LLB&L
Weekly Health Care Reform Update
Monday, August 24, 2009

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Will Health Reform Survive the Summer Recess?

With the House Tri-Committee bill poised for a vote on the floor of the U.S. House of Representatives after Labor Day and a bill approved by the Senate Health, Education, Labor and Pensions (HELP) Committee – feats never achieved by the Clinton-era health reform initiatives – President Obama's goal of signing meaningful health care reform legislation by year's end appears, at best, tenuous.

In an interview that aired Sunday, August 23, Senator John McCain (R-AZ) indicated that the President "needed to come back to the drawing board on health reform and consider abandoning the government-run public option." Senator Joe Lieberman (I-CT) recently urged the President to postpone many of his health reform initiatives until the economy was stronger. Criticizing various provisions of the current health reform bill, Senate Republican leader Mitch McConnell (R-KY) indicated that Republicans would like to start over "with a genuine bipartisan approach." Senator Richard Lugar (R-IN) concurred. Senator Lugar further suggested that the health reform legislative process should be reset and that, in view of the recession, health care reform should be tabled until at least next year, if not later. Meanwhile, more liberal Democrats in Congress and around the Country threaten to abandon the President over what is viewed as the President's soft support for a public option and unwillingness to fight for it.

With all of these divergent opinions percolating from a recessed Congress, Democratic Senators are strategizing about a "go-it-alone" tactic to pass one or more health care reform bills through the budget reconciliation process. This strategy, which has been met with strong opposition by Republicans and reluctance by some Democrats, has its risks and may result in scaled down versions of some of the President's key health reform initiatives. Still, this approach may become less theoretical if the Senate Finance Committee fails to reach a bipartisan consensus on a health reform bill. Although the bi-partisan group of six Senate Finance Committee members continue to hold talks during the Congressional recess, they have not publicly reported any substantive progress on a health reform bill.

The President cannot be pleased that, by the end of the third week of the Congressional recess, Congress appears no closer to passing health reform legislation than when the recess began. Arguably, since the beginning of the recess, there has been some retreat in the summer's slow and steady progress down the path toward health care reform. Still, only time will tell whether the President will deliver on his promise of health care reform. The LLB&L Weekly Health Care Reform Update shall continue to track the progress of the Congressional health reform initiatives, wherever their paths should lead us.

Obama and Press Vying for Spotlight to Push Reform Back on Track

From bloggers to established news reporters, coverage of raucous town hall meetings and efforts to "clarify" or sometimes recast the issues in the health reform debate are taking place in multiple forums. Last weekend the Associated Press reported data that showed that competition among health insurers in many market areas is limited, and that in a number of areas one or two companies dominate the marketplace. Critics of the current insurance-based health care payment system often point to a lack of competition among insurers as driving up the cost of premiums, contributing to a growing number of uninsured individuals and families. Democrats pushing a public plan option see that option as competing with private insurers, bringing down premium rates because the public plan will not be required to make a profit, and creating a healthier, more competitive market that will help keep prices down.

President Barack Obama, while indicating earlier in the year that he wants a tax-payer funded option, in Colorado over the weekend said that the public option is "just one sliver" of the entirety of health reform. Press reports quickly followed with details that a public option may not be an Obama-priority after all. However, the *Wall Street Journal* reported that a group of liberal bloggers raised $309,393 in 72 hours from 5,155 donors for Congressmen demanding the inclusion of a public health plan option. The issue continues to generate press and White House comments seeking to redefine the scope of the health reform package that now appears to be revolving around one issue.

With two weeks to go before Congress reconvenes to once again tackle the health reform issue and attempt to fashion legislation acceptable to both the House and Senate, there appears to be no consensus yet as to whether the public option is out, is in, and if in, what form it will take.

Senate Finance Committee Still Struggling with Bi-Partisan Legislation

The sub-committee of six negotiators from the Senate Finance Committee (known now as the "Gang of Six") continues to work on a bi-partisan bill through the recess, with Senator Grassley calling a roundtable conference call of the members to catch up on open issues and the status of individual negotiations. Separately, other Democratic members of the Senate have been quietly discussing separating the reform package into two parts, one that could pass the Senate with just a Democratic majority vote, and another that would be discussed and voted upon by the full Senate. The two packages could focus separately on a publicly financed plan under the budget authority of the Finance Committee, to contend with the "public option" foes, while other aspects of health reform, including increased insurance company regulation and other health coverage options, would be addressed in the larger forum.

