Major Health Care Legislation in Congress

Information courtesy of the National Association of Insurance Commissioners

As of Feb. 3, 2010

The loss of a 60-vote majority by Senate Democrats in the Massachusetts special election has thrown health reform efforts into disarray. While it may be too early to call the legislation dead, there is no clear path forward for Democrat House and Senate leaders seeking to enact comprehensive reform this year.

In addition to the procedural difficulty of adopting legislation in the Senate, where a united Republican caucus with 41 votes can successfully filibuster legislation, many centrist Democrats are now much more wary of voting for health reform after seeing a reliably Democratic Senate seat captured by a Republican and do not want to spend much more time with it in the public spotlight, especially when other important domestic issues such as stubbornly high unemployment rates are waiting to be addressed.

The Situation Prior to Massachusetts

The House adopted its comprehensive health reform legislation on November 7 by a narrow 220-215 margin, with 39 moderate and conservative Democrats voting against the bill, and a lone Republican voting in favor. The Senate adopted its legislation by a straight party-line 60-39 vote early in the day on December 24. Representatives of the two chambers began meeting shortly after the new year, and were reportedly close to a deal when the January 19 special election upended the process.

There were several major disagreements between the two bills and scores of smaller issues that needed to be resolved. Of these, the one that received the most media attention was the public plan, which under the House bill would have been sold through the Health Insurance Exchanges, and would have been required to negotiate reimbursement rates with health care providers. The Senate bill did not contain a public plan, instead providing for the U.S. Office of Personnel Management (OPM), which administers the Federal Employees Health Benefits Program, to contract with private insurers to provide nationwide coverage that would be sold through the Exchanges. It is unclear how this would have worked in practice, but it is likely that final legislation would have included the Senate OPM provision in lieu of a public plan.

A less-publicly debated issue dealt with how the Health Insurance Exchanges would have been implemented. The House bill created a new federal agency, the Health Choices Administration, run by a Health Choices Commissioner, that would have administered a National Health Insurance Exchange. The Commissioner would have had the authority to enforce federal insurance standards, even in states that had adopted legislation that conforms to these minimum standards, resulting in the potential for regulatory conflict and confusion. States could have applied to the Commissioner to operate an Exchange, but would have little leeway to deviate from the design of the National Exchange to suit state market needs.

The Senate bill would have begun with each state operating its own Exchange. As a fallback measure, the Secretary of Health and Human Services would have established an Exchange in states that failed to do so on their own. No new federal agency would have been created under the Senate plan, which would likely have been the position of a final bill. Final legislation would most likely have ended up somewhere between the House and Senate Exchange provisions, with state-based Exchanges subject to more federal oversight than in the Senate bill or a national Exchange with more flexibility for optional state-based Exchanges than the House bill provided.

Another important difference between the bills was in the penalties associated with a failure to obtain acceptable health insurance coverage. The House bill would have fined non-compliant individuals 2.5% of household income, up to the average cost of a basic plan in the Exchange. The Senate legislation, which was improved somewhat during floor debate, would have fined individuals the greater of 2% of household income or $750 per non-compliant adult. The Senate penalty, however, was phased in over three years with the penalty in the crucial first year being only $95 per adult or 0.5% of household income. Furthermore,

anyone for whom the cost of coverage exceeded 8% of income would have been exempt from the individual mandate, which would have severely compromised its efficacy. It is difficult to predict where final legislation would have come down on this issue.

Another important mechanism for mitigating adverse selection resulting from the market reforms were the subsidies for lower-income individuals purchasing coverage through the Exchanges. These were higher in the House bill than in the Senate. It is likely that the subsidies in a final bill would have been between House and Senate levels, but closer to the Senate position.

The House would have financed its subsidies largely through a surtax on high income individuals, while the Senate bill imposed an excise tax of 40% on the portion of high-cost health insurance policies above a threshold of approximately $8,000 for single coverage and $23,000 for family coverage. According to media reports, a deal was reached by House, Senate and administration negotiators shortly before the Massachusetts election that would have increased the threshold for the Senate excise tax and delayed its applicability to plans that were subject to collective bargaining arrangements.

What now

A number of ideas have been suggested in the wake of the loss of the Democratic supermajority in the Senate.

