



WEEKLY UPDATE ON HEALTH CARE REFORM

January 21, 2010

Improbably, perhaps the biggest news concerning health care reform this week is Massachusetts Republican Scott Brown's stunning upset victory to claim the United States Senate seat held by the late Senator Ted Kennedy, offering the Republican minority their 41st vote in the chamber and the ability to filibuster health care legislation. Although the ultimate impact of this development is unclear, what is clear is that the political landscape has dramatically changed overnight, and Democratic options for finalizing their reform package have been narrowed significantly.

All eyes are now on the House Democratic caucus. House leadership has been sparring with Senate leaders in recent weeks over differences in the reform measures that include (among others) taxes, abortion language, size of subsidies, and administration of the health insurance exchanges that would serve as marketplaces for small businesses and individuals to buy health insurance. House Democrats now face enormous pressure, including from the White House, to cave on these issues and quickly pass the Senate's version of the health care bill, which would send the legislation directly to the White House for the President's signature. It is rumored that this could be done with an agreement to later "fix" the bill through a Senate reconciliation process. However, this option appears unlikely, with Speaker Pelosi announcing this afternoon that "I don't see the votes for it". Also, the Catholic Bishops, who previously rallied pro-life Democrats to the consternation of other Democrats, are vigorously urging House Members to oppose the Senate bill. Additionally, some progressive Democrats who support a public insurance option are saying that they too would oppose the Senate bill.

Other options on the table are even more difficult to envision. These include passing compromise provisions through Senate reconciliation, which requires only 51 votes but could be politically devastating for Democrats, or winning the support of a Republican Senator.

And another idea being floated is to cherry-pick the most popular items from both bills, label many of them "insurance reform," throw in a few Medicare/Medicaid expansion measures along with some extra money for states, then and call the entire package "health care reform."

The one option that reportedly is off the table is attempting to ram a bill through Congress before the new Senator from Massachusetts is seated. But in truth, with all of the moving parts involved, it is nearly impossible to predict how this will all unfold.

In the meantime, the most significant development up until the Massachusetts Senate election had been the announcement that Democrats were "very close" to reaching a deal on the substance of a final bill, following several days of intense negotiations between the White House and Democratic leaders last week. Although the relevance of the deal may be in doubt now that the House could be forced to hold its nose and pass the Senate's version, we will briefly discuss some of the more notable aspects of the deal in light of the possibility that deals might still need to be made if Congress takes the approach of passing the Senate bill now and "fixing" it later.

The deal reportedly involved a compromise with labor unions on taxation of so-called "Cadillac" health plans to raise the thresholds for individual and family plans and exempt union plans until 2018. The union exemption drew protests from Republicans, who had no role in the discussions.



Another high-priority issue was the question of a single national health insurance exchange that would serve as a portal for employers and individuals to buy insurance, versus state-based exchanges. The Senate legislation is state-based, and would allow the federal government to establish a national exchange only in the absence of state action. The House bill calls for a single national exchange, wherein the Department of Health and Human Services would establish marketing rules for all products sold through exchanges, and would require the Small Business Administration to establish its own marketing services. There had been discussion of a “compromise” that would call for a national exchange that would allow states to “opt out” and establish their own similar programs. It is difficult to envision how this would work in practice, however.

And under intense time pressure to strike a deal before the Massachusetts election, Democratic negotiators were rumored to have been approaching different health care sectors asking them to revise their “deals” they had cut with the Obama Administration very early on in the debate. The pharmaceutical industry, for example, was reportedly willing to accept \$10 billion in additional taxes to help pay for the reforms. Discussions were ongoing regarding other funding sources for the reforms, but the Congressional leadership’s apparent rage at health insurance plans made it unlikely that any of the proposed fees for insurance companies would be reduced or eliminated.

The safe bet was also to expect a final deal to include the Senate’s more moderate limits on use of federal dollars for abortion, an issue that has been a huge sticking point, even though this deal would cause the House to lose about a half dozen votes from pro-life Democrats. The expectation was, however, that Democrats could compensate for this loss with support from more moderates who would support the otherwise more moderate, overall deal on the bill.

For more details on the substance of the bills, click the links below to view memorandums on the House Bill passed in November, the Senate bill as passed in December, and a comparative analysis of the House versus Senate versions, from Steptoe & Johnson LLP.

As mentioned, it is difficult to predict where things go from here. And if Thursday’s election in Massachusetts is any indication, surprises are very likely. We will keep you apprised of the latest political and legislative climate as it changes. In the meantime, feel free to contact us through our Health Care Reform Hotline at 610-945-1198 or email health.reform@trion.com for more information.

Links to additional documentation:

House Bill Memorandum

Senate Reform Bill

House Senate Comparison