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New Breach Notification Rules Released

An interim final rule released last week by the U.S. Department of Health & Human Services (HHS) requires health care providers, health plans and other entities covered by the Health Insurance Portability and Accountability Act (HIPAA) to provide notice to individuals, HHS and, potentially, the media when unsecured protected health information is breached. The Federal Trade Commission (FTC) also issued a companion breach notification final rule that applies to vendors of personal health records and certain others not covered by HIPAA. These regulations implement provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act, passed as part of the American Recovery and Reinvestment Act of 2009.

Under the HHS rule, a breach occurs when the unauthorized acquisition, access, use or disclosure of protected health information (PHI) compromises the security or privacy of such information. Upon discovery of a breach, health care providers and other HIPAA covered entities must notify affected individuals without unreasonable delay but no later than 60 calendar days from the date of discovery. If a breach affects, or is believed to affect, 500 or more residents in a particular state or jurisdiction, additional notice must be provided to prominent media outlets serving that area. If a breach involves 500 or more individuals, the covered entity also must immediately notify HHS. All other breaches may be logged and reported to HHS annually. Business associates also have an obligation to report breaches to the affected covered entity so that the covered entity can then properly notify individuals, HHS and the media.

The HHS interim final regulations are scheduled to appear in the Federal Register on August 24, and will be effective 30 days afterwards. Covered entities and business associates should begin updating policies and procedures, training and existing business associate agreements to comply with the new rule. Penalties for HIPAA violations were increased last February by the HITECH Act, which also enhanced federal and state government HIPAA enforcement capabilities.

The FTC issued companion breach notification regulations that apply to vendors of personal health records and other entities not covered by HIPAA. The breach notification procedures are similar to the HHS rule, but violations will be treated as unfair or deceptive acts or practices under the Federal Trade Commission Act. These rules apply to breaches that are discovered on or after 30 days from the rule's publication date in the Federal Register, which has yet to be announced. To give companies time to come into full compliance with the FTC rule, the FTC will begin enforcement 180 days after publication.

Locke Lord will soon release a detailed analysis of both the HHS and FTC rules governing breach notification. This analysis will describe the notification procedures, describe the nuances of th rules and assist covered entities, business associates and entities governed by the FTC rules with implementation strategies.

Congress Focuses on Health Insurer Executive Compensation and Profits

On August 17, Chairman of the House Energy and Commerce Committee, Henry Waxman (D-CA), and Chairman of the Subcommittee on Oversight and Investigations, Bart Stupak (D-MI), issued letters to 52 health insurance companies seeking detailed information about the insurer's executive compensation, corporate events, profits from various lines of business and other business practices. Responses to these requests are due September 4, and September 14, 2009. Even though health insurers which received these letters are not legally obligated to comply, the House Energy and Commerce Committee could subsequently vote to subpoena such information.

The letters do not reference any particular health reform initiatives or positions. However, the health insurance industry has been a vocal opponent of a government-run public option, a position spearheaded by the industry trade association, America's Health Insurance Plans (AHIP). On the other hand, when promoting or defending the Administration's health reform initiatives, including the public option, spokespersons are sometimes disparaging of insurer profits. For instance, in his weekly address on August 15, President Obama's express focus was that health reform would put patients' interests ahead of insurer profits. Several weeks ago, House Speaker Nancy Pelosi (D-CA) went as far as accusing health insurance companies of making "immoral profits." Compared to other industries, health insurance is a relatively low margin business. According to a *Kaiser Health News* alert published on July 24, 2009, *Fortune* magazine reported that profit margins for insurers averaged 7.1 percent in 2005; 5.8 percent in 2006; and 6.2 percent in 2007. In 2008, profits fell to an average of 2.2 percent. In an earlier *Kaiser Health News* alert published on June 22, 2009, the author noted that, of the $2.5 trillion spent on health care this year, the elimination of health insurers' profits and executive compensation would lower health care spending by just 0.5 percent. The June 22 *Kaiser Health News* alert identified rising prices and increased utilization of medical services as the major cause of health care's escalating costs.

It is difficult to know whether legitimate Congressional concerns about executive compensation and business practices in the health insurance industry have caused the ratcheting up of the rhetoric about health insurer profits or whether the rhetoric has fueled the House's interest in the business practices of health insurers.