Mahoney&Associates

OnPoint

POSITION PAPER

October 5, 2009

Health Care Reform Update

The wheels of Congress continue to grind slowly toward an outcome that cannot possibly be predicted at this time. Within the past few days, there was significant action taken in the Senate Finance Committee under the leadership of Max Baucus (D-MT). In addition, a new issue has become a more frequent topic of conversation in the halls of government.

Senate Finance Committee Rejects Public Option Amendments

The biggest news of the week came on Tuesday, September 29, 2009, when the Senate Finance Committee rejected two proposed Public Option amendments to the Baucus bill.

Senator Jay Rockefeller's (D-WV) amendment would have made insurance available to all individuals and businesses through a national exchange and would have required Medicare providers to participate in the public plan for the first two years. It was defeated by a vote of 15-8, with all Republicans and 5 Democrats voting "nay".

A proposal put forward by Senator Charles Schumer (D-NY) called for the public plan to pay providers above Medicare rates but under those paid by insurers. It was defeated 13-10, this time with 3 Democrats joining the "nays" of all Committee Republicans. Naysayers included Baucus each time.

Schumer and other public option proponents vowed to fight on, but this was clearly a setback for them, particularly with public support for a government-operated plan slowly dissolving. Various potential maneuvers remain available to them. They might try to involve President Obama in the proceedings as "the final arbiter" on whether a public plan should be included in any bill the full Senate considers.

Another option is to engage Senate Majority Leader Harry Reid (D-NV) who will oversee the merger of the Finance Committee's bill with the Senate Health, Education, Labor and Pensions Committee's bill (S. 1679). Expert observers say that he could effectively decide whether or not to insert a public plan in the bill (see *Politico*, 9/29). Also, any final bill that comes out of a House-Senate conference could include a public plan. During floor debate in both the House and Senate, proponents can propose amendments to insert into the final bill. Against this backdrop, an observer can only conclude that the public plan fight is far from over. About all that can be said is that Round 1 goes to the opposition.

For the moment at least, Baucus seems to have positioned himself as the probable architect of any compromise legislation. One of his principal concerns must be the looming possibility of a Republican filibuster. The math is daunting - it would take 60 votes to end a filibuster. Some Senate Democrats have already shown they will break ranks if they don't like a particular feature in the legislation.

The Republicans hold exactly 40 Senate seats so if it comes to a filibuster; the mathematical reality facing Obama-Care is a stark one. As Baucus said, "My job is to put together a bill that will become law…I can count, and no one shows [*sic*] me how to get 60 votes with a public option." It is a stunning turnaround in his stature from just a few days ago.

One more thing - last week we joined others in describing the proposed "member-owned insurance cooperative" in the Baucus bill as nothing more than a "Trojan Horse" for the public option. That provision is still a part of the current proposal and it is still a Trojan Horse.

Prison Time for Some Who Refuse to Buy Health Insurance?

This week reform opponents shifted their big guns away from the public option and towards another growing controversy - the individual mandate to buy health insurance – more specifically, the "penalty" for failing to comply with the mandate.

In a recent television interview with George Stephanopoulos, the president insisted there was no new tax in the bill. The bill itself contradicts the president. Page 29, sentence one of the bill says: "The consequence for not maintaining insurance would be an excise **tax**" (of up to $1,900). The question is, what is the penalty for *not* paying the excise tax?

Existing rules in the U.S. tax code could make it a crime to willfully fail to pay excise tax. Depending on which of several criminal tax provisions under which the government chooses to proceed, the penalties could range from 1 to 5 years in prison and fines of up to either $25,000 or $100,000 (depending on whether a misdemeanor or a felony).

This observation is not mere speculation. During the week ending September 27, 2009, Tom Barthold, the chief of staff of the Joint Committee on Taxation, said that failing to comply with the individual mandate "could be criminal, yes, if it were considered an attempt to defraud." Does the Obama Administration really wish to incarcerate uncovered people who refuse to either buy health insurance or pay the excise tax?

The individual mandate in the Baucus bill closely resembles a similar mandate contained in the Massachusetts Health Care Access and Affordability Act, first enacted in 2007. We examined that law and the corresponding tax enforcement scheme to determine if the possibility of criminal charges also exists there. In fact, Massachusetts does **not** impose criminal sanctions on any failure to pay this particular penalty. It is enforced strictly by offsets against tax refunds and other payments owing from Massachusetts, as well as the usual civil collection procedures.

We do not believe that the lawmakers intentionally wrote a law that would put people in prison for not buying health insurance or paying the penalty tax. We trust this was simply a legislative oversight. If so, it is one that is easily corrected even if such a mandate eventually becomes law. All that is necessary is to amend other provisions of the tax code to make it clear that criminal charges will not be brought for failure or refusal to pay the "tax". In the meantime, we will continue to monitor and report on this issue.

Wayne W. Wisong, J.D., LL.M.
Senior Director ERISA Compliance &
In House Legal Counsel
Mahoney&Associates