1. The House could adopt the Senate bill and then make changes using the reconciliation process, which only requires 51 votes, instead of 60. This approach would be seen by many as circumventing normal Senate procedures, and therefore carries a great deal of political risk. Furthermore, there are a lot of procedural restrictions that accompany the reconciliation process. Any provision that does not directly affect either government spending or revenue could be stripped from the measure on the Senate floor. Among other areas that would be off-limits under reconciliation are Senate abortion provisions that many conservative Democrats in the House object to, making passage of the Senate bill difficult in the House.
2. The House and Senate could draft two completely new bills. One would follow regular order, needing 60 votes in the Senate, and would contain the provisions that do not qualify for reconciliation and might garner one or two Republican votes in the Senate. The other would contain more controversial provisions, and would follow reconciliation procedures. This option would have the advantage of making it easier for legislators to avoid the abortion issue, but would take a lot of time and keep health reform in the spotlight, while distracting attention from other agenda items, something that makes conservative and moderate Democrats very nervous. It is also unclear if any Senate Republicans would support the noncontroversial bill if they expect more controversial provisions to be added through reconciliation.
3. Finally, scaled-back legislation could be drafted that can garner 60 votes in the Senate, without any sort of reconciliation measure. This is probably the most likely of the alternatives. It would probably not contain an individual mandate, a public plan, an employer mandate, Exchanges or a federal regulator. It may not even contain subsidies for low-income individuals to purchase coverage. The equity reforms such as guaranteed issue, rating reforms, and an end to preexisting condition exclusions become very difficult without an individual mandate or subsidies, however, especially in the individual market. An opportunity would probably exist to insert provisions to provide some flexibility for states to enact their own reforms. Leaders in the House and Senate are acutely aware of the interdependence of elements of the bills, however, and have been struggling to find individual pieces that can be pulled out for separate passage.

North Dakota requirements for new companies

Primary UCAA

The primary Uniform Certificate of Authority Application is found on the NAIC's website at www.naic.org/industry_ucaa.htm. A complete application must be submitted. The review process generally takes 60 to 90 days.

Minimum capital and surplus

Stock company—$500,000 capital stock and $500,000 surplus (N.D.C.C. 26.1-05-04)
Mutual company—$1,000,000 surplus (N.D.C.C. 26.1-12-08)
Risk-based capital (RBC)—a minimum 200% RBC ratio required after first year of business (N.D.C.C. ch. 26.1-03.1 and N.D.C.C. ch. § 26.1-03.2)

Physical presence in North Dakota

Must designate its principal place of business (home office) in North Dakota or place a deposit with the Bank of North Dakota in an amount established by the Commissioner, i.e., $1 million if some physical presence (regional office, claims center, etc) is located in the state (N.D.C.C. § 26.1-05-07.1).

Statutory deposit

Domestic P&C insurers—none
Domestic life insurers—securities equal to net value of all in force policies must be physically deposited or retained separate and distinct by the insurer who files a detailed verified statement listing the securities (N.D.C.C. § 26.1-05-23).

Premium taxes

The tax is levied on gross premiums (including assessments, membership, subscriber and policy fees, finance and service charges, less return premiums, refunds and abatements) at the following rates:
Life—2%
All others—1 ¾ %
Annuity premiums are not taxed in North Dakata.
All premium taxes are on a retaliatory state basis (N.D.C.C. § 26.1-03-17).

Statutory membership

Life and Health Insurance Guaranty Association (N.D.C.C. ch. 26.1-38.1)
Insurance Guaranty Association (N.D.C.C. ch. 26.1-42.1)
Other P&C: ND Automobile Assigned Claims Plan

Filing fee

Larger of $500 or retaliatory amount (N.D.C.C. § 26.1-01-07)
Additional fees of $180 when company is redomesticating
Additional fees of $145 when company is newly formed

Authority: North Dakota Century Code sections N.D.C.C. § § 26.1-05-07.1 and 26.1-05-07.2

North Dakota
INSURANCE
DEPARTMENT
PROTECTING THE PUBLIC GOOD
ADAM HAMM, COMMISSIONER

North Dakota requirements for new companies

Primary UCAA requirements

Application form and attachments

- Application Checklist and Listing of Incorporators, Officers, Directors and Shareholders—Form 1P
- Primary Application executed and signed—Form 2P
- Identify all lines of insurance the applicant is requesting authority to transact (for a redomestication filing, company needs to complete the section listing the lines of business the applicant is currently licensed to transact and is transacting in all jurisdictions)—Form 3

Filing fee

- Payment of required filing fee—larger of $500 or retaliatory amount (retaliatory amount only applies to redomesticating companies)
- Copy of check

Minimum capital and surplus requirements

Explanation of compliance with minimum capital and surplus requirements

Statutory deposit requirements

Documentation explaining how the applicant meets or is meeting the statutory deposit requirements

