Senate Finance Health Care Reform Framework Improves on House and Senate HELP Proposals, But Falls Short of Association Position on Health Care Reform While Significantly Increasing the Cost of Employer-Provided Health Care

On September 16, Senate Finance Committee Chairman Max Baucus released a Chairman's "mark" of the America's Healthy Future Act of 2009. The document describes national health care reform legislation that is scheduled to be considered by the Committee the week of September 21. As proposed, the mark does not yet have support from any Senate Republicans, including the "Gang of Six" that has been seeking to develop a bi-partisan approach. Senate Democrats have also criticized the proposal for both not offering rich enough subsidies for middle and lower income Americans and excluding a new government plan.

From HR Policy's perspective, the proposal represents a significant improvement over the House and Senate HELP proposals and is a step in the right direction to achieving true reform, but it still falls short of the key consensus objectives identified in the HR Policy Association's Position Regarding the Reform of the U.S. Health Care System and significantly raises the cost of employer-provided health care. Several provisions are consistent with the Association's position, including:

- maintenance of ERISA preemption;
- allowing for the creation of standard national insured coverage options that are not subject to state regulation;
- new programs to promote wellness for Medicare and Medicaid beneficiaries;
- insurance underwriting reform to require insurers to offer guarantee issue coverage without regard to preexisting conditions and to write policies using modified community rating;
- an individual mandate requiring individuals to maintain coverage;
- steps to strengthen primary care and health care provider workforce shortages;
- some modest Medicare and Medicaid payment reform;
- new public reporting requirements for providers and health plans; and
- comparative effectiveness research to advance evidence based medicine.

However, other key consensus objectives are lacking, and would significantly raise the cost of employer-provided health care. Specifically, the proposal:

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Creates Considerable Financial Penalties for Employers That Do Not Offer "Affordable Coverage" and Creates Incentives for Employers to Drop Coverage

While significantly less onerous than the employer mandates included in the proposed Senate HELP and House legislation, employers would pay a penalty tax in some cases where their employees qualify for a tax credit and receive coverage through a state run health insurance exchange. For employers who offer coverage, they are responsible for the penalty tax in cases where an employee waives coverage and the coverage offered does not have an actuarial value of 65 percent or the coverage offered requires an employee contribution of 13 percent or more of an employee's income.

For employers with more than 50 employees who do not offer coverage, they would pay the penalty tax for each employee who qualifies for a tax credit for coverage through an exchange. The penalty would be a flat dollar amount set by the Secretary of HHS equal to the average tax credit for state exchanges and would apply to full-time employees defined as working 30 hours or more each week. The maximum aggregate penalty would be capped at an amount equal to $400 multiplied by the total number of employees of the employer regardless of how many receive the tax credit.

The following example provided in the Senate Finance document explains how the employer penalty would work. Employer A, who does not offer health coverage, has 100 employees, 30 of whom receive a tax credit for enrolling in a state exchange offered plan. If the flat dollar amount set by the Secretary of HHS for that year is $3,000, Employer A should owe $90,000. Since the maximum amount an employer must pay per year is limited to $400 multiplied by the total number of employees (for Employer A, 100), however, Employer A must pay only $40,000 (the lesser of the $40,000 maximum and the $90,000 calculated fee).

This "free rider" approach would create incentives for employers to drop coverage for low-income workers and have these employees enroll in state run exchanges in order to qualify for the tax credit without triggering a financial penalty for the employer. It would also create incentives for employers to restrict the hours of part-time workers to less than 30 hours per week so they would not have to pay the penalty.

Establishes a New 35 Percent Excise Tax Paid By Employers for Plans With a Value In Excess of $8,000 Per Year for Single Coverage and $21,000 for Families

Employers offering plans to employees and retirees that exceed this cap would pay a 35 percent excise tax on the value of benefits in excess of the maximum allowable amounts. This cap is indexed to the consumer price index (CPI), not medical CPI. Therefore, as health care costs continue to escalate at a rate that exceeds inflation, more and more employers will pay the excise tax unless they cap their benefits at or below the maximum allowed. According to the Joint Committee on Taxation, this provision will impose more than $30 billion per year in new taxes on employer-sponsored plans.

Imposes a Cap On Flexible Spending Arrangements (FSA) Contributions of $2,000 Per Year Employer efforts to promote consumerism would be undermined by significant reductions in the maximum allowable amount that employers could make available to employees on a pre-tax basis for flexible spending accounts. This would also have the effect of increasing

taxes paid by many employees unless employers increased premium subsidies or offered more generous coverage to offset the reduced pre-tax contributions that can be made to FSAs.

Fails to Adequately Address Medicare and Medicaid Payment Reform and Cost Shifting While the proposal does include some payment reforms for Medicare and Medicaid, it still would have both programs relying primarily on the current fee-for-service payment scheme into the foreseeable future. This, combined with expanded eligibility for Medicaid, would continue and exacerbate the cost shifting from these plans to employer-sponsored plans, making them more expensive. Under the proposal, substantial cuts in Medicare physician fees could be triggered after 2010, further exacerbating cost shifting to employer-sponsored plans.

Expands Existing Entitlement Programs Without Adequate Funding Medicaid and the Children's Health Insurance Program would be expanded to cover more individuals. This, combined with a continued reliance on government-imposed fee schedules that pay artificially low amounts to providers for these programs, would further increase cost shifting to employer-sponsored plans.

May Include New Provisions for Medicare Part D Drug Benefits That Will Increase Cost Shifting to Employers, Encourage Employers to Drop Part D Benefits, and Increase Employer Tax Liability The proposal would require drug manufacturers to offer rebates of 50 percent off the negotiated fees for drug costs that fall within the "donut hole" under the current rules. These savings would be passed on directly to Part D Medicare enrollees. However, it appears that retirees enrolled in employer-sponsored Part D plans would not qualify for these savings, while those enrolling in individual policies would qualify for the savings associated with this change. This will increase cost shifting from drug manufacturers to employer-sponsored plans, and create incentives for employers to drop Part D plans in favor of having Medicare eligible retirees seek coverage in the individual market so they can qualify for the discounts that are not available to employer-sponsored plans. The proposal would also make employers include the amount of government subsidies received for providing retiree prescription drug coverage in their gross income, whereas those subsidies are not currently considered taxable income.

Establishes a New Precedent By Imposing Federal Premium Taxes On Self-Insured Plans To fund certain provisions of the bill, the federal government would impose a $2 per person per year premium tax on self-insured plans, which would increase in future years. Although relatively modest at the outset, this establishes a troubling new precedent of the federal government imposing premium taxes on self-funded plans.

Creates New Taxes for Health Care Suppliers Which Will Be Passed On to Employers The bill imposes new taxes on medical devices, pharmaceuticals, laboratories, and insurers. This establishes a new taxing authority for the federal government, and will result in a substantial portion of these new taxes being passed on to large employers.

Lacks Malpractice Reform Provisions The proposal lacks any meaningful action to address malpractice reform. It includes only a "sense of the Senate" provision that indicates that malpractice reform may be needed and encourages states to consider actions to address this issue.

It is becoming increasingly evident that reaching consensus to advance health care reform that is consistent with the Association's key objectives will be challenging at best. The Baucus proposal is considerably more aligned with the Association's position than the House and Senate HELP proposals, but still contains provisions that are of significant concern for large employers. We will continue to work with Congressional leaders to modify aspects of the proposals that are inconsistent with our position.