America Act of 2009." The House bill narrowly passed by a vote of 220 to 215, which was in large part along party lines. On December 24, 2009, the U.S. Senate passed its health care reform bill, H.R. 3590, known as the "Patient Protection and Affordable Care Act." Passage of the Senate bill came after three and a half weeks of Senate floor debate, and consideration of approximately 30 amendments. Ultimately, Senate Majority Leader Harry Reid (D-NV) was able to secure the 60 votes needed to end debate and overcome a Republican filibuster by garnering support from 58 Democratic and two Independent senators.

As you may recall, the Obama administration has emphasized the following three goals for health care reform: (i) ensuring the stability and security of health insurance for those who currently have coverage; (ii) providing insurance for those who are not covered; and (iii) decelerating the rise in health care costs for families, employers and the government. As a result, both the House and Senate bills strive to provide near-universal health coverage by building on key parts of the current health insurance framework – employer-based coverage offered by large employers, the Medicaid program, and the Children's Health Insurance Program. In addition, both bills would reform the parts of our health insurance system that are most in need of attention – the individual and small group markets.

## KEY SIMILARITIES IN HOUSE AND SENATE BILLS

Because of these common goals, the House and Senate proposals contain a number of similarities, such as:

- a mandate for individuals to obtain health coverage or face a penalty;
- a mandate for employers to provide coverage or pay a penalty;
- creation of health insurance exchanges through which individuals and small employers would be able to purchase affordable coverage from insurers participating in the exchange;
- facilitate the creation of health insurance cooperatives;
- provide premium subsidies to individuals and small employers for the purchase/provision of health coverage;
- impose issue and rating restrictions, including no pre-existing condition exclusions and elimination of lifetime limits;
- establish a minimum essential standard benefit package;
- impose minimum medical loss ratio requirements that vary across markets;
- establish a voluntary insurance program for purchasing long-term care services – the CLASS Act; and
- expansion of the Medicaid and CHIP programs.

## IMPORTANT DIFFERENCES

The House and Senate bills are different in several key areas. While both bills provide for the creation of new health insurance exchanges and facilitate the establishment of health insurance cooperatives, the House proposal creates a government run public health insurance plan to be offered in the exchange, and the Senate bill does not. In addition, the House bill provides for a national insurance exchange that would be run by a new federal agency, while the Senate bill provides for state-based insurance exchanges. The House bill requires employers to offer health insurance to their full and part-time employees and contribute a minimum amount toward coverage. The Senate bill, on the other hand, requires employers to provide coverage to full-time employees or pay a penalty, and excludes employers with less than 50 employees. Although both proposals aim to finance the cost of reform through a blend of new revenues and various savings measures within Medicare and Medicaid, they have taken starkly different approaches. The House bill imposes a 5.4% tax on high-income earners, which includes families with incomes above $1 million and individuals with incomes above $500,000. The Senate imposes an excise tax on high-cost insurance plans.

## THE ROAD TO RECONCILIATION

Since the passage of the House and Senate bills, Democratic leaders from each chamber, with strong participation by the Obama administration, have been negotiating a deal to reconcile the two proposals. It was initially thought that Congressional leaders would reconcile the bills through the appointment of a formal House-Senate conference committee. Democratic leaders have instead opted to work out differences between the two proposals through informal negotiations, which will allow the Democrats to finalize the overhaul bill largely behind closed doors, and prevent Congressional Republicans from delaying or halting progress on the final bill. Agreements between House and Senate leaders will likely be packaged into a single amendment to the bill.

While there are numerous specifics that need to be reconciled between the thousands of pages of the two bills, there are several significant issues that are consuming most of the negotiation efforts. The methods to finance health care reform are critically important to reaching a deal, as the Obama administration has pledged that any reform passed would not add to the federal budget deficit. With respect to each chamber's most significant new revenue raiser, the Obama administration has favored the Senate Democrats' approach, taxing high-cost insurance plans. In response, union leaders voiced their opposition to this 40% so-called "Cadillac" tax on high-end plans, threatening to withdraw support from the health reform bill. Last week, the Obama administration, Congressional Democrats, and union leaders reached a deal to limit the reach of the 40% excise tax. The parties agreed to raise the thresholds for the tax from $23,000 to

$24,000 health plans for families, and from $8,500 to $8,900 plans for individuals. Also on the negotiating table is a Senate bill provision that would increase the Medicare payroll tax by 0.9% on income over $200,000 for individuals, and $250,000 for married couples filing jointly. Whatever negotiators ultimately agree to with respect to revenue raisers or savings within the system will likely have an impact on the amount of individual and employer subsidies offered to purchase/provide health coverage.

