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## House Reform Bill Passes in Dramatic Fashion

This week held much suspense as speculation continued to mount about whether House Speaker Nancy Pelosi (D-CA) could marshal a minimum of 218 votes from her Democratic Caucus of 258 to pass the House's health reform bill. At approximately 11:15 p.m. ET on Saturday, November 7, all speculation ended. Indeed Speaker Pelosi had cobbled together just enough votes from her own fractious caucus and picked up one Louisiana Republican, Ahn "Joseph" Cao, to pass the Affordable Health Care for America Act by a vote of 220 – 215. The landmark vote in the House of Representatives this weekend brings the country one giant step closer to seeing health reform enacted into law. However, the path to achieve this end is far from clear and is still riddled with the same landmines that nearly caused the House's reform efforts to explode.

Although the Democratic leadership appeared calm, confident and united throughout the week and on Saturday, House members' strongly held divergent views on abortion rights, immigration and the role and size of the federal government kept passage of the House reform bill in jeopardy. As late as Friday evening, a deal on the funding of abortion disintegrated and opened the door to the passage of an amendment on Saturday that resulted in more restrictive abortion funding language than contemplated by the broken compromise. On Saturday, we saw Democracy in action as the House of Representatives debated their reform bill for well over 12 hours. The debate at times was contentious, humorous, sobering and relenting. Irrespective of which side of the debate the House members espoused, there was a sense of history in the making as the House of Representatives considered the passage of, arguably, the most sweeping legislation in a generation.

Still, in the end, the Democratic-controlled House was able to control the fate of the reform bill by adopting a procedural rule that governed the debate on the health reform bill and limited the ability to add last minute changes to the legislation. The procedural resolution was passed by a vote of 242 – 192, with all Republicans and only 15 Democrats opposing it. The resolution permitted the adoption of a "Manager's" amendment to the health reform bill which added both technical changes and substantive matters to address

the concerns of a few wavering Democrats and consideration of the abortion funding amendment which was necessary to secure the votes of a sufficient number of moderate and conservative Democrats. Other than permitting consideration of the Republican alternative health reform plan introduced earlier in the week, the procedural rule did not give the Republican minority any other procedural advantages.

The Democratic majority in the House also was in control of when debate on the health reform bill would be closed. Presumably, Speaker Pelosi allowed debate long enough to secure the votes of at least 218 House Democrats, but not much longer. Most Democrats who voted against the House reform bill hailed from conservative districts and maintained philosophical concerns about the sweeping reach and cost of the bill. However, a couple of liberal Democrats, such as Representative Dennis Kucinich (D-MI), failed to vote for the reform bill because it did not reach far enough and create a government-run single payer. Perhaps, the evening's biggest surprise was the lone Republican vote from Representative Cao who indicated that he was able to vote for the bill once the abortion protections were added. Notably, Representative Cao is from a Congressional district which is heavily democratic.

In the end, Speaker Pelosi was able to deliver the votes to move forward a health reform bill that is intended to provide universal health care coverage to 36 million uninsured Americans over the next 10 years. Despite the magnitude of this effort, the Speaker's coalition of the willing may have an very short shelf life. Already, 40 House Democrats have threatened to abandon the bill if the expansive anti-abortion language is not scaled back in the conference committee to reconcile the House bill with the bill that is passed by the Senate, provided that such occurs. The Congressional Hispanic Caucus continues to be concerned that restrictions imposed on the ability of undocumented immigrants to purchase health care coverage through the exchanges may re-emerge in the conference committee. The progressives in the House will likely threaten to revolt if the public option is removed or considerably weakened in a Senate bill. For House Speaker Pelosi, the drama will likely continue as she tries to hold her caucus together through the second act of this play.

## The GOP Health Reform Plan – Too Late to the Party?

Last week, Republican members of the House of Representatives finally offered their own version of health reform and dangled the proposal in front of others in the House as an alternative to the Affordable Health Care for America Act ("HR 3962"), the combined tri-committee bill introduced by the Democratic House leadership. The long-awaited GOP bill touted a much

smaller version of reform, focusing primarily on the cost of health care, rather than attempting to provide more universal coverage. According to the Congressional Budget Office ("CBO"), the GOP reform package was estimated to cost \$61 billion over 10 years, compared to the \$1.1 trillion cost estimate given to the Democratic bill. While the Democratic bill is expected

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## The GOP Health Reform Plan – Too Late to the Party? (cont'd.)

to extend health care coverage to 36 million uninsured Americans in 10 years, the CBO estimated that the GOP bill would cover only 3 million.

