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US Congress considers Major Health Insurance Legislation

The US Congress is currently considering proposals to overhaul the nation's health care system. On 7 November 2009, the House of Representatives passed the "Affordable Health Care for America Act" (H.R. 3962), and, on 24 December 2009, the Senate passed the "Patient Protection and Affordable Care Act" (H.R. 3590). The House and Senate bills, which differ from each other in material respects, are now in the hands of a Joint Conference Committee of the two chambers, whose mandate it is to seek to reconcile the two bills. If the reconciliation process is successful, the Conference Committee report will go back to each chamber to be voted upon. If adopted by both the House and the Senate, the Conference Committee report will be presented to President Obama for his signature.

Both the House and Senate bills are very lengthy and complicated and, if enacted in anything resembling their present form, would have a profound impact on the health insurance industry in the US. At the risk of oversimplification, three of the most important consequences of the bills would be to: (i) greatly increase the number of purchasers of health insurance as a result of the individual and employer mandates, (ii) establish a number of alternatives to the traditional insurance market, and (iii) significantly alter underwriting practices (*e.g.*, through mandating guaranteed issue and renewability, restricting rating variation and prohibiting lifetime coverage limits and pre-existing condition exclusions). Importantly, however, the effective date of a number of the bills' provisions would be several years in the future.

The following brief summary highlights some of the key features of the two bills.

Individual mandates – The bills would require individuals to have qualifying health coverage. Those without coverage would pay a penalty, unless they qualified for an exemption (*e.g.*, religious objection, financial hardship). The penalty would be imposed in 2013 in the House version, and phased in beginning in 2014 in the Senate version.

Employer mandates ("pay or play") – The bills would require employers to either offer health coverage to their employees or pay a penalty. The details of this requirement, including the extent of relief to be provided to small employers, differ considerably between the two bills. The mandate would be imposed in 2013 in the House version, and in 2014 in the Senate version.

Expansion of Medicaid – The Medicaid program (which provides health coverage for indigent persons) would be expanded to cover all individuals under age 65 with incomes up to 150% (House version) or 133% (Senate version) of the Federal poverty line.

Health insurance exchanges – The House bill would create a National Health Insurance Exchange, through which individuals and employers could purchase qualified insurance, including from private health plans and the public health insurance option. The House bill would also allow states to operate state-based exchanges if they demonstrate the capacity to meet the requirements for administering the exchange. The Senate bill would create state-based American Health Benefit Exchanges and Small Business Health Options Program (SHOP) Exchanges, administered by a governmental agency or non-profit organization, through which individuals and small businesses with up to 100 employees could purchase qualified coverage.

Public option – The House bill would create a new public health insurance option to be offered through the National Health Insurance Exchange that must meet the same requirements as private plans regarding benefit levels, provider networks, consumer protections, and cost-sharing. The Senate bill has no public option.

CO-OP program – Both bills would create a Consumer Operated and Oriented Program (CO-OP) to facilitate the establishment of non-profit, member-run health insurance cooperatives to provide insurance through the National Health Insurance Exchange.

Guaranteed issue and rating rules – Both bills would require guaranteed issue and renewability. The House bill would allow rating variation based only on age (maximum 2-to-1 ratio), premium rating area, and family enrolment. The Senate bill would allow rating variation based only on age (maximum 3-to-1 ratio), premium rating area, family composition, and tobacco use (maximum 1.5-to-1 ratio) in the individual and the small group market and the Exchange. Rating based on gender and health would be eliminated.

Temporary high-risk pool – The bills would establish a temporary national high-risk pool to provide health coverage to individuals (and spouses and dependents) with pre-existing medical conditions. Premiums, deductibles, and cost-sharing would be capped for individuals in the national high-risk pool.

Limits on medical loss ratios – The bills would limit health plans' medical loss ratio to not less than 85% (80% in the Senate version for plans in the individual and small group markets), to be enforced through a rebate back to consumers.

Prohibited limitations on coverage – The bills would prohibit individual and group health plans from placing aggregate dollar lifetime limits on coverage, and would prohibit insurers from rescinding coverage except in cases of fraud. The Senate bill would also prohibit annual coverage limits.

Health care choice compacts – The bills would permit states to form Health Care Choice Compacts to facilitate the purchase of individual insurance across state lines.

Health Choices Administration – The House bill would create a federal Health Choices Administration, headed by a Health Choices Commissioner, to establish the qualifying health benefits standards, establish the National Health Insurance Exchange, and enforce the requirements for qualified health benefit plan offering entities, including those participating in the Exchange or outside the Exchange.

Antitrust exemption – The House bill would eliminate the longstanding statutory antitrust exemption for health insurers and medical malpractice insurers.

Reactions from state insurance regulators – The National Association of Insurance Commissioners (NAIC) is the umbrella organization of US state insurance regulators who historically have had almost exclusive jurisdiction over US insurance regulation. On 6 January 2010, the NAIC's executive officers sent a letter to Congressional leaders, expressing the NAIC's views on the House and Senate health care bills. Among their comments were the following:

- The NAIC supports extending guaranteed issue protections to the non-group health insurance market, eliminating pre-existing condition exclusions and annual and lifetime limits, and prohibiting the rating of policies based on gender and health.
- By the same token, the NAIC underscores the need for a robust individual mandate, implemented sooner rather than later, and with strong penalties, to mitigate the risk of adverse selection.
- The NAIC recommends that health insurance exchanges be established and administered at the state level and opposes the House bill's provision to establish a new federal Health Choices Administration headed by a Health Choices Commissioner.
- The NAIC urges that nationally-sold plans be subject to all statutes and regulations that apply to other plans being sold to the same population and that they remain subject to the oversight of state insurance regulators.
- The NAIC warns against any provision (e.g., giving federal regulators the authority to deny premium increases) that could separate the regulation of premiums from the regulation of solvency by state insurance regulatory authorities.

