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Final Push for Health Care Reform

The final push to achieve health care reform is underway. The White House and Democratic Congressional leaders have officially decided not to convene a formal conference committee, thus avoiding some of its procedural complexities and the delays associated with such procedures. Instead, the differences between the House and Senate health reform bills will be resolved through a procedure which is formally known as "messages between the Houses" and is referred to by political insiders as a "ping pong." The ping pong procedure will allow the House and the Senate, respectively, to vote on a compromise health reform bill arrived at through private negotiations between Democratic Senate and House leaders while bypassing certain procedural votes required to simply convene a conference and votes to further amend the bills that may highlight the thorny, political issues that already divide the fractious Democratic caucus. Although the ping pong procedure has been widely criticized because it lacks the transparency of public proceedings, much of the negotiations and compromises attributable to a formal conference committee typically would occur behind-the-scenes as well.

Once Congressional leaders have completed their back-and-forth negotiations, the House of Representatives will be the first to vote on the compromise health reform bill, framed as an amendment to the Senate bill which passed on Christmas Eve. Once the compromise bill passes the House, it will be sent to the Senate for approval. Each up or down vote on the compromise bill will be preceded by a vote to invoke cloture, or to end debate on the bill, cutting off an anticipated Republican filibuster. House Speaker Nancy Pelosi (D-Calif.) will need the votes of a majority of the representatives in the House, totaling 218, to both invoke cloture and approve the compromise health reform bill. Senate Majority Leader Harry Reid (D-Nev.) will need the votes of 60 senators to invoke cloture on the compromise bill approved by the House, but can then pass the compromise health reform bill by the majority vote of 51 senators.

The ping pong procedure bypasses some of the opportunities for public debate on the competing health reform bills and appears to place a lot of power in the hands of Majority Leader Reid and Speaker Pelosi and their respective staffs. However, because the health reform bills initially passed with razor thin margins in both Houses, we should expect ample opportunities for input into the compromise agreement from Committee Chairmen and rank and file members and direct hands-on involvement from the White House. Already this past week, President Obama has met with Majority Leader Reid and key Democratic Senate leadership. Following that meeting, two key Senate Committee Chairmen indicated that they had just completed a "positive and productive meeting with President Obama" concerning the health reform bills and that "[w]e are in the final

stages of this process, and at today's meeting, . . . made significant progress." President Obama plans to meet with House leadership in the coming week. Also, last week, Speaker Pelosi convened a conference call with approximately 175 House members in attendance. According to *Congressional Quarterly* reporting, Speaker Pelosi was less sanguine in her message, indicating that House negotiators do not plan simply to accept the Senate's health reform bill in its entirety, "and that [Pelosi] will fight for key provisions in the House overhaul plan."

Despite the difference in tone between Senate and House leaders this past week, progress is being reported in the tri-party negotiations among Reid, Pelosi and President Obama and their respective staffs who are working feverishly to bring this process to a close. There is rampant speculation about, but no concrete evidence of, which provisions of the House health reform bill will survive into the compromise bill. There is further speculation that, in an effort to address the ardent concerns of House negotiators, the price tag of the compromise bill may be increasing beyond \$1 trillion. Still, as Congressional negotiators flex their muscles in the final stage of the health reform negotiations, an inescapable reality should be setting in among Democratic lawmakers. The window for passing health reform, which the President has aptly framed as health insurance reform during the last five months, may be slowly closing. Polling reflects eroding public support for health reform proposals being pushed through Congress. The Administration is ever cognizant that it must devote its attention in a more discernible way to the sluggish economy and job creation, as well as national security concerns which predominate daily news coverage and voter concerns. Moreover, even under the best of scenarios, it appears that the 2010 elections will result in the loss of the Democrats' filibuster-proof majority in the Senate and a significant decline in the House's Democratic majority. There is even concern that Democratic candidate, Martha Coakley, running in a special election on January 19 to fill the Senate seat of the late Ted Kennedy (D-Mass.), may be in trouble, with at least one poll showing that she is running even with her Republican challenger, Scott Brown.

The efforts which lawmakers make over the next several weeks to arrive at a compromise health care reform bill may indeed be the *final* push for health care reform, whether or not Democratic leaders are successful in finding a compromise that will satisfy President Obama's framework and be palatable to members in both Houses of Congress. Now it is up to Congress to decide whether they will use the momentum of the last several months and the substantial, although not unanimous, support of the health industry to reach consensus on a health reform compromise bill which President Obama can sign or squander the opportunity by ending in a stalemate that may push health reform from President Obama's domestic agenda indefinitely.