Another item that must be reconciled is what role the states should play in health care reform. At issue is whether to opt for the national insurance exchange offered by the House bill, or the state-based exchanges in the Senate bill. The Senate alternative is designed to give more deference to the states, and is a move supported by the health insurance producer industry, among others. A state-based insurance exchange has the advantage of being consistent with the current, state-based insurance regulatory framework.

It remains unclear whether the new Medicare Advisory Board in the Senate bill will make it through. House leaders continue to be uncomfortable with the new advisory board, given the tremendous amount of authority the Board would have to pass new Medicare proposals. Also at issue is how much the Medicaid program will be expanded. Under the House bill, the Medicaid program would expand eligibility to those within 150% of the federal poverty level. The Senate bill increases eligibility to 133% of the poverty level.

The next few weeks will be critical to whether health care reform is passed and the scope of the changes in the legislation. Democratic leaders have set a goal to have reform passed before the President's State of the Union address. The President's address will likely be delayed until early February in order to accommodate reform efforts. In the meantime, Democratic leaders are continuing to negotiate a deal. Once a deal is reached, the bill will then be sent to the Congressional Budget Office ("CBO") to be scored, which could take another 10 days. Once a CBO score is issued, Congress would then vote on a final bill. Given the timing, a vote by Congress on a final bill will likely not occur until February 1 at the earliest.

## THE IMPACT OF THE MASSACHUSETTS ELECTION

As has been the case throughout much of the road to health care reform, nothing seems to be certain and the process has been in a constant state of flux. The January 19, 2009 Massachusetts special election will determine who will succeed the late Senator Ted Kennedy. The race, which has turned into a surprisingly close one, has an impact on the health care reform debate. If the Republican candidate, Massachusetts state Senator Scott Brown, defeats the Democratic nominee, Massachusetts Attorney General Martha Coakley, the crucial 60th vote in the U.S. Senate to thwart a Republican filibuster is at stake. Brown has indicated that he would vote against a Democratic health care reform bill. Democratic strategists have considered alternatives to relying on Massachusetts for the 60th vote, including rushing a reform bill through Congress before Brown is seated, delaying his election certification, using the budget reconciliation process to pass a narrower version of the bill through the Senate with just 51 votes, and revising the bill to appeal to moderate Republicans, such as Senator Olympia Snowe (R-ME).

## WHAT'S TO COME

Meanwhile, Republican state attorneys general from at least 10 states, including Florida and South Carolina, are considering whether to file a lawsuit to challenge the constitutionality of the federal health care bill. At issue is the provision that requires individuals to buy health insurance or pay a fine.

Even with enactment of health care reform legislation, many significant changes will not be realized for some time (2013 and beyond), such as establishment of a health insurance exchange, increases to Medicaid eligibility levels, the provision of financial credits and cost-sharing for families and small businesses to purchase coverage, the individual insurance mandate, and employer responsibility to offer coverage or make a financial contribution. Some of the reforms, however, will take effect immediately in 2010, such as creation of a high-risk insurance pool for individuals who are uninsured or have been denied a policy because of pre-existing

conditions, a prohibition on lifetime coverage limits, a prohibition on rescinding an insured's policy when a claim for benefits is filed, except in the case of fraud, and a requirement that plan dependents through the age of 26 remain on their parents' i nsurance policy, at the parents' choice.

Numerous details remain to be worked out regarding a final reform bill, besides a host of other political factors hanging in the balance. Yet, Congress is remarkably close to passing comprehensive health care reform. We will keep you apprised of these historic developments as they play out in the coming weeks, and if passed, in the months and years to come

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This Alert was written by Laura L. Katz and Daniel D. Santos, members of the firm's Insurance Practice Group. Laura can be reached at 410.332.8804 or lkatz@saul.com. Daniel can be reached at 717.257.7512 or dsantos@saul.com. This publication has been prepared by the Insurance Practice Group for information purposes only.

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**Baltimore, MD**
500 East Pratt St.
Charles O. Monk, II
410.332.8668

**Chesterbrook, PA**
1200 Liberty Ridge Dr.
Michael S. Burg
610.251.5750

**Harrisburg, PA**
2 North Second St.
Eric L. Brossman
717.257.7570

**Newark, NJ**
One Riverfront Plaza
Stephen B. Genzer
973.286.6712

**New York, NY**
400 Madison Ave.
John J. Jerome
212.980.7212

**Philadelphia, PA**
1500 Market St.
Bruce D. Armon
215.972.7985

**Princeton, NJ**
750 College Rd. E
Marc A. Citron
609.452.3105

**Washington, DC**
2600 Virginia Ave. NW
Mark L. Gruhin
202.342.3444
Edward R. Levin
202.342.3420

**Wilmington, DE**
222 Delaware Avenue
Wendie C. Stabler
302.421.6865
William E. Manning
302.421.6868