The GOP reform measures included (1) expanding the use of health savings accounts (“HSAs”) to, among other things, allow funds to be used to pay for premiums in certain circumstances, (2) providing for interstate sales of individual health insurance through interstate compacts with a unified regulatory structure, (3) expanding the availability of insurance for employers with pooling arrangements and association health plans and (4) providing limits on medical malpractice lawsuits. The GOP proposal also included strong anti-abortion features and protections against extending health care coverage to undocumented immigrants.

House Republicans wanted the GOP package to interfere with a vote in the House on the Democratic bill by offering their package as an amendment to substitute for that bill. This resulted in a lengthy, and sometimes raucous, House Rules Committee meeting that began

Friday afternoon and ended after 2:30 a.m. When the House convened on Saturday, the GOP proposal was taken up and voted down, effectively killing the Republicans’ efforts to thwart the majority’s bill. Still, the House Republicans were able to join moderate and conservative House Democrats to ensure passage of an amendment to the Affordable Health Care for America Act that limits the use of federal subsidies to purchase health insurance policies that cover most abortion procedures. As amended to prevent federal funding of most abortions, the Democratic reform bill garnered one Republican vote and captured a number of Democratic moderates on its way to passage in the House.

The GOP bill could still have an impact in the Senate, where the action has now shifted, by providing a roadmap that Republican Senators may use to counter Democratic proposals being crafted by Majority Leader Reid (D-NV). For all practical purposes, though, the Republican health reform proposal introduced the House will be seen as too little, too late.

## HHS Releases New HIPAA Rules for Immediate Comment

On Friday, October 30, the U.S. Department of Health and Human Services (“HHS”) issued an interim final rule, with request for comments, to strengthen its enforcement of the rules promulgated under the Health Insurance Portability and Accountability Act (“HIPAA”). The Health Information Technology for Economic and Clinical Health (“HITECH”) Act, which was enacted as part of the American Recovery and Reinvestment Act of 2009, modified the HHS Secretary’s authority to impose civil money penalties for violations occurring on or after February 18, 2009. These HITECH Act revisions significantly increase the penalty amounts which the Secretary may impose for violations of the HIPAA rules and encourage prompt corrective action.

Prior to the HITECH Act, the Secretary could not impose a penalty of more than \$100 for each violation or \$25,000 for all identical violations of the same provision. A covered health care provider, health plan or clearinghouse could also bar the Secretary’s imposition of a civil money penalty by demonstrating that it did not know that it violated the HIPAA rules. Pursuant to the HITECH Act, and as promulgated in HHS’ interim final rule, HIPAA violations occurring on or after February 18, 2009 will result in the following violations and respective penalties amounts:

- **Unknown violations** (*i.e.*, if a person did not know and by exercising reasonable diligence would not have known that a violation occurred): The penalty shall be at least \$100 for each violation but shall not exceed \$50,000 for each violation or be in excess of \$1,500,000 for all such identical violations during a calendar year.

- **Violations due to reasonable cause and not to willful neglect:** The penalty shall be at least \$1,000 for each violation but shall not exceed \$50,000 for each violation or be in excess of \$1,500,000 for all such identical violations during a calendar year.
- **Violations due to willful neglect** (and the violations have been corrected within 30 days): The penalty shall be at least \$10,000 for each violation but shall not exceed \$50,000 for each violation or be in excess of \$1,500,000 for all such identical violations during a calendar year.
- **Violations due to willful neglect** (and the violations have **not** been corrected within 30 days): The penalty shall be at least \$50,000 for each violation but shall not exceed \$1,500,000 for all such identical violations during a calendar year.

Comments to the rules note that HHS will not impose the maximum penalty amount in all cases. The penalty determinations will be based on the nature and extent of the violation, the nature and extent of the resulting harm as well as other factors such as the covered entity’s prior compliance or financial condition. Furthermore, for violations that occur on or after February 18, 2009, a covered entity can no longer utilize an affirmative defense to bar the imposition of a civil money penalty for an unknown violation.

This rulemaking will become effective on November 30, 2009, and HHS will consider all comments received by December 29, 2009.