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Industry Associations Jump into the Compromise Process

Last ditch efforts to influence the final health reform legislation by the association groups representing insurance and hospital industries found the National Association of Insurance Commissioners (“NAIC”) and the American Hospital Association (“AHA”) submitting “position” letters to the House and Senate leadership. The letters discussed the aspects of the House and Senate bills that each group favored and hoped to see carried forward in the final legislation being crafted by Senate Majority Leader Harry Reid and House Speaker Nancy Pelosi and their negotiators.

The NAIC letter, dated January 6, heavily emphasized the need to maintain state regulatory control over the new health insurance products and rating processes that would be implemented under both versions of health reform legislation. The NAIC stated that it opposed the creation of a new federal Health Choices Commissioner and Health Choices Administration to enforce the health reform act in states meeting the new minimum standards as being duplicative of already existing regulation, with the likelihood of producing both confusion and unnecessary costs. Federal approval or denial of premium rates or exclusions of plans from the health exchange process would also interfere with the states’ regulation and oversight of insurance companies and their financial solvency, according to the NAIC.

The NAIC also honed in on specific provisions that would phase in new requirements for group health plans and would impose minimal penalties on individuals who do not acquire health insurance coverage. Among other things, the NAIC recommended that all group policies be subject to the new requirements not later than the end of a five-year grace period and that more stringent sanctions be included for individuals who fail to acquire coverage. By way of example, the NAIC expressed concern that exempting anyone whose premiums would amount to more than 8 percent of income, as included in the Senate proposal, would result in significant adverse selection by keeping the young and healthy out of the insured pool when they were needed to help balance the insurance risks and lower the resulting premiums. NAIC further recommended either deleting the 8 percent threshold altogether or raising it significantly.

Adverse selection was a recurrent theme in the NAIC comments, with the industry requesting careful coordination of the effective dates of individual mandates and subsidies with minimum medical loss ratios for insurers, adjusted community rating and health insurance exchanges. Generally, the NAIC comments reflected concerns that allowing existing programs and processes to continue while gradually phasing in the reforms would result in premium rating discrepancies, push group health plans to self-insurance to avoid the reforms and encourage adverse selection by insureds. The NAIC also noted that the repeal of the McCarran-Ferguson antitrust exemption for health insurers would likely result in prolonged legal

action as insurers and states tested the bounds of the remaining state antitrust enforcement, and thus recommended leaving that exemption in place.

The AHA comment letter, dated one day after the NAIC letter, was more specific in suggesting tweaks and changes to the two competing health reform bills. The AHA preferred the expanded level of coverage requirements in the House reform bill, noting that balancing the individual mandates with strong incentives for employers to offer coverage would be crucial to realizing true expansion of health care coverage. The AHA also noted concerns in the delayed implementation dates for the new provisions, and encouraged earlier implementation dates, at least as early as those noted in the House bill. The AHA recommended that Congressional negotiators adopt the Senate version of the much discussed “public option” which would create non-governmental cooperatives and non-public multi-state health plans as market-place alternatives, but supported the House version of the national insurance exchange, which would invoke greater federal regulation than the Senate proposal.

The AHA letter contained a number of technical suggestions and comments regarding proposed changes in Medicare and Medicaid, and disputed some of the cost-savings that have been touted in both the Senate and House bills as being unrealistic, with concerns that those alleged savings would result in further under-compensation to hospitals for patients receiving needed services. Medicaid expansion at the levels proposed in the House bill was supported (extending eligibility to those at or below 150 percent of the federal poverty level), along with the House proposal to provide all states 100 percent federal funding through 2019 for the expanded populations. The AHA also supported the House proposal to drop the Children’s Health Insurance Program (“CHIP”) in 2013, the first year of the fully-operational national health insurance exchange program, as long as there was a robust program of subsidies and accommodations such as a Medicaid wrap-around program to provide the needed services.

Along with numerous comments on Medicare reimbursement issues, the AHA took aim at several provisions involving physician self-referral and anti-kickback provisions. Comments supported the House version of the limitations on physician-owned hospitals (grandfathering only those hospitals that were participating in the Medicare program on or before January 1, 2009), and the House version of voluntary self-disclosure for potential violations of the physician self-referral laws. The AHA also urged rejection of the Senate’s amendments that would make anti-kickback violations also violations of the False Claims Act, and would enable individuals with no personal knowledge of a transaction to claim to be whistleblowers exposing a fraud even if the transactions were already publicly exposed to a government entity.