Name approval

A company may not adopt a name that is so similar to a name already in use by an existing company organized or licensed in North Dakota as to be confusing or misleading. Upon receipt of the application, the Department will automatically check the name for conformity and notify the applicant company of the Department's determination. N.D.C.C. §§ 26.1-11-01 and 26.1-12-27

Plan of operation

- Narrative—to include significant information not captured as a part of the questionnaire below
- Pro-forma financial statements/projections—company-wide three-year pro-forma balance sheet and income statement by line; projections must support all aspects of the proposed plan of operation, including reinsurance arrangements and any delegated function agreements. Include the assumptions used to arrive at these projections.
- Completed questionnaire—Form 8: addresses various items such as encumbrances, pledged stock, change of management and control, organizational structure, sales and marketing, underwriting, claims, affiliated arrangements, reinsurance, investments, etc.
- Attachments to questionnaire—including but not limited to: copies of agreements with agents, brokers, general agencies and managing general agents, affiliated agreements, reinsurance agreements, investment advisory and management agreements, etc.

North Dakota requirements for new companies

Primary UCAA requirements

Holding company Form B registration statement

If the applicant is a member of a holding company system, include either the most recent Annual Form B Registration Statement or a statement substantially similar to the NAIC model. Include all attachments, exhibits and appendices referenced in the Form B and include copies of all advisory, management and service agreements.

Statutory memberships

Documentation supporting membership application(s) in North Dakota Life and Health Insurance Guaranty Association (N.D.C.C. ch. 26.1-38.1) or Insurance Guaranty Association (N.D.C.C. ch. 26.1-42.1).

SEC filings or consolidated GAAP financial statement

• If the applicant, its parent or its ultimate holding company has made a filing or registration with the Securities and Exchange Commission (SEC) in connection with a public offering within the last three years, or filed an 8K, 10K or 10Q within the last 12 months, the application must note that the filing, including any supplements or amendments, is available electronically from the SEC.

• If the applicant, its parent or its ultimate holding company is not publicly traded, the application must include a copy of the applicant's most recent Consolidated GAAP financial statement.

Debt-to equity ratio statement

Applicants who are members of a holding company system must submit a comprehensive debt-to-equity ratio statement that includes the following information:

1. Provide the consolidated outside debt to consolidated equity ratio on a GAAP basis for the holding company.
2. Provide the most recent consolidated, holding company financial statement.
3. State if the holding company, on a consolidated basis, has a tangible net worth:
    a) for the past three years;
    b) at present and
    c) provide projections with assumptions for a three year period.
4. Applicants must clearly substantiate the sources of repayment of any debt, including, but not limited to whether the source of repayment is independent from the future income of the insurers.
5. Calculate the debt service (as reported in D above), required of each insurer as a percentage of the insurer's capital and surplus.
6. List the assets of the holding company, if any, that are pledged to fund the debt service or debt repayment of an affiliate or parent (include the assets or stock of any insurer subsidiaries).
7. List any guarantees (personal or otherwise) from the shareholders for repayment of the debt.

North Dakota requirements for new companies

Primary UCAA requirements

Custody agreements

• A statement setting forth whether or not any of the applicant's stocks, bonds or other physical or book entry securities are in the physical possession of another entity.

• Copy of any custody agreements—If any of the applicant's stocks, bonds or other securities are not in the applicant's actual physical possession or in a safe deposit box under the exclusive control of the applicant, the application must include a written agreement with each entity holding and/or administering these securities. The written agreement should include appropriate safeguards for the handling of the securities, in accordance with those specified in the NAIC Financial Examiners' Handbook.

Public records package

• Copy of Articles of Incorporation
• Copy of Bylaws
• Uniform Consent to Service of Process

NAIC biographical affidavits

NAIC Biographical Affidavit and Independent Third Party Verification on behalf of all officers, directors and key managerial personnel of the applicant and individuals with a 10 percent (10%), or more, beneficial ownership in the applicant and the applicant's ultimate controlling parent.

State-specific information

In addition to the UCAA requirements, the application for admission as a Prepaid Limited Health Service Organization must include all information required under N.D.C.C. § 26.1-17.1-03.

In addition to the UCAA requirements, the application for admission as a Health Maintenance Organization must include all information required under N.D.C.C. § 26.1-18.1-02(3).

The North Dakota Insurance Department has no state-specific forms.

Policy forms and rates that require approval prior to use are not to be submitted with the company application.