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The House Unveils its Health Reform Bill in Triumphant Fashion

On Thursday, October 29, House Speaker Nancy Pelosi (D-CA) and House Democratic leaders unveiled the long-awaited Affordable Health Care for America Act (H.R. 3962) in a public ceremony at the Capitol. The House health reform bill does not contain what the Speaker hoped would be a "robust" public option that pays providers based on Medicare rates. Instead, the House bill provides for a more moderate option which will allow providers to negotiate their payment rates with the government-run insurance plan. The net cost of the House plan is estimated at \$894 billion over 10 years and is expected to extend insurance coverage to 36 million Americans. The House bill raises Medicaid eligibility levels to 150 percent of the federal poverty level for all adults, which is a steeper increase than seen in earlier House proposals, and closes the Medicare Part D "donut hole" for seniors. The bill is financed primarily through a combination of a tax surcharge on wealthy Americans and spending constraints in Medicare and Medicaid. The Speaker called Thursday's event "an historic moment for our nation and families" and noted that "[f]or nearly a century, leaders of every party and political philosophy have fought for health insurance reform."

Despite its triumphant introduction, the Affordable Health Care for America Act still faces many challenges leading up to a floor vote that is tentatively set to be completed by Veterans Day on November 11. The House begins its aggressive timeline with floor debate on the bill scheduled to begin this Friday. Many contentious issues have yet to be resolved before 218 votes can be secured. In what some news sources predict to become a "showdown," anti-abortion Democrats threaten to block the legislation if

it does not contain language that explicitly bars the use of federal funds for abortions. Immigration is another issue that may engender debate among House Democrats. To the chagrin of a number of Democratic leaders and the Congressional Hispanic Caucus, some House members are pushing for language, which is seen in the Senate bills, to prohibit undocumented immigrants from purchasing health insurance through the exchange even when paying out-of-pocket.

Cost may still be another hurdle for House Democratic leaders. Last Thursday, the Congressional Budget Office ("CBO") and the Joint Committee on Taxation ("JCT") issued a preliminary analysis of the Affordable Health Care for America Act. The \$894 billion net cost of the House bill did not comfort many Blue Dog Democrats who responded with a letter to the CBO Director, Douglas Elmendorf, requesting additional calculations and explanations regarding whether the bill will reduce federal spending on health care and whether it would reduce the deficit. According to the letter, "in order to make an informed decision about the legislation, we believe it is necessary to have as full and clear a description of its long-term budgetary effects as CBO can provide."

Without resolving these issues, the House may not be able to obtain the 218 votes necessary to pass its health reform bill. House Democratic leaders are working quickly to resolve the abortion and immigration issues before releasing a manager's amendment. In the meantime, House Republicans are getting set to roll out their alternative bill which would be less sweeping and less expensive than the Democratic bill.

Reid's Public Option May Have Implications for 2010 Elections

Sen. Majority Leader Harry Reid (D-NV) last week inserted a public option plan in the Senate version of the health reform bill. The Senate bill, a work-in-progress compromise between the Senate Finance Committee ("SFC") version which does not include a public option and the Senate Health, Education, Labor and Pensions ("HELP") Committee version which does, includes a public option feature which is intended to appeal to moderate Democrats who have not been supportive of a government-run insurance program and the liberal Democrats who strongly favor such an option.

According to coverage of Majority Leader Reid's closed-door negotiations featured on TIME.com, Reid determined that he would be able to muster the necessary votes to move a bill that included a public option to the floor of the Senate. The current version of the Senate bill includes a public option with an "opt-out" provision that allows states to opt out of the program if they do not want their uninsured population to have the opportunity to participate in a publicly-run insurance plan. It appears that Majority Leader Reid's public option would feature negotiated payment rates for providers, rather than using

Medicare payment schedules, would be optional for consumers and would not require state funding. Other than those few details, not much is known about how the public option opt-out would work.

In theory, an opt-out program would appeal to the Democratic moderates by allowing the states to decide whether to participate, and also would appease the liberal faction who have been vocally demanding public competition for big insurance. Reid's real test will come in acquiring the 60 votes needed to cut off an anticipated Republican filibuster by invoking "cloture," which would force the bill to a full Senate vote. Once on the Senate floor, the Senate health reform bill could be passed by a simple majority of the Senate. According to TIME, three key Democratic votes are in doubt, all three from states easily won by Republican Sen. McCain (R-AZ) in last year's Presidential race. Because those states lean to the right, their Democratic Senators are concerned about conservative backlash if they vote for a public option plan. One such Senator, Democrat Blanche Lincoln from Arkansas faces what could be a major re-election battle next year and is reported to be carefully assessing the

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Reid's Public Option May Have Implications for 2010 Elections (cont'd.)

impact that a vote for a public option would have on her constituency. Standing in another posture under the Democrats' broad tent is Sen. Majority Leader Reid, himself, who faces a potentially difficult re-election bid in 2010, and may be seeking to show home-state Democrats – especially the Labor constituency – that he made a significant effort to beat back a filibuster to support a public option.

