ROPES & GRAY

September 17, 2009

Senator Baucus Opens Final Phase of Health Reform Debate with Release of Much-Anticipated Legislation

Senator Max Baucus, the chairman of the Senate Finance Committee, released his much-anticipated health reform legislation, "America's Healthy Future Act of 2009." The proposal has no Republican supporters as yet, but it remains the most likely template for successful bipartisan legislation. A copy of the legislation and the chairman's summary are available in the Comprehensive Health Reform section of Ropes & Gray's Health Reform Resource Center. A roadmap of the reform debate and an analysis of the proposal follow.

America's Healthy Future Act of 2009

The Senate Finance Committee is the last congressional committee of jurisdiction to consider a bill, as the Senate Health, Education, Labor & Pensions (HELP) Committee and the House Ways & Means, Energy & Commerce and Education & Labor committees approved bills earlier this year. The bill reflects weeks of negotiations by the "Gang of Six"—three Democratic and three Republican senators who attempted to reach a bipartisan consensus over the summer—yet it ultimately failed to garner the group's endorsement. If no Republicans sign on to the bill after mark-up on September 22, Democrats may resort to a procedural maneuver known as "reconciliation," thereby exempting the bill from filibuster. Should the bill pass the full Senate, differences between it and the legislation that passes the full House would be resolved in conference.

America's Healthy Future Act of 2009 follows the same outline as the predecessor bills passed out of their respective committees, and is consistent with the conceptual framework Senator Baucus released on September 8. Each proposal provides for the creation of insurance exchanges through which individuals and small employers would purchase coverage from a menu of health plans. Like the other bills, the Baucus legislation includes an individual mandate requiring most individuals to have health insurance, and it provides tax credits to individuals at or below specified income levels and to small employers. Each bill also adopts reforms to the private insurance market. Also like the other bills, this legislation requires state Medicaid programs to expand their coverage to new groups.

What's New In the Senate Finance Committee Plan?

The Baucus proposal differs from the other bills in several important respects. These differences aim to garner majority support in the Senate. To gain such support, the legislation addresses a variety of the criticisms lodged against health reform over the summer, by reducing overall costs and assuaging concerns relating to a public plan and the need for malpractice reform. Below are summaries of some of the noteworthy differences in the Baucus proposal. A full summary of the bill is available here.

Insurance and the Insurance Exchange

- CO-OPs But No Public Option: $6 billion is authorized to fund the development of non-profit, member-run Consumer Operated and Oriented Plans (CO-OPs). There is no public plan or public plan "trigger."
- Less Generous Subsidies: Premium subsidies are available only to those up to 300% of the Federal Poverty Level (FPL), and cost sharing subsidies are provided only up to 200% FPL. In the House bills, subsidies are available for premiums and cost sharing up to 400% FPL.

- No Employer Mandate: No employers are required to offer insurance to employees, although employers with more than 50 employees must pay a fee for each employee who receives a premium subsidy.

Medicaid

- Larger Burden on States: The federal government will finance a smaller proportion of the costs incurred by states for Medicaid expansion populations than in the House bills.

Medicare

- Value-Based Purchasing (VBP): Unlike the House or Senate HELP bills, the Baucus proposal implements VBP and/or quality reporting programs for most Medicare providers.
- Hospital-Acquired Conditions (HAC) Penalty: Hospitals in the top quartile for national, risk-adjusted HAC rates will receive a payment reduction for the following year.
- Sustainable Growth Rate (SGR) Formula: $11 billion is provided to avoid deep cuts in Medicare physician fee schedules for only one year; in contrast, the House bills adopt a permanent fix at a cost of $228 billion.
- Part D "Doughnut Hole": While the House bills phase out the doughnut hole in Part D coverage, the Baucus legislation only provides manufacturer discounts on drugs purchased in the coverage gap.
- Medicare Commission: The legislation would establish an independent Medicare Commission to propose Medicare savings to be considered by Congress through a fast-track process that would ensure attainment of specified savings targets.

Medical Malpractice Reform

- Litigation Alternatives: The bill includes a resolution expressing the "Sense of the Senate" that states should be encouraged to establish demonstration programs to evaluate alternatives to the civil litigation system for medical malpractice claims.

Requirements for Tax-Exempt Hospitals

- Community Care and Billing Standards: Tax-exempt hospitals must adopt policies to address community needs, follow Medicare debt collection rules and charge financial assistance patients no more than they charge insurance carriers. HHS must report to Congress on charity care, bad debt expenses and unreimbursed costs incurred by tax-exempt, taxable and governmental hospitals.

Tax and Revenue Provisions

- Surcharge on Cadillac Health Plans: Health care insurers will be subject to a 35 percent excise tax on the aggregate value of employer-sponsored health coverage, which includes dental, vision and other supplementary health insurance coverage, that exceeds a specified state-specific threshold (commonly referred to as "Cadillac plans"). (Effective for taxable years beginning after December 31, 2012.)
- Tax on Health Benefits: Employers must report the value of health insurance benefits for employees on their W-2s. (Effective for taxable years beginning after December 31, 2009.)
- Enhancements for Long-Term Care Insurance: Long-term care insurance may be elected on a pre-tax basis under a cafeteria plan, and long-term care insurance premiums may be reimbursed by Flexible Spending Accounts (FSAs). (Effective for taxable years beginning after December 31, 2010.)
- Cap on FSAs: Employee contributions to a FSA will be capped at $2,000. (Effective for taxable years beginning after December 31, 2012.)

- Penalty on Non-Qualified HSA Distributions: The tax on non-qualified distributions from Health Saving Accounts (HSAs) will be increased to 20 percent. (Effective for taxable years beginning after December 31, 2009.)
- Definitional Changes Limit Over-The-Counter Reimbursement: The definition of qualified medical expenses for purposes of FSAs, Health Reimbursement Accounts (HRAs), HSAs and Archer Medical Savings Accounts (MSAs) will be changed to match the definition of medical expenses for purposes of the itemized deduction. This proposal effectively excludes reimbursement for the cost of over-the-counter medicines in the above accounts. (Effective for taxable years beginning after December 31, 2009.)
- Increased Payment Reporting: Information reporting, similar to a 1099 or W-2, will now be required for all payments made to corporations, for both property and services, of $600 or more. (Effective for taxable years beginning after December 31, 2011.)
- Fees on Drugs, Devices, Plans and Labs: An annual fee will be imposed on manufacturers and importers of branded drugs, manufacturers and importers of medical devices, health insurance providers and clinical laboratories. (Effective for calendar year 2010 and thereafter, with respect to domestic covered sales in calendar year 2009 and thereafter.)
- Small Employer Nondiscrimination Rule Changes: New safe harbors will be available for cafeteria plan nondiscrimination rules for certain small employers. This is expected to have a negligible revenue effect. (Effective for taxable years beginning after December 31, 2010.)
- Repeal of Business Deduction for Part D Subsidies: The amount of the deduction for retiree prescription drug expenses will be reduced by the amount of the Medicare Part D subsidies. (Effective for taxable years beginning after December 31, 2010.)

For further information, please contact your regular Ropes & Gray attorney.