LLB&L

Health Care Reform Update

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Back to the Future – Budget Reconciliation in the Senate

The more than year-long process of health reform went back to the future on Tuesday, as the Senate took up the amendments that were passed by the House of Representatives late Sunday night to the newly inked legislation. Under the tightly controlled process, only matters that deal with revenue or spending under the finalized health reform law (the Patient Protection and Affordable Care Act that the Senate passed on Christmas Eve in 2009) could be considered in the reconciliation bill, so a number of areas that still represented issues of concern are not included in the House-passed bill. H.R. 4872, the Reconciliation Act of 2010, is a 153-page set of budgetary tweaks and fixes to the major legislation (see discussion below for more details).

Additionally, the Senate parliamentarian became the focal point in this next step as he considered points of order regarding the contents of the bill and the allowability for consideration through the reconciliation process. The passage of the reconciliation bill requires only a majority (51) vote of the Senate. Debate is limited to 20 hours, and then votes on amendments will begin, a process with no time limit but one that allows for only one minute between votes. Republicans are reportedly trying to find rules on reconciliation that will allow them to change the bill, which would result in reconsideration by the House, and are submitting numerous amendments for consideration. According to *The Boston Globe*, Democrats must resist any temptation to amend the reconciliation bill, even amendments that they would favor, or the House will have to vote on it again, resulting in additional delay and uncertainty. The sense of urgency is heightened due to the two-week Easter recess that is slated to begin Friday night. Senate Democratic leaders have indicated that they will work through the night Wednesday with a goal of voting on the reconciliation bill on Thursday. Whatever the result of the voting, the new health reform law is certain to be a major element of continued discussion and debate, carrying into the midterm election campaign season for both parties.

Health Reform Dance – Next Up, the Reconciliation Bill Two-Step

Following Sunday night's record vote that passed the Senate health reform legislation signed into law by the President Tuesday morning, the House then passed their own amendments to the law in the form of a reconciliation bill, garnering one additional vote from House members. That bill now goes to the Senate, where debate will be limited but additional amendments can be passed. If passed by the Senate with further amendments, the amended bill will have to go back to the House for additional voting until a final, agreed-upon version is attained that the President can then sign. As noted above, the reconciliation bill is limited to items that have a budget impact on the new law.

So, what are the primary changes already made to the new law by the House? The Representatives immediately revoked the "Cornhusker Kickback" which drew instant criticism when it was passed in the Senate to provide full funding for Nebraska's expanded Medicaid program, assuring the vote of the Nebraska Senator. This and several other similar provisions that benefited single states would be removed from the law under the reconciliation bill. At the same time, the bill will increase the amount of the federal share by fully funding increased Medicaid costs for three years for all states that experience increased enrollment under the expanded coverage provisions, with a phased-in drop in that funding over the following four years to 90 percent.

A number of other items in the health reform legislation are subject to tweaking in the reconciliation bill, some just by changing the effective dates and some with more expansive changes. Notable revisions are found in the following:

- A revenue-producing provision known as the "Cadillac tax" will be applied to health plans costing more than $10,200 a year for individuals (up from the Senate version of $8,500) and $27,500 for families (up from $23,000). The tax would be assessed against the insurers or plan sponsors, possibly resulting in higher rates for the coverage, and will not kick in until 2018, lowering the near-term revenue to the government.

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Health Reform Dance – Next Up, the Reconciliation Bill Two-Step (cont'd.)

- The new law requires most Americans to have qualifying health coverage, and those who do not will face an annual penalty, beginning in 2014. In years following 2014, the reconciliation bill will calculate the penalties slightly differently, potentially resulting in greater overall penalties for those who do not acquire health care coverage. For example, in 2016, the penalty would be the greater of either a flat fee of $695 (down from the new law's fee of $750) or 2.5 percent of the uninsured person's income, up from 2 percent in the current version.
- The provisions in the new law include an increase in the Medicare payroll tax of 0.9 percent on adjusted gross income above $200,000 for individuals, or $250,000 for couples. The reconciliation bill adds a new provision starting in 2013 for those people in the noted income tax brackets, who will also face a 3.8 percent tax on investment income, including interest, dividends and capital gains.
- Medicare beneficiaries enrolled in Part D drug plans will benefit this year under the reconciliation bill, by receiving a rebate of $250 to help with the costs of prescription drugs when the beneficiary reaches the "donut hole" under Part D, during which no coverage is available, and, beginning next year, by having a 50 percent discount on brand-name drugs in the donut hole. The discounts will expand in subsequent years to include generic drugs, and will eventually close the coverage gap. In 2011, the costs will be borne by the pharmaceutical industry, while in subsequent years, the government will pick up the expense. Employers will lose the deduction for Part D subsidies for eligible retirees beginning in 2013 instead of 2011.
- Low and moderate income Americans will be eligible for subsidies to help them purchase health care coverage. The reconciliation bill will provide for more generous subsidies than the new law, with sliding scale cost-sharing subsidies and tax credits for individuals with incomes up to 400 percent of the federal poverty level.
- Primary care physicians will get a Medicaid payment increase under the reconciliation bill. Currently Medicaid pays doctors about 20 percent less than Medicare. The increases starting in 2013 and 2014 will boost those rates to be on par with Medicare, in part to encourage more physicians to participate in the programs that will see increasing enrollment due to the law's expansion in Medicaid eligibility. Federal funding will cover 100 percent of the increased incremental costs to the states.
- The reconciliation bill will freeze Medicare Advantage payments in 2011 and cut back payments to Medicare Advantage plans more sharply than the new law, resulting in an estimated cut back over 10 years of $132 billion, compared to $118 billion. Funding will also be shifted for Medicare Advantage plans in low cost areas, which will actually experience an increase up to 15 percent in funding over traditional Medicare, while plans in high cost areas will experience a decrease in funding to about 95 percent of Medicare. High quality plans will be eligible for increased payments of at least 5 percent.
- Beginning in 2014, employers with more than 50 employees not offering minimum essential health coverage will be required to pay a penalty for each employee. A separate per-employee fine will be assessed for any employees who are in waiting periods that exceed 30 days. The reconciliation bill will increase the applicable no-coverage fine from $750 to $2000 for each employee, but will exempt the first 30 employees from the fine calculation. It also will eliminate the fine for all employees who are in a waiting period for coverage, while maintaining the 90-day limit on waiting periods that will take effect in 2014.
- The new law will prohibit physician-owned hospitals without an in-place Medicare provider agreement as of August 1, 2010, from participating in Medicare, with some exceptions, and limits the "grandfathered" hospitals' expansion for continuing participation. The reconciliation bill will change the date of the grandfathered facilities' Medicare agreements to December 31, 2010.

The music has started once again, and the Senate now takes to the floor to debate, and perhaps further amend, the new health reform law. The Administration participants appear to all hope to end the dance on a positive note, but there are certainly discordant notes being played. The next three days will likely see the Senate's resolution of the reconciliation bill, and perhaps the final strains of the health reform melody.