In the event that Majority Leader Reid is unable to gather enough Senate votes for the opt-out plan to survive, it could be replaced by a government-run plan that would not go into effect until states individually determined that there was a lack of competition among private insurers.

This is known as the “trigger” plan, and is favored by some moderates, including Sen. Olympia Snowe (R-ME), the only Republican to vote in favor of the SFC reform bill. Still, the public option is essentially a lightning rod for a small part of the overall effort to provide major reform to the American system. While fewer than five percent of Americans are expected to sign up for a public program, to some it symbolizes the beginnings of a single-payer system run by the government. To Majority Leader Reid, it means the opportunity to deliver significant change through an admittedly partisan effort to present President Obama with a major political win and, in turn, enhance his own re-election prospects in 2010.

Could the “Individual Mandate” Eventually Fall on Constitutional Grounds?

During the course of the health reform debate, scholars, policymakers and lawmakers have questioned whether the federal government can require individuals to purchase health insurance or pay a tax if they fail to do so. The same concern has been raised with respect to proposals that require employers to offer health insurance to their employees. On Thursday, after the House Democratic leadership introduced its health reform bill to the public, Representative Ted Poe (R-TX) made an impassioned floor speech in which he questioned the constitutionality of the individual mandate contained in the House bill and argued that forcing Americans to purchase health insurance violates the U.S. Constitution. If comprehensive health insurance reform is signed into law, will the individual mandate set law and policy on a path to collide in the hallowed rooms of the U.S. Supreme Court?

From a policy perspective, health insurers, hospitals and other health industry participants which are being asked to make concessions in the health care overhaul do so on the condition that health reform legislation will result in coverage of tens of millions of Americans who are now uninsured. In the event that health insurance coverage is optional or there is insufficient incentive to obtain coverage, the health industry fears that too many individuals will opt out of coverage, thereby creating an economic imbalance that will not support these concessions. Other policymakers believe in the concept of shared responsibility and maintain that Americans must do their part by securing health care coverage so that health care costs are spread among everyone – individuals, private insurers and the government – with the paramount goal of reducing health insurance costs for all.

On the other hand, from a constitutional perspective, lawyers and think tanks have raised concerns that the Constitution does not grant Congress the power to force individuals to purchase health insurance. Commentators point out that the United States has not enacted any other social legislation that serves as an ideal analogy to the individual mandate and there is no other example where the government has required Americans to purchase goods or services, a concern raised by the nonpartisan CBO to the

Clinton health reform efforts. There also is uncertainty as to whether compelling Americans to purchase health insurance would constitute an impermissible government “taking” of private property without due process of law under the Fifth Amendment. Furthermore, imposing an excise tax on Americans who fail to maintain insurance coverage would be a “novel” use of the federal government’s taxing authority, noted Peter Urbanowicz in his recently co-authored publication, *Constitutional Implications of an “Individual Mandate” in Health Care Reform*. Most federal excise taxes are used to raise revenue, observes Urbanowicz, and not for punitive purposes.

Still, despite the constitutional objections, at least some scholars strongly believe that, although the Constitution does not confer plenary powers over the public welfare like those possessed by the states, imposing an individual health insurance mandate should fall within Congress’ broad power to regulate interstate commerce (See, e.g., the RWJF policy publication, *The Constitutionality of Mandates to Purchase Health Insurance*). In addition, its broad powers over taxation should allow Congress to enforce the mandate through a federal tax. Lastly, Congress’ broad powers to spend to promote the general welfare should be sufficient to require states to adopt an insurance mandate as a condition to receiving federal funds for Medicaid. However, both of the publications cited in this commentary conclude that, to withstand constitutional scrutiny, health reform legislation should provide for a religious exception to the compulsory purchasing of health insurance to avoid a constitutional challenge on First Amendment grounds and a statutory challenge under the Religious Freedom Restoration Act.

If health reform legislation is passed, could the quest for universal health care coverage be derailed by a successful constitutional challenge of the individual insurance mandate? A legal challenge was made to Massachusetts’ individual mandate and, this past March, a Massachusetts Superior Court found in favor of the Massachusetts’ Department of Revenue and dismissed the lawsuit. As of the date of this *Update*, an appeal is still pending.