Prospects for the legislation – The future of the proposed health care legislation is rather uncertain at this point. The prospects of enacting either bill, or a combination of the two fashioned by the Joint Conference Committee, have been called into question by the recent victory in a Massachusetts by-election of a Republican senator who has pledged to cast the deciding vote to filibuster (*i.e.*, delay indefinitely) consideration of the legislation in its present form. While opinion polls indicate public support for certain aspects of the legislation, they also evince concern about the costs of the legislation and, in particular, the taxes that would be imposed to implement it. As 2010 is a Congressional election year, members of Congress will be more wary than usual of casting a potentially unpopular vote in favour of the legislation. Some commentators have suggested that the attempt to enact comprehensive health insurance reform should be abandoned in favour of enacting specific components of the legislation that are generally popular among the citizenry, such as guaranteed issue and renewability, restricting rating variation, and prohibiting lifetime coverage limits and pre-existing condition exclusions. As the NAIC has pointed out, however, such partial initiatives, unless combined with a robust individual mandate to maintain the integrity of the risk pool, would create an adverse selection problem of major proportions. The most that can be said at this point is that there is great uncertainty about whether the US Congress will pass comprehensive health insurance legislation this year and, if so, in what form.

VAT on management services

On 1 January 2010, amendments to the VAT place of supply of services rules came into force. In general terms, a cross-border supply of services between two businesses will now be treated for VAT purposes as being supplied in the jurisdiction in which the recipient of the supply is located. Previously, the place of supply of a cross-border supply of services was the jurisdiction of the supplier, subject to a considerable list of exceptions. These amendments may have a significant impact on UK insurers which receive management services from offshore group companies (often, the headquarters company located in Bermuda).

Prior to 1 January 2010, certain management services, such as clerical or secretarial services, were treated as being supplied in the jurisdiction in which the supplier was established. If management services were supplied to a UK company by a group company established outside the EU, no VAT would be chargeable on those supplies. Following the recent changes, the place of supply of management services provided to a UK insurer by a non-UK group company will now be the UK, with the result that the UK company will have to account for UK VAT under the reverse charge mechanism; in other words, they will need to (so to speak) charge themselves VAT. These legislative amendments may cause UK insurers to suffer significant irrecoverable VAT costs, since they are generally unable to recover much of the VAT incurred on supplies they receive.

If you thought that these changes could be sidestepped by reducing management charges, think again – HMRC will apply transfer pricing rules to impose an arm's length charge.

Lord Mandelson's ministerial speech: Friend or Foe - Is the EU good for business?

The Department for Business Innovation & Skills published on 14 January 2010 a speech made by Lord Mandelson at the Business for New Europe Event. In his speech, Lord Mandelson discussed the EU agenda for financial regulation in the aftermath of the economic crisis.

Lord Mandelson, commenting on the UK government's stance to new EU regulation, stated that "*there is a compelling case for moving the basic level of the design of financial markets regulation – although not its implementation or supervision – to the level of the Single Market. We in the government think the balance struck on de Larosiere, where the EU collectively defines, and Member States implement and supervise, is the right one. This makes prudential sense – this is the level at which markets and banking operate.*"

Highlighting the government's rationale for an EU wide approach, Lord Mandelson also highlighted that *"a coherent EU position also gives us much greater weight in shaping a new global regime through the G20 process. It also makes commercial sense. I don't see how the UK can detach itself from a single European regulatory regime. If it wants to be the main capital and financial markets centre for the single market and if we want to be the main route or centre for investment into the single market, it doesn't make sense to detach ourselves from a single coherent European system."*

Lord Mandelson accepted in his speech that certain initial attempts at EU financial regulation have been badly flawed, such as parts of the Alternative Investment Fund Managers Directive which seem *"more like a long standing grudge against the hedge fund industry than a serious attempt to address systemic risk"*. However, on a more positive point, Lord Mandelson said that *"most other member states understand in principle the fact that the UK has more skin in this game than the rest of the EU put together, and we expect that to be respected. We will need to work hard with the European Parliament to get a constructive outcome"*.

To view the full summary of Lord Mandelson's speech, please [click here](#).

International Association of Insurance Supervisors ("IAIS") to develop common framework for the supervision of internationally active insurance groups

Following its announcement in February 2009 that it was to focus on the supervision of international insurance groups, and its adoption of a guidance paper setting out key features for effective supervisory colleges in group-wide supervision in October 2009, the IAIS published a press release on 19 January 2010 announcing that it had approved recommendations on the design and workplan regarding a framework to better supervise internationally active insurance groups.

The recommendations were drawn up by a task force chaired by Monica Mächler of the Swiss Financial Market Supervisory Authority and provide for the development of approaches to better monitor group structures, group business mix, and intra-group transactions with a view to identifying risks and establishing safeguards. The framework will set out both quantitative and qualitative requirements, as well as providing a platform for supervisory cooperation and interaction, and facilitating wide implementation.

The next steps, which will be coordinated by the Executive Committee, will be the publication of a comprehensive concept paper for consultation in the first half of 2011, and the publication of the full framework, which should happen by 2013. Publication of the full framework will be followed by impact assessments.

Peter Braumüller, Chair of the IAIS Executive Committee, commented that: *"We are confident that the framework will become an important contribution to our ongoing wider efforts to promote financial stability"*.

If you have any query in connection with anything in this Bulletin, please do not hesitate to get in touch with your usual Mayer Brown contact or the contact referred to below.

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